

- b) Gross negligence.
 - c) Repeated negligent acts.
 - d) Incompetence.
 - e) The commission of any act involving dishonesty or corruption that is substantially related to the qualifications, functions, or duties of a physician.
 - f) Any action or conduct that would have warranted the denial of a certificate.
 - g) The failure by a physician, in the absence of good cause, to attend and participate in an investigatory interview by the MBC. (BPC § 2234)
- 8) Provides that a physician shall not be subject to discipline solely on the basis that the treatment or advice they rendered to a patient is alternative or complementary medicine if that treatment or advice was provided after informed consent and a good-faith prior examination; was provided after the physician provided the patient with information concerning conventional treatment; and the alternative complementary medicine did not cause a delay in, or discourage traditional diagnosis of, a condition of the patient, or cause death or serious bodily injury to the patient. (BPC § 2234.1)

This bill:

- 1) Provides that it is unprofessional conduct for a physician and surgeon to disseminate misinformation or disinformation related to COVID-19, including:
 - a) False or misleading information about the nature and risks of the virus,
 - b) COVID-19 prevention and treatment; and
 - c) The development, safety, and effectiveness of COVID-19 vaccines.
- 2) Defines the following for the purposes of 1) and 2):
 - a) "Board" means the MBC or OMBC.
 - b) "Disinformation" means misinformation that the licensee deliberately disseminated with malicious intent or an intent to mislead.
 - c) "Disseminate" means the conveyance of information from the licensee to a patient under the licensee's care in the form of treatment or advice.
 - d) "Misinformation" means false information that is contradicted by contemporary scientific consensus to an extent where its dissemination constitutes gross negligence by the licensee.
 - e) "Physician and surgeon" means person licensed by the MBC or OMBC.

- 3) Specifies that violators of these provisions are not guilty of a misdemeanor.
- 4) Makes findings and declarations that:
 - a) The global spread of the SARS-CoV-2 coronavirus, or COVID-19, has claimed the lives of over 6,000,000 people worldwide, including nearly 90,000 Californians.
 - b) Data from the federal Centers for Disease Control and Prevention (CDC) shows that unvaccinated individuals are at a risk of dying from COVID-19 that is 11 times greater than those who are fully vaccinated.
 - c) The safety and efficacy of COVID-19 vaccines have been confirmed through evaluation by the federal Food and Drug Administration (FDA) and the vaccines continue to undergo intensive safety monitoring by the CDC.
 - d) The spread of misinformation and disinformation about COVID-19 vaccines has weakened public confidence and placed lives at serious risk.
 - e) Major news outlets have reported that some of the most dangerous propagators of inaccurate information regarding the COVID-19 vaccines are licensed health care professionals.
 - f) The Federation of State Medical Boards has released a statement warning that physicians who engage in the dissemination of COVID-19 vaccine misinformation or disinformation risk losing their medical license, and that physicians have a duty to provide their patients with accurate, science-based information.
 - g) In House Resolution No. 74 of the 2021–22 Regular Session, the California State Assembly declared health misinformation to be a public health crisis, and urged the State of California to commit to appropriately combating health misinformation and curbing the spread of falsehoods that threaten the health and safety of Californians.

FISCAL EFFECT: According to the Assembly Committee on Appropriations, the bill will not result in costs to MBC, which currently implements an allegation code for COVID-19-related complaints and tracks discipline related to unprofessional conduct, meeting the requirements of this bill. The Committee noted that the bill will result in minor and absorbable costs to OMBC.

COMMENTS:

1. **Purpose.** The bill is sponsored by the California Medical Association. According to the Author, “AB 2098 is crucial to addressing the amplification of misinformation and disinformation related to the COVID-19 pandemic. Licensed physicians, doctors, and surgeons possess a high degree of public trust and therefore must be held accountable for the information they spread.

