

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

KOFI SARFO,
Appellant,

vs.

NEVADA STATE BOARD OF MEDICAL
EXAMINERS,

Respondents.

No. 73117

DOCKETING

CIVIL APPEALS

Electronically Filed
Jun 22 2017 01:29 p.m.

Elizabeth A. Brown
Clerk of Supreme Court

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Judicial District Department XVII

County Clark Judge MICHAEL VILLANI

District Ct. Case No. A-17-752616-W

2. Attorney filing this docketing statement:

Attorney Jacob Hafter Telephone 702-405-6700

Firm HafterLaw

Address 6851 W. Charleston Boulevard
Las Vegas, Nevada 89117

Client(s) KOFI SARFO, MD

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Michael Sullivan, Esq. Telephone (775) 329-3151

Firm Robison, Belaustegui, Sharp & Low

Address 71 Washington Street
Reno, Nevada 89503

Client(s) State of Nevada Board of Medical Examiners

Attorney _____ Telephone _____

Firm _____

Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input checked="" type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

No other cases.

8. Nature of the action. Briefly describe the nature of the action and the result below:

Dr. Sarfo received an administrative order from the Investigative Committee of the Board of Medical Examiners ordering him to produce the charts of five patients (without a limitation to scope or time), and ordering him to respond to allegations that he engaged in various violations of the Medical Practice Act. The administrative order was based on a third party complaint.

Respondent has a practice and custom of refusing to allow a physician to see the complaint which initiates any disciplinary investigation / action. Instead, an investigator from the Board will summarize what they feel is pertinent into just a few lines of text.

Dr. Sarfo filed this action to challenge this practice as a violation of his due process rights and to seek a judicial order requiring the Board to produce a true and correct copy of the complaint.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Dr. Sarfo sought an injunction preventing compliance with the administrative order. The district court denied the request, siding, in totality, with all arguments made by the Respondent. The district court did so without any evidentiary hearing as to the role of the Investigative Committee as to whether their purpose is merely fact finding, or, rather, can be accusatory, or otherwise serve in some prosecutorial role.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None. (yet - this office is working with other physicians to bring the same claim, as the Board's practice is unconstitutional).

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☐ N/A

☐ Yes

☒ No

If not, explain: This appeal challenges the constitutionality of the Board's interpretation of statute.

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This case deals with (13) ... a principal issue a question of first impression involving the United States or Nevada Constitutions or common law; and (14) a principal issue a question of statewide public importance.

Specifically, this appeal deals with the unconstitutional assault on this great State's physicians.

14. Trial. If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? _____

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
Not at this time.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from May 9, 2017

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served May 22, 2017

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed May 22, 2017

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|---------------------------------------|
| <input type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input checked="" type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:
Dr. Sarfo's Motion for Preliminary Injunction was denied.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Dr. Sarfo, Petitioner

Nevada State Board of Medical Examiners, Respondent

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Dr. Sarfo believes that the practices of Respondent violate his constitutional due process rights by refusing to allow him to see the actual complaint which is being investigated.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☐ Yes

☒ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

The substance of the Petition is still pending.

(b) Specify the parties remaining below:
Dr. Sarfo, Petitioner

Nevada State Board of Medical Examiners, Respondent

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☒ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

Independently appealable

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Kofi Sarfo, MD

Name of appellant

Jacob Hafter, Esq.

Name of counsel of record

June 22, 2017

Date

/s/ Jacob Hafter, Esq.

Signature of counsel of record

Clark County, Nevada

State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 22 day of June, 2017, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Michael Sullivan, Esq.
Therese Shanks, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503
(775) 329-3151
Counsel for Respondent

Dated this 22nd day of June, 2017

/s/ Jacob Hafter

Signature

DISTRICT COURT CIVIL COVER SHEET

CLARK County, Nevada **A-17-752616-W**
 Case No. **XVIII**
(Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone): KOFI SARFO, MD C/O HAFTERLAW	Defendant(s) (name/address/phone): NEVADA STATE BOARD OF MEDICAL EXAMINERS 1105 TERMINAL WAY, STE 301 RENO, NEVADA 89502 775-688-2559
Attorney (name/address/phone): JACOB HAFTER, ESQ. / HAFTERLAW 6851 W. CHARLESTON BLVD LAS VEGAS, NEVADA 89117 702-405-6700	Attorney (name/address/phone): ROBERT KILROY, ESQ SAME AS ABOVE

