

AMENDED IN ASSEMBLY SEPTEMBER 11, 2013

AMENDED IN ASSEMBLY SEPTEMBER 6, 2013

AMENDED IN ASSEMBLY AUGUST 19, 2013

AMENDED IN ASSEMBLY AUGUST 6, 2013

AMENDED IN SENATE MAY 24, 2013

AMENDED IN SENATE APRIL 8, 2013

SENATE BILL

No. 670

Introduced by Senator Steinberg

February 22, 2013

An act to amend Sections 2225 and 2234 of, and to add Section 2221.5 to, of the Business and Professions Code, and to amend Section 11529 of the Government Code, relating to healing arts.

LEGISLATIVE COUNSEL'S DIGEST

SB 670, as amended, Steinberg. Physicians and surgeons: drug prescribing privileges: investigation.

(1) Existing law authorizes investigators and representatives of the Medical Board of California, among others, to inquire into any alleged violation of the Medical Practice Act or any other federal or state law, regulation, or rule relevant to the practice of medicine or podiatric medicine, and to inspect documents relevant to those investigations, including the inspection and copying of any document relevant to an investigation where patient consent is given.

Existing law requires specified persons, including the administrator of a peer review body, to file a report with the board within 15 days after the effective date of any specified action taken against a licensee

for a medical disciplinary cause or reason. Existing law also requires a coroner to make a report to the board, among other specified entities, when he or she receives information that indicates that a death may be the result of a physician and surgeon's, podiatrist's, or physician assistant's gross negligence or incompetence.

This bill would authorize the board, in any investigation that involves the death of a patient, to inspect and copy the medical records of the deceased patient without the authorization of the beneficiary or personal representative of the deceased patient or a court order solely to determine the extent to which the death was the result of the physician and surgeon's violation of the Medical Practice Act, if the board provides a written request to the physician and surgeon that includes a declaration that the board has been unsuccessful in locating or contacting the deceased patient's beneficiary or personal representative after reasonable efforts.

(2) Existing law requires the board to take action against any licensee who is charged with unprofessional conduct. Unprofessional conduct is defined for this purpose to include, among other things, the repeated failure by a licensee who is the subject of a board investigation, in the absence of good cause, to attend and participate in an interview scheduled by the mutual agreement of the licensee and the board.

This bill would revise that definition of unprofessional conduct to include the repeated failure by a licensee who is the subject of a board investigation, in the absence of good cause, to attend and participate in an interview by the board.

(3) Existing law, the Administrative Procedure Act, authorizes the administrative law judge of the Medical Quality Hearing Panel to issue an interim order suspending a license, or imposing drug testing, continuing education, supervision of procedures, or other licensee restrictions.

This bill would further authorize the administrative law judge to issue an interim order limiting the authority to prescribe, furnish, administer, or dispense controlled substances. ~~The bill would also authorize the board, notwithstanding the authority of an administrative law judge to issue an interim order, to impose limitations on the authority of a physician and surgeon to prescribe, furnish, administer, or dispense Schedule II, III, or IV drugs during a pending investigation if the board has probable cause to believe that the physician and surgeon has prescribed, furnished, administered, or dispensed Schedule II, III, or IV drugs in violation of the Medical Practice Act and the failure of the~~

board to impose those limitations will imminently endanger the public health, safety, or welfare, as specified. The bill would require written notification to the physician and surgeon of the limitations at least 10 business days prior to the effective date of those limitations and would specify administrative procedures for the review of the limitations, including, upon the request of the physician and surgeon, requiring a committee of 3 board members to conduct an informal hearing prior to the effective date of the limitations:

(4) The California Constitution requires that a statute, court rule, or other authority adopted after November 4, 2004, that limits the public's right of access be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

This bill would, with respect to this constitutional provision, express findings and declarations of the Legislature regarding the privacy interests of patients and doctors that are protected under the bill.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. ~~Section 2221.5 is added to the Business and~~
2 ~~Professions Code, to read:~~