Providing patients with accurate, science-based information on the pandemic and COVID-19 vaccinations is imperative to protecting public health. By passing this

legislation, California will demonstrate its unwavering support for a scientifically informed populous to protect ourselves from COVID-19.”

2. Background.

COVID-19 Misinformation and Disinformation. In March 2020, Governor Newsom declared a State of Emergency due to the COVID-19 pandemic that was beginning to spread widely. Center for Disease Control (CDC) and State Public Health Officials began issuing regular updates to inform the state on the long and short impacts of the virus, best ways to prevent spreading and contracting the virus which include wearing surgical and N-95 masks and receiving the COVID-19 vaccine, and awareness of symptoms. As the CDC and State Public Health officials began to learn more about the virus, spread, and overall impacts, the information was disseminated to doctors to help patients survive the virus if contracted, prevent patients from getting the virus, and cope with long term side effects now known as “long COVID”. During the course of the pandemic, all healthcare professionals spent countless days treating patients and learning about the virus.

In December 2020, an emergency-approved COVID-19 vaccine began to roll out first to the aging population and healthcare professionals and eventually to all adults, and now all children. While scientists began working on creating the vaccine, misinformation and disinformation spread widely. CDC makes the distinction that misinformation is shared by people who not intend harm and disinformation is false information to deliberately disseminate with malice. This bill makes a distinction, but does not differentiate consequences for doctors.

Misinformation has resulted in less than desired vaccine rates, continued unnecessary spread and risk to communities. As of June 21, 2022, only 75.6% of people 5 and older are fully vaccinated¹. Yale Medicine reports that a community needs 95% of the population to reach herd immunity. Part of the low vaccine rate is attributed to misinformation causing fear about potential side effects. Vaccine hesitancy is directly linked to misinformation.² Researchers at the Center for Health Security at the Johns Hopkins Bloomberg School of Public Health recently estimated that 2 million to 12 million people in the US were unvaccinated against COVID-19 because of misinformation or disinformation.

In November 21, the American Medical Association adopted a new policy to combat misinformation because “[health professional] using their professional license to validate the disinformation they are spreading has seriously undermined public health efforts”³ The CDC and State Public Health Officials have published a myths and facts page to clarify misinformation. Myths the CDC is actively informing Americans about include: vaccines do not contain microchips, the vaccine will not make you magnetic, and the vaccine will not change your DNA. Origination of misinformation is not clear; however, the White House reported in 2021 that much

¹ <https://covid19.ca.gov/vaccination-progress-data/#overview>

² <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8528483/>

³ <https://www.ama-assn.org/press-center/press-releases/ama-adopts-policy-combat-disinformation-health-care-professionals>

of the COVID-19 vaccine misinformation began with a number of online social media users.

The CDC and State Public Health Officials are generally recognized as the leading experts in issue guidance for all public health matters which in the recent past has included sharing information on heart disease, diabetes, and communicable diseases. However, the CDC and public health officials' knowledge and public trust has been questioned. In peer-reviewed journal, a study determined that "prophylaxis of COVID-19 misinformation might be achieved by taking concrete steps to improve trust in science and scientists, such as building understanding of the scientific process and supporting open science initiatives."⁴ Doctors providing accurate information would serve as an imperative piece of this recommendation to combat current misinformation.

In Florida, a doctor filed a complaint the Florida Department of Health allegedly a doctor was spreading misinformation about the safety and effectiveness of the COVID-19 vaccine and the use of masks for prevention. Ultimately there was no action taken against the doctor accused of spreading misinformation because state law does not prohibit misinformation or disinformation from doctors.⁵ Other reports of physicians providing false information remains an issue.

Physicians and healthcare professionals play a critical role in keeping communities healthy. A physician's recommendation and information sharing will educate and inform decisions made by their patients. As such, providing accurate information will ultimately impact patient's health. NPR reported that, "The Center for Countering Digital Hate, which tracks vaccine misinformation online, says that even though the number of doctors involved in spreading this sort of bad information is tiny, they're having an outsized influence."⁶ This bill would explicate hold physicians accountable for providing misinformation or disinformation about COVID-19 vaccines. This bill does not, however, include other healthcare professionals which have also been reported as spreading misinformation and disinformation.