II. Nature of Controversy *(please select the one most applicable filing type below)*


Civil Case Filing Types

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate <i>(select case type and estate value)</i> <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input checked="" type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

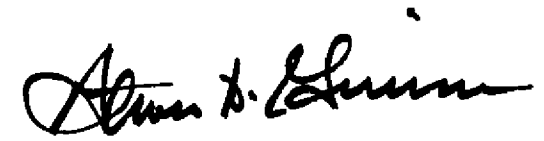
Business Court filings should be filed using the Business Court civil coversheet.

MARCH 16, 2017

Date


 Signature of initiating party or representative

See other side for family-related case filings.


CLERK OF THE COURT

JACOB L. HAFTER, ESQ.
Nevada State Bar No. 9303
HAFTERLAW
6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
Tel: (702) 405-6700
Fax: (702) 685-4184
jhafter@hafterlaw.com

Attorney for Petitioner

**EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA**

KOFI SARFO, M.D.;

Petitioner,

vs.

**NEVADA STATE BOARD OF MEDICAL
EXAMINERS,**

Respondents.

Case Number: A - 17 - 752616 - W

Department Number: XVI I I

**PETITIONER'S EMERGENCY
PETITION FOR WRIT OF MANDAMUS
OR PROHIBITION**

COMES NOW, Petitioner KOFI SARFO, M.D., ("Petitioner"), by and through its counsel, Jacob Hafter, Esq., of **HAFTERLAW**, to move this court for an emergency writ of mandamus or prohibition, preventing the enforcement of that certain Order issued by the Investigative Committee of the Board of Medical Examiners of the State of Nevada in Case No. 17-17051 on March 14, 2017, requiring Dr. Sarfo to produce the entire medical records of five patients ("IC Order").

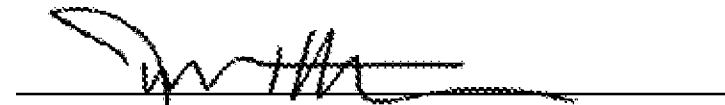
This Petition is made pursuant to the NRS §34.320-350, Nevada Rules of Civil Procedure, Local Rules 7-2, the attached memorandum of points and authorities, the exhibits hereto, and any oral argument

entertained by the Court at the hearing set on the original Motion.

Dated this 16th day of March, 2017.

HAFTERLAW

By:



Jacob L. Hafter, Esq.
Nevada Bar Number 9303
6851 W. Charleston Boulevard
Las Vegas, Nevada 89117

Counsel for Petitioner

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

I.

INTRODUCTION

This is a case where a Nevada physician is tired of how the Board of Medical Examiners (“Board”) treats its licensees. Petitioner is tired of the Board’s flame shooting approach to physician discipline, and turns to this Court for relief from the Board’s overreaching, unconstitutional conduct in the investigations of its licensees.

From 2010 through 2014, Dr. Sarfo defended six different administrative Board actions. At the end of the day, despite all of the investigations and complaints and the time and expense defending them all, Dr. Sarfo pled no contest to one charge of failure to maintain timely, legible, accurate and complete medical records relating to the diagnosis, treatment and care of a patient, a violation of NRS 630.3062(1). He was publicly reprimanded and paid \$4,900 for the Board’s costs. He also had to pay his own defense costs from all of the Board’s various fishing expeditions.

While he thought he was done with this, the Board is starting again. On March 14, 2017, Don Andreas, Deputy Chief of Investigations of the Board, penned Dr. Sarfo a letter making a broad range of vague allegations, without any limitation of time, and demanding that Dr. Sarfo provide him with the complete medical records of five patients, again, without a limitation to time or subject matter of why the records are being requested. Mr. Andreas included an Order from the Investigatory Committee demanding compliance with the records request or threatening disciplinary action for failure to cooperate.

Dr. Sarfo will no longer tolerate this abusive investigatory tact by the Board. The request is vague as to time and the allegations of wrongdoing. Dr. Sarfo should not have to be subject to such fishing expeditions by the Board. Dr. Sarfo has already responded to the Board’s allegations, but is not willing to give an unfettered production of these records to the Board so they can go fishing, again.