3 2221.5. ~~(a) (1) Notwithstanding Section 11529 of the~~
4 ~~Government Code, the board may impose limitations on the~~
5 ~~authority of a physician and surgeon to prescribe, furnish,~~
6 ~~administer, or dispense Schedule II, III, or IV drugs during a~~
7 ~~pending investigation if the board has probable cause to believe~~
8 ~~both of the following:~~

9 (A) ~~The physician and surgeon has prescribed, furnished,~~
10 ~~administered, or dispensed Schedule II, III, or IV drugs in violation~~
11 ~~of the Medical Practice Act.~~

12 (B) ~~The failure of the board to impose limitations on the~~
13 ~~authority of that physician and surgeon to prescribe, furnish,~~
14 ~~administer, or dispense Schedule II, III, or IV drugs will~~
15 ~~imminently endanger the public health, safety, or welfare. Proof~~
16 ~~of imminent danger shall include, but not be limited to, a pattern~~
17 ~~or practice of prescribing, furnishing, administering, or dispensing~~
18 ~~Schedule II, III, or IV drugs that has led to, or may lead to, death~~
19 ~~or great bodily injury.~~

1 ~~(2) The board shall provide written notice of the limitations to~~
2 ~~the affected physician and surgeon at least 10 business days prior~~
3 ~~to the effective date of any limitations. Notice shall be~~
4 ~~accomplished by either 24-hour delivery service or personal~~
5 ~~service, shall state the effective date of the limitations, and shall~~
6 ~~include all of the following:~~

7 ~~(A) Affidavits showing that the board has met the requirements~~
8 ~~of paragraph (1), including a summary of facts and evidence upon~~
9 ~~which the board is relying.~~

10 ~~(B) An explanation of the time and manner in which the~~
11 ~~physician and surgeon may respond to the notice of limitations at~~
12 ~~an informal hearing pursuant to subdivision (b).~~

13 ~~(C) Notice of the physician and surgeon's right to be represented~~
14 ~~in a proceeding under subdivision (b).~~

15 ~~(b) (1) Upon the request of the physician and surgeon to whom~~
16 ~~the limitations would apply, a committee of three board members,~~
17 ~~appointed by the executive director of the board and comprised of~~
18 ~~two physician and surgeons and one public member, shall conduct~~
19 ~~an informal hearing prior to the effective date of any limitations~~
20 ~~imposed pursuant to subdivision (a). The hearing shall determine~~
21 ~~whether the board has met all of the requirements of paragraph (1)~~
22 ~~of subdivision (a). For good cause, the committee may delay the~~
23 ~~effective date of the limitations in order to complete a hearing and~~
24 ~~to issue a decision. The committee's decision shall take into~~
25 ~~account all materials and testimony submitted by the board and~~
26 ~~the physician and surgeon. The decision by the committee to~~
27 ~~sustain, reject, or modify the limitations is final.~~

28 ~~(2) Meetings of the committee pursuant to this subdivision are~~
29 ~~exempt from Article 9 (commencing with Section 11120) of~~
30 ~~Chapter 1 of Part 1 of Division 3 of Title 2 of the Government~~
31 ~~Code relating to public meetings.~~

32 ~~(e) In all cases in which the board, pursuant to this section, has~~
33 ~~imposed any limitations on the authority of a physician and surgeon~~
34 ~~to prescribe, furnish, administer, or dispense Schedule II, III, or~~
35 ~~IV drugs, and a petition for an interim suspension order is not filed~~
36 ~~and served against the physician and surgeon pursuant to Section~~
37 ~~11529 of the Government Code within 30 business days of the~~
38 ~~date on which the board imposed the limitations, the imposed~~
39 ~~limitations shall be dissolved. Any record of the limitations~~
40 ~~imposed pursuant to this section shall be removed from the board's~~

1 ~~Internet Web site immediately after the limitations are dissolved~~
2 ~~or when action is taken pursuant to Section 11529 of the~~
3 ~~Government Code.~~