Physician and surgeon enforcement. The enforcement process begins with a complaint. Complaints are received from various sources, including the public, generated internally by MBC or OMBC, or based on information MBC and OMBC receive from various entities through mandatory reports to the boards.

MBC licensee complaints are received by the Central Complaint Unit, which starts the process of determining next steps for a complaint. All complaints that pertain to treatment provided by a physician require patient medical records to be obtained. MBC reports that it is "subject to significant limitations in its authority to inspect and review medical records in the possession of a licensee. Generally, the Board must obtain patient consent prior to requesting records from a licensee. However, obtaining patient consent (for example, in cases involving inappropriate prescribing of opioids) may be difficult. If the patient refuses to give consent, then the Board

⁴ <https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-020-10103-x>

⁵ <https://jamanetwork.com/journals/jama/fullarticle/2789369>

⁶ <https://www.npr.org/sections/health-shots/2021/09/14/1035915598/doctors-covid-misinformation-medical-license>

must establish good cause to issue a subpoena and may have to file a motion to compel in superior court to enforce the subpoena. Without quick access to records, investigations take longer to complete. In some cases, the Board is required to close complaints because its investigation cannot proceed without relevant medical records." Complaints regarding quality of care are received and reviewed by OMBC's Complaint Unit (CU) in Sacramento by a medical consultant. The CU medical consultant determines whether the quality of care issues presented in the complaint and supporting documents warrant investigation.

Pursuant to Business and Professions Code (BPC) Section 2220.08, before a quality of care complaint for MBC licensees is referred for further investigation, it must be reviewed by one or more medical experts with the pertinent education, training, and expertise to evaluate the specific standards of care issues raised by the complaint to determine if further field investigation is required. When a medical reviewer determines that a complaint warrants referral for further investigation, CCU transfers the complaint to the Health Quality Investigation Unit (HQIU) in the DCA's Division of Investigation (DOI) which handles investigations for a number of health related boards within DCA to be investigated by a sworn investigator, a peace officer. There are 12 HQIU field offices located throughout California that handle these investigations.

MBC's complaint priorities are outlined in BPC section 2220.05 in order to ensure that physicians representing the greatest threat of harm are identified and disciplined expeditiously. MBC must ensure that it is following this section of law when investigating complaints, including complaints alleging the following as being the highest priority:

- Gross negligence, incompetence, or repeated negligent acts that involve death or serious bodily injury to one or more patients, such that the physician and surgeon represents a danger to the public
- Drug or alcohol abuse by a physician and surgeon involving death or serious bodily injury to a patient
- Repeated acts of clearly excessive prescribing, furnishing, or administering of controlled substances, or repeated acts of prescribing, dispensing, or furnishing of controlled substances without a good faith prior examination of the patient and medical reason therefor
- Repeated acts of clearly excessive recommending of cannabis to patients for medical purposes, or repeated acts of recommending cannabis to patients for medical purposes without a good faith prior examination of the patient and a medical reason for the recommendation
- Sexual misconduct with one or more patients during a course of treatment or an examination,
- Practicing medicine while under the influence of drugs or alcohol; and

- Repeated acts of clearly excessive prescribing, furnishing, or administering psychotropic medications to a minor without a good faith prior examination of the patient and medical reason therefor.

