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9  
 10 **BEFORE THE MEDICAL BOARD OF CALIFORNIA**

11 **PETITION FOR**  
 12 **RULINGMAKING TO**  
 13 **IMPLEMENT BUS. & PROF.**  
 14 **CODE PROVISIONS ON**  
 15 **DISCLOSURE OF PHYSICIAN**  
 16 **DISCIPLINE**

17 **TO: Medical Board of California**

18 **COMES NOW PETITIONER and alleges:**

19 **I. INTRODUCTION**

20 1. This is a formal petition by the Union of American Physicians & Dentists  
 21 ("UAPD") calling for the MBC to initiate formal rulemaking to provide higher-quality  
 22 information on its website to consumers accessing this website for data about individual  
 23 practitioners.

24 2. This petition is brought pursuant to the Administrative Procedure Act which  
 25 requires a reasoned response from the Board within 30 days, absent stipulation to  
 26 continue the matter. Gov. Code section 11340.7.

27 **II. REASONS FOR RULEMAKING**

28 3. Business & Professions Code §2027(a) mandates the posting on MBC's  
 website of various actions against physicians. This statute also requires the MBC include  
 "appropriate disclaimers and explanatory statements to accompany the above

1 information." The latter provisions of the statute are not being met by MBC's current  
2 regulation (16 CCR 1355.35) because MBC is posting baseless disciplinary accusations  
3 by hospitals without any disclaimers or explanatory statements allowing consumers to  
4 realize those accusations were baseless. Indeed, these disciplinary actions are labelled by  
5 the MBC website as actually being for medical disciplinary cause or reason, when in  
6 reality the motives behind them are far less legitimate.

7 4. The MBC's website contains for each practitioner a disclosure of every 805  
8 report filed by hospitals, even if MBC staff investigated such report and found the  
9 hospital's report unjustified. Nowhere does the website disclose such finding by MBC  
10 staff, nor does the website publish a rebuttal by the physician.

11 5. This is in stark contrast to how this issue is handled at the National  
12 Practitioner Databank, which allows a physician to post a brief rebuttal of the charges  
13 against him.

14 6. MBC's current approach to this issue unfairly smears physicians'  
15 reputations, in addition to violating the above-quoted legislative mandate to include  
16 appropriate disclaimers and explanations. The website now misleads consumers, who are  
17 likely to think any disciplined practitioner is actually less competent, when in truth he  
18 may have been disciplined for having advocated for patients and hence unfairly deemed  
19 "disruptive" by hospital management.

20 7. Attachment A hereto is the how one doctor's MBC record appears, showing  
21 he was suspended by a hospital and stating "The action taken by this healthcare facility  
22 against this physician's privileges to provide healthcare services at this facility was for a  
23 medical disciplinary cause or reason. The Medical Board is authorized by law to disclose  
24 only revocations and terminations of staff privileges at this facility. The Medical Board is  
25 prohibited by law from releasing a copy of the actual report or any other information."  
26 Attachment B shows how his listing appears on the National Practitioner Databank in

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1 which he explains his belief that he was retaliated against for agreeing to testify against  
2 another physician working for the same hospital chain. Attachment C is the MBC staff  
3 letter confirming there was no substance to the hospital's suspension of him.

4 8. MBC's comments on its website that it is prohibited from releasing any  
5 other information about this discipline are not an accurate summary of the law and are  
6 misleading: further information could be released if the practitioners grant consent, but  
7 MBC has not asked practitioners for consent. It has not given them an opportunity to  
8 provide further information on its website.

9 9. UAPD's counsel raised these issues with the MBC's Executive Director and  
10 counsel by letter of January 14, 2005, to which UAPD's counsel received no response.

11 10. When consumers see on the MBC website that discipline was imposed by  
12 the MBC itself, they will tend to think such discipline was due to some misconduct  
13 concerning patients. They do not realize such discipline could have resulted from a  
14 highly-technical violation not likely impacting patient care, such as the wording of a  
15 practitioner's sign. MBC's rulemaking concerning its website should consider the unfair  
16 tarnishing of the professional reputations of practitioners who committed minor technical  
17 violations when such discipline is posted without offering any explanation, either from  
18 the MBC or the practitioners themselves.

### 19 **III. NATURE OF REGULATION REQUESTED**

20 11. MBC should at a minimum allow a physician to post a 500-word rebuttal  
21 when MBC has posted hospital discipline or MBC discipline against him.

22 12. Also, where MBC staff has investigated and decided that hospital discipline  
23 was unwarranted, the MBC would be well within its rights in not posting such discipline  
24 at all, for it was not for the cause set forth in the statute. MBC is required by B & P Code  
25 §2027(a)(6) to post revocations of staff privileges "for a medical disciplinary cause or  
26 reason", which should not be construed to require posting of false accusations because  
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1 such revocations were not for medical disciplinary cause, but rather for other reasons. At  
2 a minimum, MBC should adopt a rule by which it posts its staff's finding of no cause to  
3 pursue professional discipline against the practitioner.

4 13. B & P Code section 2027 must be harmonized with B & P Code §800(b),  
5 which states "If the board, or a division thereof, a committee, or a panel has failed to act  
6 upon a complaint or report within five years, or has found the complaint or report is  
7 without merit, the central file shall be purged of information related to the complaint or  
8 report." This would allow the MBC to pull off its website those 805 reports which its  
9 staff found without substance. However, if MBC is not willing to go so far, then it should  
10 least disclose on its website that its staff investigated this report and found no basis to  
11 impose discipline against this physician's license and that the information concerning this  
12 report has been purged from the MBC's files.

#### 13 IV. LEGAL AUTHORITY TO TAKE THE ACTION REQUESTED

14 14. The MBC has both the authority and the duty to engage in further formal  
15 rulemaking here pursuant to the statutes cited above. By having already adopted a  
16 regulation concerning its website, MBC appears to acknowledge that its decision on what  
17 generally to include (and not include) on its website about individual practitioners is a  
18 decision subject to the APA's requirement of making policy decisions via formal  
19 rulemaking rather than informally. Gov. Code section 11342.600. The courts have  
20 vigorously enforced this ban against "underground" rulemaking. See e.g., UAPD v. Kizer  
21 (1990) 223 CA3d 490,497; Tidewater Western Marine v. Bradshaw (1996) 14 Cal.4th  
22 557, 571-76; Cal. Advocates for Nursing Home Reform v. Bonta (2003) 106 CA 4<sup>th</sup> 598,  
23 505 (rejecting agency's argument that it was entitled to deference in procedure it selected  
24 for decisionmaking). An agency which fails to comply with the APA until ordered to do  
25 so by a court is typically liable to pay attorney's fees to petitioner's counsel under Cal.

1 Code Civ. Pro. 1021.5. Ligon v. State Personnel Bd. (1981) 123 CA 3d 583, 592. See also  
 2 Edgerton v. SPB (2000) 83 CA4th 1350(multiplier of 1.5 used to determine fee award).

3 **III. CONCLUSION**

4 The Board both must initiate a rulemaking proceeding on the issues raised above  
 5 so as to comply with the APA, and also should do so as a policy matter: a new rule will  
 6 ensure that consumers do not receive misleading information about practitioners. Please  
 7 feel free to communicate directly with my clients concerning this matter, and please  
 8 advise them and me when this matter will be heard by the Board. Thank you for your  
 9 attention to this matter.

10 Dated: February 15, 2005

Respectfully submitted,

DAVIS, COWELL & BOWE, LLP

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