4 ~~(d) Limitations imposed pursuant to this section shall not be~~
5 ~~deemed a reportable act by a state medical licensing agency or~~
6 ~~board of medical examiners for purposes of the National~~
7 ~~Practitioner Data Bank.~~

8 ~~(e) The board may adopt regulations or policies and procedures~~
9 ~~to carry out the provisions of this section.~~

10 ~~SEC. 2.~~

11 *SECTION 1.* Section 2225 of the Business and Professions
12 Code is amended to read:

13 2225. (a) Notwithstanding Section 2263 and any other law
14 making a communication between a physician and surgeon or a
15 doctor of podiatric medicine and his or her patients a privileged
16 communication, those provisions shall not apply to investigations
17 or proceedings conducted under this chapter. Members of the
18 board, the Senior Assistant Attorney General of the Health Quality
19 Enforcement Section, members of the California Board of Podiatric
20 Medicine, and deputies, employees, agents, and representatives of
21 the board or the California Board of Podiatric Medicine and the
22 Senior Assistant Attorney General of the Health Quality
23 Enforcement Section shall keep in confidence during the course
24 of investigations, the names of any patients whose records are
25 reviewed and shall not disclose or reveal those names, except as
26 is necessary during the course of an investigation, unless and until
27 proceedings are instituted. The authority of the board or the
28 California Board of Podiatric Medicine and the Health Quality
29 Enforcement Section to examine records of patients in the office
30 of a physician and surgeon or a doctor of podiatric medicine is
31 limited to records of patients who have complained to the board
32 or the California Board of Podiatric Medicine about that licensee.

33 (b) Notwithstanding any other law, the Attorney General and
34 his or her investigative agents, and investigators and representatives
35 of the board or the California Board of Podiatric Medicine, may
36 inquire into any alleged violation of the Medical Practice Act or
37 any other federal or state law, regulation, or rule relevant to the
38 practice of medicine or podiatric medicine, whichever is applicable,
39 and may inspect documents relevant to those investigations in
40 accordance with the following procedures:

1 (1) Any document relevant to an investigation may be inspected,
2 and copies may be obtained, where patient consent is given.

3 (2) Any document relevant to the business operations of a
4 licensee, and not involving medical records attributable to
5 identifiable patients, may be inspected and copied if relevant to
6 an investigation of a licensee.

7 (c) (1) Notwithstanding subdivision (b) or any other law, in
8 any investigation that involves the death of a patient, the board
9 may inspect and copy the medical records of the deceased patient
10 without the authorization of the beneficiary or personal
11 representative of the deceased patient or a court order solely for
12 the purpose of determining the extent to which the death was the
13 result of the physician and surgeon's conduct in violation of the
14 Medical Practice Act, if the board provides a written request to
15 the physician and surgeon that includes a declaration that the board
16 has been unsuccessful in locating or contacting the deceased
17 patient's beneficiary or personal representative after reasonable
18 efforts. Nothing in this subdivision shall be construed to allow the
19 board to inspect and copy the medical records of a deceased patient
20 without a court order when the beneficiary or personal
21 representative of the deceased patient has been located and
22 contacted but has refused to consent to the board inspecting and
23 copying the medical records of the deceased patient.

24 (2) The Legislature finds and declares that the authority created
25 in the board pursuant to this section, and a physician and surgeon's
26 compliance with this section, are consistent with the public interest
27 and benefit activities of the federal Health Insurance Portability
28 and Accountability Act (HIPAA).

29 (d) In all cases in which documents are inspected or copies of
30 those documents are received, their acquisition or review shall be
31 arranged so as not to unnecessarily disrupt the medical and business
32 operations of the licensee or of the facility where the records are
33 kept or used.