For complaints about physicians and surgeons that are subsequently investigated and meet the necessary legal prerequisites, a Deputy Attorney General (DAG) in the Office of the Attorney General (OAG) drafts formal charges, known as an "Accusation". A hearing before an Administrative Law Judge (ALJ) is subsequently scheduled, at which point settlement negotiations take place between the DAG, the physician and their attorney and MBC or OMBC staff. Often times these result in a stipulated settlement, similar to a plea bargain in criminal court, where a licensee admits to having violated charges set forth in the accusation, or admits that the MBC or OMBC could establish a factual and legal basis for the charges in the Accusation at hearing, and accepts penalties for those violations. If a licensee contests charges, the case is heard before an ALJ who subsequently drafts a proposed decision. This decision is reviewed by a panel of MBC members or the OMBC Board who either adopt the decision as proposed, adopt the decision with a reduced penalty or adopt the decision with an increased penalty. If probation is ordered, a copy of the final decision is referred to MBC's Probation Unit or OMBC's probation monitor for assignment to an inspector who monitors the licensees for compliance with the terms of probation.

3. **Arguments in Support.** According to The American College of Obstetricians and Gynecologists District IX (ACOG), "In response to the surge of misinformation, AB 2098 will constitute unprofessional conduct for a physician and surgeon to spread disinformation related to COVID-19, including false or misleading information regarding the virus, its prevention and treatment; and development, safety, and effectiveness of COVID-19 vaccines.

Licensed physicians possess a high degree of public trust and therefore have a powerful platform in society. When they choose to spread inaccurate information, physicians contradict their responsibilities and further erode public trust in the medical profession. By passing this bill, California will demonstrate its unwavering support for a scientifically informed populous to protect ourselves from COVID-19."

The California Medical Association writes, "The COVID-19 pandemic has unfortunately led to increasing amounts of misinformation and disinformation related to the disease including how the virus is transmitted, promoting untested treatments and cures, and calling into question public health efforts such as masking and vaccinations. Many health professionals, including physicians, have been the culprits of this misinformation and disinformation effort.

In July, the Federation of State Medical Boards (FSMB) released a statement¹ in response to the dramatic increase in COVID-19 misinformation and disinformation. The FSMB stated, "physicians who generate and spread COVID-19 vaccine misinformation or disinformation are risking disciplinary actions by state medical boards, including the suspension and revocation of their medical licenses ... they also have an ethical and professional responsibility to practice medicine in the best interests of their patients and must share information that is factual, scientifically grounded and consensus-driven for the betterment of public health. Spreading

inaccurate COVID-19 vaccine information contradicts that responsibility, threatens to further erode public trust in the medical profession, and puts all patients at risk.”

While the MBC may have the ability to discipline licensees for unprofessional conduct under Business and Professions Code section 2234, AB 2098 makes clear that the MBC has the statutory authority to take such actions against physicians that spread COVID-19 misinformation or disinformation.”

The County Health Executives Association of California (CHEAC) writes, “The United States Surgeon General Dr. Vivek H. Murthy recently stated “Health misinformation is a serious threat to public health. It can cause confusion, sow mistrust, harm people’s health, and undermine public health efforts.” Unfortunately, throughout the COVID-19 pandemic, we have witnessed a small minority of medical professionals spread misinformation and disinformation that has led some Californians to decline COVID-19 vaccines, reject public health measures such as masking and physical distancing, and use unproven treatments, such as ivermectin. The American Board of Medical Specialties (ABMS), consisting of the boards that determine whether physicians can be board-certified, issued a statement in September 2021 stating, “The spread of misinformation and the misapplication of medical science by physicians and other medical professionals is especially harmful as it threatens the health and wellbeing of our communities and at the same time undermines public trust in the profession and established best practices in care.” Further, a recent article in the Journal of the American Medical Association states that the power of social media amplifies the message of the small minority of physicians making these types of false claims. AB 2098 clarifies in statute that the dissemination of COVID-19 misinformation and disinformation is unprofessional conduct and would give clear direction to the Medical Board of California and the Osteopathic Medical Board of California on how to evaluate a potential disciplinary action against a physician or surgeon who may be investigated for this reason.”