Accordingly, Dr. Sarfo asks this Court to issue a Writ of Prohibition or Mandamus stopping the Board from taking any action against Dr. Sarfo for his refusal to comply with the IC Order demanding the medical records.

II.

ISSUES PRESENTED

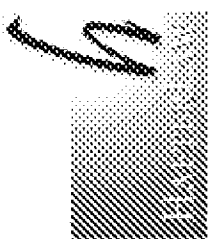
1. Is the Board of Medical Examiner's reliance on NRS §630.336(4)'s requirement that complaints and investigations related thereto remain confidential to prevent disclosure of the complaint to the physician that is the subject of the complaint erroneous?
2. Does the Board's practice of keeping complaints confidential, even from the target physician of the complaint, violate that physician's procedural due process rights?
3. Does the refusal to provide a target physician with a copy of the complaint fail to safeguard the physician from overzealous prosecution?
4. Is the Board's demand for five (5) patient files without limitation to time frame or procedure an overbroad request, especially in light of the scant of information conveyed about the underlying complaint?

III.

FACTS

The following facts are supported by Dr. Sarfo's declaration, , a true and correct copy of which is attached hereto as **Exhibit "A"**, the letter sent by Don Andreas on March 14, 2017, a true and correct copy of which is attached hereto as **Exhibit "B"**, the Order from the Investigative Committee dated March 14, 2017, a true and correct copy of which is attached hereto as **Exhibit "C"**, and his March 16, 2017, response, a true and correct copy of which is attached hereto as **Exhibit "D"**.

1. Dr. Sarfo is licensed as a physician in the State of Nevada and has been since 2004.
2. Dr. Sarfo has an extensive history with baseless investigations conducted by the Nevada State Board of Medical Examiners ("Board").
3. The Board was a serial filer of investigatory and administrative cases against him from the years 2010 until 2014.



- 1 4. The Board filed an investigative case in 2010 against me (Case #10-12353).
- 2 5. The Board filed an investigative case against me in 2011 (Case # 11-13343).
- 3 6. The Board filed a two investigative cases against me in 2012 (Case #s 12-13762, 12-
- 4 14231), as well as a formal administrative complaint against me in the same year (Case #12-
- 5 29257-1).
- 6 7. The Board filed an investigative case against me in 2014 (Case #14-15034).
- 7 8. All of these complaints were initiated through overly broad investigatory letters
- 8 requesting unlimited medical records for an uncertain period of time.
- 9 9. Despite all of these cases, only the administrative case (#12-29257-1) resulted in any
- 10 discipline.
- 11 10. In that case, the Board publicly alleged numerous violations of Nevada Revised Statutes
- 12 (NRS) Chapter 630, against Dr. Sarfo, including six (6) violations of NRS 630.301(4),
- 13 malpractice, as defined by Nevada Administrative Code §630.040, and one (1) violation of NRS
- 14 §630.3062(1), keeping legible and complete medical records.
- 15 11. Dr. Sarfo suffered severe hardships once this complaint was made public. He had to
- 16 disclose the complaint to all hospitals where he had privileges, as well as all insurers with whom
- 17 he contracted to provide medical services.
- 18 12. This one administrative complaint, alone, jeopardized his ability to work at various
- 19 hospitals and surgery centers, as well as his ability to remain under contract with various payors.
- 20 13. Ultimately, that case ended when Dr. Sarfo entered a no contest plea for one count of
- 21 failure to maintain timely, legible, accurate and complete medical records relating to the
- 22 diagnosis, treatment and care of a patient, a violation of NRS 630.3062(1). For this, he received
- 23 a public reprimand and was required to pay the Board's investigatory costs for this case.
- 24 14. During this time period, Dr. Sarfo did have troubles transitioning from paper charts to
- 25 electronic medical records, causing some of his records to be lost, disorganized or otherwise
- 26 incomplete. This was an administrative issue which his practice worked hard to resolve; one
- 27 that the Board was completely aware of while it was ongoing.
- 28 15. On March 15, 2017, Dr. Sarfo received a letter from Don Andreas, Deputy Chief of

Investigations for the Board.