34 (e) If documents are lawfully requested from licensees in
35 accordance with this section by the Attorney General or his or her
36 agents or deputies, or investigators of the board or the California
37 Board of Podiatric Medicine, the documents shall be provided
38 within 15 business days of receipt of the request, unless the licensee
39 is unable to provide the documents within this time period for good
40 cause, including, but not limited to, physical inability to access

1 the records in the time allowed due to illness or travel. Failure to
2 produce requested documents or copies thereof, after being
3 informed of the required deadline, shall constitute unprofessional
4 conduct. The board may use its authority to cite and fine a
5 physician and surgeon for any violation of this section. This remedy
6 is in addition to any other authority of the board to sanction a
7 licensee for a delay in producing requested records.

8 (f) Searches conducted of the office or medical facility of any
9 licensee shall not interfere with the recordkeeping format or
10 preservation needs of any licensee necessary for the lawful care
11 of patients.

12 ~~SEC. 3.~~

13 *SEC. 2.* Section 2234 of the Business and Professions Code is
14 amended to read:

15 2234. The board shall take action against any licensee who is
16 charged with unprofessional conduct. In addition to other
17 provisions of this article, unprofessional conduct includes, but is
18 not limited to, the following:

19 (a) Violating or attempting to violate, directly or indirectly,
20 assisting in or abetting the violation of, or conspiring to violate
21 any provision of this chapter.

22 (b) Gross negligence.

23 (c) Repeated negligent acts. To be repeated, there must be two
24 or more negligent acts or omissions. An initial negligent act or
25 omission followed by a separate and distinct departure from the
26 applicable standard of care shall constitute repeated negligent acts.

27 (1) An initial negligent diagnosis followed by an act or omission
28 medically appropriate for that negligent diagnosis of the patient
29 shall constitute a single negligent act.

30 (2) When the standard of care requires a change in the diagnosis,
31 act, or omission that constitutes the negligent act described in
32 paragraph (1), including, but not limited to, a reevaluation of the
33 diagnosis or a change in treatment, and the licensee's conduct
34 departs from the applicable standard of care, each departure
35 constitutes a separate and distinct breach of the standard of care.

36 (d) Incompetence.

37 (e) The commission of any act involving dishonesty or
38 corruption that is substantially related to the qualifications,
39 functions, or duties of a physician and surgeon.

1 (f) Any action or conduct that would have warranted the denial
2 of a certificate.

3 (g) The practice of medicine from this state into another state
4 or country without meeting the legal requirements of that state or
5 country for the practice of medicine. Section 2314 shall not apply
6 to this subdivision. This subdivision shall become operative upon
7 the implementation of the proposed registration program described
8 in Section 2052.5.

9 (h) The repeated failure by a certificate holder, in the absence
10 of good cause, to attend and participate in an interview by the
11 board. This subdivision shall only apply to a certificate holder who
12 is the subject of an investigation by the board.

13 ~~SEC. 4.~~

14 *SEC. 3.* Section 11529 of the Government Code is amended
15 to read:

16 11529. (a) The administrative law judge of the Medical Quality
17 Hearing Panel established pursuant to Section 11371 may issue
18 an interim order suspending a license, *or* imposing drug testing,
19 continuing education, supervision of procedures, limitations on
20 the authority to prescribe, furnish, administer, or dispense
21 controlled substances, or other license restrictions. Interim orders
22 may be issued only if the affidavits in support of the petition show
23 that the licensee has engaged in, or is about to engage in, acts or
24 omissions constituting a violation of the Medical Practice Act or
25 the appropriate practice act governing each allied health profession,
26 or is unable to practice safely due to a mental or physical condition,
27 and that permitting the licensee to continue to engage in the
28 profession for which the license was issued will endanger the
29 public health, safety, or welfare.

30 (b) All orders authorized by this section shall be issued only
31 after a hearing conducted pursuant to subdivision (d), unless it
32 appears from the facts shown by affidavit that serious injury would
33 result to the public before the matter can be heard on notice. Except
34 as provided in subdivision (c), the licensee shall receive at least
35 15 days' prior notice of the hearing, which notice shall include
36 affidavits and all other information in support of the order.