According to the American Academy of Pediatrics, California, “Licensed physicians possess a high degree of public trust and therefore have a powerful platform in society. When they choose to spread inaccurate information, physicians contradict their responsibilities and further erode public trust in the medical profession. By passing this bill, California will demonstrate its unwavering support for a scientifically informed populous to protect ourselves from COVID-19.”

4. **Arguments in Opposition.** According to a Voice for Choice Advocacy, “While we agree that physicians and surgeons should be disciplined for maliciously sharing misinformation and disinformation, there are already measures in place for the California Medical Board to discipline for such offenses. Furthermore, AB 2098 is overly broad and would be impossible to implement because there is no definition and no established “standard of care” or “contemporary scientific consensus” for treating SARS-COV-2/COVID-19.

We are still in a time of evolution with this virus and its treatment, as we have been for the past 2+ years. SARS-COV-2 has mutated becoming more transmissible but less severe. While a handful of treatments have been authorized by the FDA, such as monoclonal antibodies and anti-viral medications, there are hundreds more in clinical trials that will come to market in the next months and years.

In the meantime, if this bill passes, California risks losing even more doctors to other states because they do not want to be put in the position of possibly being disciplined because they were using the latest research, which had not become standard of care yet, or trying adjunct treatments for better outcomes, that may not have been discovered or written about yet, or using protocols from other countries or states. If it were not for doctors trying different approaches throughout the past two years, we would still be using ventilators ineffectively.”

Association of American Physicians and Surgeons, Inc. write, “We believe it is unethical for physicians to participate in any process that impedes the free exchange of scientific and clinical ideas through public allegations of misconduct or threats of punishment. Use of the stigmatizing label “misinformation” in a medical disciplinary environment is anti-scientific and unethical. *To our colleagues:* In addressing differences of opinion regarding patient management, we call on all physicians to abstain from making public allegations of professional misconduct against colleagues. *To Medical Board Members:* Decisions on sanctions against individual physicians exert the gravest of influence, reaching into life and- death clinical decision-making. AAPS believes the proper role for a medical practice board is to provide a legal mechanism for patients and physicians to investigate and resolve allegations of professional misconduct. This can only be accomplished in an environment with clearly defined rules, access to full legal due process, and scientific integrity. It is ethically improper to use disciplinary boards to resolve debates about the interpretation of medical science.”

According to California Health Coalition Advocacy, “CHCA has the following concerns about this bill:

- Doctors go through rigorous education and training and should be allowed to voice their medical and professional opinions freely.
- Science and medicine have historically been advanced through minority voices. The stifling of dissenting opinion will have long lasting effects on the advancement of health care.
- The unintended consequence might be that the healthcare provider shortage would be exacerbated by the proposed law.
- California Business and Professions code recognizes that: “Since the National Institute of Medicine has reported that it can take up to 17 years for a new best practice to reach the average physician and surgeon, it is prudent to give attention to new developments not only in general medical care, but in the actual treatment of specific diseases, particularly those that are not yet broadly recognized in California.” Division 2, Chapter 5, Article 12, Section 2234.1
- The understanding of the data and science related to COVID-19 continues to change as more studies are done. Standards of care are being updated as new information and treatments emerge. Any attempt at determining “contemporary scientific consensus” will be fleeting.
- Top doctors in their field from UCSF, Stanford, and other well respected institutions are speaking out about their lack of support for COVID-19 vaccines for children. Would these respected doctors be disciplined if AB 2098 were to pass?”

Californians for Good Governance opposes this bill “based on concerns about its unconstitutional restrictions on free speech.” The organization argues that “while the state may be able to claim that providing the public with accurate information regarding Covid-19 is a compelling interest, it cannot possibly argue that the blunt weapon that AB 2098 represents is narrowly tailored to that interest.” The organization further states that “in a country such as ours, which was established on the foundation of civil liberties such as free speech, the truth is something hashed out in the marketplace of ideas, rather than dictated by the government.”