16. In this March 15, 2017, letter Dr. Sarfo was asked to provide a “written response” to allegations that he engaged “poor documentation, fail[ure] to keep legible, accurate and complete medical records, and ...billing for services not rendered” for five patients.

17. Included with the letter as an Order from the Investigative Committee, demanding that he provide the “complete” medical records for these five patients.

18. No other information was provided about the allegations or the complaint which was the catalyst for Mr. Andreas’ March 14, 2017, letter.

19. Dr. Sarfo is very familiar with these patients, as he has a longstanding relationship with them.

20. Dr. Sarfo has spoken to these patients and they deny making any complaints to the Board; in fact, four of the five have offered to write letters of support of him in this matter.

21. Coincidentally, these patients all have a certain type of insurance with a certain carrier, a carrier with whom Dr. Sarfo has been battling for years to simply be paid for the services that he has rendered to their patients.

22. This carrier refuses to pay for services he renders to their patients, or, when they do pay, they pay less than the contracted amount, or, they will pay only to later seek to take back those payments on some technicality or falsified claim.

23. Dr. Sarfo has reported their malfeasance to the Department of Insurance.

24. Dr. Sarfo believes that the insurance company is the origin of the complaint in this new Board matter and has done so simply to cause him aggravation, cost him money in legal fees and costs and, potentially, to jeopardize his ability to practice medicine in this State.

25. Dr. Sarfo is concerned that if he releases these records, the Board will find any reason to use them against him, including the issues with documentation from years ago which he has already addressed with the Board.

26. Dr. Sarfo has responded to the Board’s inquiry, but refuses to provide the unfettered medical records.

27. Through counsel, Dr. Sarfo asked that the Board delay the deadline under the Order,

1 pending this Court's review of this Petition; the Board's counsel denied the request.

2 28. Absent intervention from this Court, if Dr. Sarfo does not comply with the Board's
3 request within 21 days of March 15, 2017, he may face additional disciplinary sanctions.

4 29. Dr. Sarfo have no other speedy or available remedy at law.

5
6 **IV.**

7 **LEGAL STANDARD**

8 A "court has original jurisdiction to issue writs of mandamus and prohibition."
9 MountainView Hosp., Inc. v. Eighth Judicial Dist. Court, 128 Nev. 180, 184, 273 P.3d 861, 864
10 (2012); see also Nev. Const. art. 6, § 4(1); NRS §34.160, and NRS §34.330. Where there is no
11 "plain, speedy, and adequate remedy" available at law, extraordinary relief may be available.
12 NRS §34.170; Smith v. Eighth Judicial Dist. Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).
13 However, even if an adequate legal remedy exists, this court will consider a writ petition if an
14 important issue of law needs clarification or if review would serve a public policy or judicial
15 economy interest. See Diaz v. Eighth Judicial Dist. Court, 116 Nev. 88, 93, 993 P.2d 50, 54
16 (2000). This court will examine each case individually, granting extraordinary relief if the
17 "circumstances reveal urgency or strong necessity." See Jeep Corp. v. Second Judicial Dist.
18 Court, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982).

19 A writ of prohibition is the appropriate remedy for an administrative body's improper
20 exercise of jurisdiction. See NRS 34.320; see also Smith, 107 Nev. at 677, 818 P.2d at 851. "A
21 writ of mandamus is available . . . to control an arbitrary or capricious exercise of discretion."
22 Humphries v. Eighth Judicial Dist. Court, 129 Nev., Adv. Op. 85, 312 P.3d 484, 486 (2013)
23 (*quoting* Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 124 Nev. 193, 197, 179 P.3d 556,
24 558 (2008)). "An exercise of discretion is considered arbitrary if it is founded on prejudice or
25 preference rather than on reason and capricious if it is contrary to the evidence or established
26 rules of law." Nev. Dep't of Pub. Safety v. Coley, 132 Nev., Adv. Op. 13, 368 P.3d 758, 760
27 (2016) (internal quotations omitted). As a general principle, courts practice judicial restraint,
28 avoiding legal and constitutional issues if unnecessary to resolve the case at hand. Miller v. Burk,

1 124 Nev. 579, 588-89, 188 P.3d 1112, 1118-19 (2008).