37 (c) If an interim order is issued without notice, the administrative
38 law judge who issued the order without notice shall cause the
39 licensee to be notified of the order, including affidavits and all
40 other information in support of the order by a 24-hour delivery

1 service. That notice shall also include the date of the hearing on
2 the order, which shall be conducted in accordance with the
3 requirement of subdivision (d), not later than 20 days from the
4 date of issuance. The order shall be dissolved unless the
5 requirements of subdivision (a) are satisfied.

6 (d) For the purposes of the hearing conducted pursuant to this
7 section, the licentiate shall, at a minimum, have the following
8 rights:

9 (1) To be represented by counsel.

10 (2) To have a record made of the proceedings, copies of which
11 may be obtained by the licentiate upon payment of any reasonable
12 charges associated with the record.

13 (3) To present written evidence in the form of relevant
14 declarations, affidavits, and documents.

15 The discretion of the administrative law judge to permit
16 testimony at the hearing conducted pursuant to this section shall
17 be identical to the discretion of a superior court judge to permit
18 testimony at a hearing conducted pursuant to Section 527 of the
19 Code of Civil Procedure.

20 (4) To present oral argument.

21 (e) Consistent with the burden and standards of proof applicable
22 to a preliminary injunction entered under Section 527 of the Code
23 of Civil Procedure, the administrative law judge shall grant the
24 interim order if, in the exercise of discretion, the administrative
25 law judge concludes that:

26 (1) There is a reasonable probability that the petitioner will
27 prevail in the underlying action.

28 (2) The likelihood of injury to the public in not issuing the order
29 outweighs the likelihood of injury to the licensee in issuing the
30 order.

31 (f) In all cases in which an interim order is issued, and an
32 accusation is not filed and served pursuant to Sections 11503 and
33 11505 within 15 days of the date on which the parties to the hearing
34 on the interim order have submitted the matter, the order shall be
35 dissolved.

36 Upon service of the accusation the licensee shall have, in addition
37 to the rights granted by this section, all of the rights and privileges
38 available as specified in this chapter. If the licensee requests a
39 hearing on the accusation, the board shall provide the licensee with
40 a hearing within 30 days of the request, unless the licensee

1 stipulates to a later hearing, and a decision within 15 days of the
2 date the decision is received from the administrative law judge, or
3 the board shall nullify the interim order previously issued, unless
4 good cause can be shown by the Division of Medical Quality for
5 a delay.

6 (g) If an interim order is issued, a written decision shall be
7 prepared within 15 days of the hearing, by the administrative law
8 judge, including findings of fact and a conclusion articulating the
9 connection between the evidence produced at the hearing and the
10 decision reached.

11 (h) Notwithstanding the fact that interim orders issued pursuant
12 to this section are not issued after a hearing as otherwise required
13 by this chapter, interim orders so issued shall be subject to judicial
14 review pursuant to Section 1094.5 of the Code of Civil Procedure.
15 The relief that may be ordered shall be limited to a stay of the
16 interim order. Interim orders issued pursuant to this section are
17 final interim orders and, if not dissolved pursuant to subdivision
18 (c) or (f), may only be challenged administratively at the hearing
19 on the accusation.

20 (i) The interim order provided for by this section shall be:

21 (1) In addition to, and not a limitation on, the authority to seek
22 injunctive relief provided for in the Business and Professions Code.

23 (2) A limitation on the emergency decision procedure provided
24 in Article 13 (commencing with Section 11460.10) of Chapter 4.5.

25 ~~SEC. 5. The Legislature hereby finds and declares that Section
26 1 of this bill, which adds Section 2221.5 to the Business and
27 Professions Code, imposes a limitation on the public's right of
28 access to the meetings of public bodies or the writings of public
29 officials and agencies within the meaning of Section 3 of Article
30 I of the California Constitution. Pursuant to that constitutional
31 provision, the Legislature makes the following findings to
32 demonstrate the interest protected by this limitation and the need
33 for protecting that interest:~~

34 ~~The protection of confidential medical information is of great
35 interest to the state and to the health care system. The privacy
36 rights of the patients whose treatment occasioned the hearing would
37 be impaired if the hearing were open to the public.~~

O