5. **Comments.** MBC supports this bill if it is amended. According to MBC, it “faces considerable challenges investigating cases involving a violation of the [Act] related to COVID-19. Oftentimes, complaints received by the Board pertaining to COVID-19 are made by a member of the public and not the patient of the physician. In some COVID-19 related investigations, the Board is unable to identify any specific patients who have been treated by the physician in question. Without a patient’s name, it is impossible to obtain their consent for records and the Board will be unable to identify what patient records to seek in an investigative subpoena.”

MBC notes that its request for enhanced authority to inspect medical records would assist in overcoming this challenge. MBC also states that “The definition of ‘misinformation’ is unclear and may lead to legal challenges following the imposition of discipline under this proposed law. If this occurs, the Board will have to use its financial resources, its staff time, and the staff time of the Attorney General’s Office to defend against such litigation. Further, the Board may face significant challenges proving the dissemination of “disinformation,” as it would be required to establish the physician’s intent. Under current law, to prove a violation of the standard of care, the intent of the licensee, generally, is not relevant. MBC requests that the definition be updated to read

“Misinformation” means false information that is contradicted by contemporary scientific consensus ***contrary to the standard of care*** ~~to an extent where its dissemination constitutes gross negligence by the licensee.~~

According to MBC, “This amendment connects the potential violation to the standard of care, which is a well-established concept followed by the Board and related administrative entities involved in the disciplinary process.”

6. **Should this bill only apply to physicians and surgeons?** Physician and surgeons are not the only licensed health care providers licensed who may engage in practices that this bill seeks to address. Earlier this year, this Committee, in coordination with the Assembly Committee on Business and Professions, asked questions through the sunset review oversight process about efforts health care licensing programs are undertaking in order to curb the spread of medical misinformation. One example was highlighted in a staff prepared background paper for the sunset review oversight of the Board of Chiropractic Examiners noting that in Spring 2020, that board reported that several complaints were received about licensed doctors of chiropractic who were advertising that chiropractic care can help patients reduce their risk of COVID-19 infection. That board investigated the complaints, and the licensees subsequently removed advertisements from their

websites. Given that many additional licensed health care providers also have a “high degree of public trust and therefore must be held accountable for the information they spread”, as the Author notes for physicians and surgeons in identifying the rationale for this measure, it is unclear why only one category of professional would be specified through statute designating their activities as unprofessional conduct. *The Author may wish to continue discussing whether other health care licensees should be included in the provisions of this bill.*

SUPPORT AND OPPOSITION:

Support:

California Medical Association (Sponsor)
American Academy of Pediatrics, California
American College of Obstetricians and Gynecologists District IX
California Chapter of The American College of Emergency Physicians
California Podiatric Medical Association
California Rheumatology Alliance
California Society of Anesthesiologists
Children's Specialty Care Coalition
County Health Executives Association of California
Families for Opening Carlsbad Schools
Pandemic Patients
Protect US
Teens for Vaccines INC.

Opposition:

A Voice for Choice Advocacy
Association of American Physicians and Surgeons
California Health Coalition Advocacy
Californians for Good Governance
Catholic Families 4 Freedom CA
Central Coast Health Coalition
Children's Health Defense California Chapter
Coalition for Informed Consent
Concerned Women for America
Dbsa California
Educate. Advocate.
Family Details LLC
Frederick Douglass Foundation of California
Freedom Keepers United, CA Freedom Keepers
Front Line Covid-19 Critical Care Alliance
Homewatch Caregivers of Huntington Beach
Natomas USD for Freedom
Not On Our Watch
Nuremberg 2.0 Ltd.
Pacific Justice Institute
Physicians for Informed Consent
Protection of The Educational Rights for Kids

Real Impact.
Restore Childhood
Siskiyou Conservative Republicans
Stand Up Sacramento County
Towards an Internet of Living Beings
Whittier Parents for Choice

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