2 Further, it should be noted that “[a] writ of prohibition [may] issue to interdict retrial in
3 violation of a defendant’s constitutional right not to be put in jeopardy twice for the same
4 offense.” Glover v. Eighth Judicial Dist. Court, 125 Nev. 691, 701, 220 P.3d 684, 692 (2009).

5
6 V.

7 **ARGUMENT**

8
9 **A. THE BOARD OF MEDICAL EXAMINER’S REFUSAL TO DISCLOSE THE**
10 **COMPLAINT TO THE PHYSICIAN THAT IS THE SUBJECT OF THE**
11 **COMPLAINT IS ERRONEOUS**

12 It is well understood that the Nevada State Board of Medical Examiners (“Board”) has a
13 duty to regulate the profession of allopathic medicine in the State of Nevada. See NRS §630.003.
14 Specifically, the Legislature has stated that:

15 (a) It is among the responsibilities of State Government to ensure,
16 as far as possible, that only competent persons practice medicine,
17 perfusion and respiratory care within this State;

18 (b) For the protection and benefit of the public, the Legislature
19 delegates to the Board of Medical Examiners the power and duty to
20 determine the initial and continuing competence of physicians,
21 perfusionists, physician assistants and practitioners of respiratory
22 care who are subject to the provisions of this chapter;

23 (c) The Board must exercise its regulatory power to ensure that the
24 interests of the medical profession do not outweigh the interests of
25 the public;

26 (d) The Board must ensure that unfit physicians, perfusionists,
27 physician assistants and practitioners of respiratory care are
28 removed from the medical profession so that they will not cause
harm to the public; and

(e) The Board must encourage and allow for public input into its
regulatory activities to further improve the quality of medical
practice within this State.

1 NRS §630.003(1). Moreover, “[t]he powers conferred upon the Board by this chapter must be
2 liberally construed to carry out these purposes for the protection and benefit of the public.” NRS
3 §630.003(2).

4 An administrative board “has no inherent power but is limited to the powers conferred
5 by statute.” Nev. Power Co. v. Eighth Judicial Dist. Court, 120 Nev. 948, 955-56, 102 P.3d 578,
6 583-84 (2004). Accordingly, the Board is limited to its statutory power as set forth in Chapter
7 630 of the Nevada Revised Statutes.

8 The Board’s investigatory powers, therefore, are set forth by statute. There are several
9 methods for a complaint to be initiated before the Board. Nevada law requires that a licensee
10 self-report certain occurrences. See NRS §630.30665 and 630.3068. Certain other parties are
11 also required to report occurrences to the Board. See, e.g., NRS §630.3067 and 630.307. Other
12 times, a report of an occurrence can be made directly to the Board. See NRS §630.309.

13 The sole statutory discussion of what the Board does with these reports is set forth in
14 NRS §630.311, as follows:

15
16 **Review and investigation of complaint by committee designated**
17 **by Board; formal complaint; proceedings confidential;**
publication of summary of proceedings and determinations.

18 1. A committee designated by the Board and consisting
19 of members of the Board shall review each complaint and conduct
20 an investigation to determine if there is a reasonable basis for the
21 complaint. The committee must be composed of at least three
22 members of the Board, at least one of whom is not a physician. The
23 committee may issue orders to aid its investigation including, but
24 not limited to, compelling a physician to appear before the
25 committee.

26 2. If, after conducting an investigation, the committee
27 determines that there is a reasonable basis for the complaint and that
28 a violation of any provision of this chapter has occurred, the
committee may file a formal complaint with the Board.

3. The proceedings of the committee are confidential
and are not subject to the requirements of NRS 241.020. Within 20
days after the conclusion of each meeting of the committee, the
Board shall publish a summary setting forth the proceedings and

determinations of the committee. The summary must not identify any person involved in the complaint that is the subject of the proceedings.

NRS §630.336(4) states that “[e]xcept as otherwise provided in subsection 5 and NRS 239.0115, a complaint filed with the Board pursuant to NRS 630.307, all documents and other information filed with the complaint and all documents and other information compiled as a result of an investigation conducted to determine whether to initiate disciplinary action are confidential.” Accordingly, the Board will initiate investigations without ever showing the licensee the complaint that precipitated the investigation, or disclosing who made the complaint.

This Petition challenges, in part, this practice.

“Statutory interpretation is a question of law subject to de novo review.” State v. Catanio, 120 Nev. 1030 1033, 102 P.3d 588, 590 (2004). “We must attribute the plain meaning to a statute that is not ambiguous.” Id. “An ambiguity arises where the statutory language lends itself to two or more reasonable interpretations.” Id.

This case reflects a dispute as to how this statute is interpreted. The Board believes that every document related to a complaint, including the complaint, are confidential from everyone but the Board, including the target of the complaint. Dr. Sarfo disagrees. Because many documents collected during the investigation will come from Dr. Sarfo, it is impossible to keep all documents and other information collected as part of the investigation of his professional services confidential from him. Rather, Dr. Sarfo’s interpretation is far more reasonable, suggesting that the documents and other materials should be kept confidential from non-related parties.

While confidentiality of Board investigations has not been discussed by the Nevada Supreme Court, the confidentiality of judicial discipline proceedings has. Whitehead v. Nevada Com’n on Judicial Discipline, 893 P.2d 866, 111 Nev. 70 (Nev., 1995). In that case, the Nevada Supreme Court recognized that “[t]he State of Nevada has a compelling interest, enthroned in its constitution, to assure the confidentiality of judicial discipline proceedings until there has been a decision to discipline.” Id. (citing First Amendment Coal. v. Judicial Inquiry & Review, 784

1 F.2d 467 (3d Cir.1986) (Pennsylvania has a substantial interest in preserving *limited*
2 confidentiality); People ex rel. Ill. Jud. Inquiry Bd. v. Hartel, 72 Ill.2d 225, 20 Ill.Dec. 592, 380
3 N.E.2d 801 (1978) (state constitutional requirement that judicial discipline proceedings be kept
4 confidential must be implemented *except as overriding federal due process requirements*
5 *compel court to do otherwise*), cert. denied, 440 U.S. 915, 99 S.Ct. 1232, 59 L.Ed.2d 465 (1979);
6 Kamasinski v. Judicial Review Council, 797 F.Supp. 1083 (D.Conn.1992) (state's interest in
7 prohibiting disclosure prior to determination of probable cause is sufficiently compelling to
8 survive the strictest First Amendment scrutiny); see also Kamasinski v. Judicial Review Council,
9 843 F.Supp. 811 (D.Conn.), aff'd, 44 F.3d 106 (2d Cir.1994)). However, in all those cases, the
10 proceedings were not to keep the target out, but, rather, to keep the public out from the
11 proceeding. In this case, the same applies – the confidentiality should not to exclude the target
12 licensee, but, rather, the public in an attempt to protect the licensee from the fallout that comes
13 with such accusations.

14 To that end, we must look at the reason why a particular matter is closed. The Nevada
15 Supreme Court than stated:

16 Closure of court proceedings or records may be necessary to comply
17 with established public policy in the constitution, statutes, rules, or
18 case law; to protect a compelling governmental interest; to obtain
19 evidence to properly determine legal issues; or to avoid substantial
20 injury to a party by disclosure of matters protected by a common
21 law or privacy right not generally inherent in the specific type of
22 civil proceeding sought to be closed. See Barron v. Florida Freedom
Newspapers, 531 So.2d 113 (Fla.1988).

23 Id. at 875.

24 To best understand what the Legislature meant, we should look at legislative history.
25 Senate Bill 77 in 1987 amended NRS §630.336 to state:

26 1. Any proceeding of a committee of the board investigating
27 complaints is not subject to the requirements of NRS 241.020,
28 unless the licensee under investigation requests that the proceeding
be subject to those requirements. Any deliberations conducted or
vote taken by:

1 (a) The board or panel regarding its decision; or

2 (b) The board or any investigative committee of the board
3 regarding its ordering of a physician to undergo a physical or mental
4 examination or any other examination designated to assist the board
5 or committee in determining the fitness of a physician,

6 are not subject to the requirements of NRS 241.020.

7 2. Except as otherwise provided in subsection 3, all applications
8 for a license to practice medicine, any charges filed by the board,
9 financial records of the board, formal hearings on any charges heard
10 by the board or a panel selected by the board, records of such
11 hearings and any order or decision of the board or panel must be
12 open to the public.

13 3. The following may be kept confidential:

14 (a) Any statement, evidence, credential or other proof submitted
15 in support of or to verify the contents of an application;

16 (b) All investigations and records of investigations;

17 (c) Any report concerning the fitness of any person to receive
18 or hold a license to practice medicine;

19 (d) Any communication between:

20 (1) The board and any of its committees or panels; and

21 (2) The board or its staff, investigators, experts,
22 committees, panels, hearing officers, advisory members or
23 consultants and counsel for the board; and

24 (e) Any other information or records in the possession of the
25 board.

26 4. This section does not prevent or prohibit the board from
27 communicating or cooperating with any other licensing board or
28 agency or any agency which is investigating a licensee, including a
law enforcement agency. Such cooperation may include providing
the board or agency with minutes of a closed meeting, transcripts of
oral examinations and the results of oral examinations.

In 1989, only subsection 3 of NRS §630.336 was amended, and it was amended to read

“3. Except as otherwise provided in NRS 630.352 and section 1 of this act, the following may
be kept confidential:”.

It was in 2003 when the major revision to this law occurred. In that change, NRS
§630.336 was amended to read:

1. Any deliberations conducted or vote taken by the Board or any
investigative committee of the Board regarding its ordering of a

1 physician, physician assistant or practitioner of respiratory care to
2 undergo a physical or mental examination or any other examination
3 designated to assist the Board or committee in determining the
4 fitness of a physician, physician assistant or practitioner of
5 respiratory care are not subject to the requirements of NRS 241.020.

6 2. Except as otherwise provided in subsection 3 or 4, all applications
7 for a license to practice medicine or respiratory care, any charges
8 filed by the Board, financial records of the Board, formal hearings
9 on any charges heard by the Board or a panel selected by the Board,
10 records of such hearings and any order or decision of the Board or
11 panel must be open to the public.

12 3. The following may be kept confidential:

13 (a) Any statement, evidence, credential or other proof
14 submitted in support of or to verify the contents of an application;

15 (b) Any report concerning the fitness of any person to
16 receive or hold a license to practice medicine or respiratory care;
17 and

18 (c) Any communication between:

19 (1) The Board and any of its committees or panels;
20 and

21 (2) The Board or its staff, investigators, experts,
22 committees, panels, hearing officers, advisory members or
23 consultants and counsel for the Board.

24 4. Except as otherwise provided in subsection 5, a complaint filed
25 with the Board pursuant to NRS 630.307, all documents and other
26 information filed with the complaint and all documents and other
27 information compiled as a result of an investigation conducted to
28 determine whether to initiate disciplinary action are confidential.

5. The complaint or other document filed by the Board to initiate
disciplinary action and all documents and information considered by
the Board when determining whether to impose discipline are public
records.

6. This section does not prevent or prohibit the Board from
communicating or cooperating with any other licensing board or
agency or any agency which is investigating a licensee, including a
law enforcement agency. Such cooperation may include, without
limitation, providing the board or agency with minutes of a closed
meeting, transcripts of oral examinations and the results of oral
examinations.

When reviewing the legislative history, it is clear that the concern was the frivolous

complaints that are made public would be harmful to physicians in the State. See excerpt of legislative history of SB 250 (2003), a true and correct copy of which is attached hereto as **Exhibit "E"** at page 172 of April 16, 2003 hearing. Specifically, the following interchanged occurred:

FRED L. HILLERBY, LOBBYIST, NEVADA STATE BOARD
OF DENTAL EXAMINERS, NEVADA STATE BOARD OF
NURSING, AND NEVADA STATE BOARD OF PHARMACY:

We have two recommendations. Section 25 of S.B. 364 shows a deletion of language on lines 10 to 17. That deletion would allow frivolous cases to be made public. The new language on lines 18 to 21 states any complaint will be made public. We would like to add to lines 18 to 21, "if discipline is imposed," so billing errors and other minor infractions would not become public record.

CHAIRMAN TOWNSEND:

If a complaint is filed and the board takes any action, whether a reprimand, negotiated settlement, suspension, revocation, or fine; the information becomes public. If no action is taken, there is no public record.

Id. at page 172 of the April 16, 2003 hearing. If the Court will recall, 2003 is when major revisions to the laws governing tort reform occurred as a result of the push to Keep Our Doctors in Nevada. Protecting the disclosure of frivolous complaints made to the Board was seen as a concession to help protect our doctors and keep them in this State. Accordingly, it would be an improper interpretation of this statute to think that the Legislature was trying to keep the complaint from the target physician's eyes.

In 2011, Senate Bill 168, Page 2863, suggests that the word "formal" was added before "complaint" in subsection 5 of NRS §630.336. There is no legislative history available for why this was added. Relying on the prior intent of the 2003 changes, it is clear that this was to keep documents which related prior to the formal complaint, i.e., frivolous complaints that never matriculate to a formal complaint, out of the public record, clearly to save physicians from having to deal with frivolous complaints. This was never intended to keep the target physician from seeing the complaints that were made about him.

**B. THE BOARD'S INVESTIGATION PROCESS VIOLATES PHYSICIANS' DUE
PROCESS RIGHTS**

The Fourteenth Amendment prevents states from depriving individuals of protected liberty or property interests without affording those individuals procedural due process. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). With procedural due process claims, the deprivation of the protected interest "is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). Before being deprived of a protected interest, a person must be afforded some kind of hearing, "except for extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, 401 U.S. 371, 378-79, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

In evaluating procedural due process claims, the Court must engage in a two-step inquiry: (1) the Court must ask whether the state has interfered with a protected liberty or property interest; and (2) the Court must determine whether the procedures "attendant upon that deprivation were constitutionally sufficient." Humphries v. County of Los Angeles, 554 F.3d 1170, 1184-85 (9th Cir.2009) (*quoting* Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989)).

1. The Protected Property Interest

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). It is well-established that a fundamental right may not be impaired without due process of law. Chudacoff v. Univ. Med. Ctr. of S. Nev., 609 F.Supp.2d 1163, 1172-73 (D.Nev.2009); Maiola v. State, 120 Nev. 671, 674-75, 99 P.3d 227, 229 (2004). Moreover, the Nevada Supreme Court has recognized that a physician's interest in practicing medicine is a property right that must be afforded due process. Minton v. Bd. of Med. Exam'rs, 110 Nev. 1060 1082, 881 P.2d 1339, 1354 (1994), *disapproved of on other*

grounds by Nassiri v. Chiropractic Physicians' Bd., 130 Nev. Adv. Op. 27, 327 P.3d 487, 489 (2014) ; Molnar v. State ex rel. Bd. of Med. Exam'rs of the State of Nev., 105 Nev. 213, 216, 773 P.2d 726, 727 (1989); Potter v. State Bd. of Med. Exam'rs, 101 Nev. 369, 371, 705 P.2d 132, 134 (1985) ; Kassabian v. State Board of Medical Examiners, 68 Nev. 455, 464, 235 P.2d 327 331 (1951).

2. Whether the Procedures Were Constitutionally Sufficient

The amount of process that is due is a "flexible concept that varies with the particular situation." Zinermon, 494 U.S. at 127, 110 S.Ct. 975. The Court tests this concept by weighing several factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

The private interest at stake here is the ability to practice medicine within the State of Nevada. The interest extends further, however, in that a licensing action in one jurisdiction could limit a physician's ability to practice anywhere in the country, as most jurisdictions have reciprocal discipline amongst physicians. To that end, the amount of process must accord sufficient respect for a professional's life and livelihood.

Next, the risk of an erroneous deprivation is also significant, as an improper licensing action would have dramatic consequences for the physician. Additionally, the Board, as an agency that serves to protect the public, only serves as a reliable source of information if it receives accurate reports; an erroneous report reduces the Board's utility. As a result, there are substantial benefits to having procedural safeguards in place to protect both the physician and the Board from erroneous or improper reporting. Both are best served by having the safeguards in place on the front-end of the decision-making process; neither is served by remedial

provisions. Once the damage is done, it is hard to undo.

The problem with the Board's position of maintaining the complaint as confidential, even from the physician against whom it is made, is that it fails to provide the physician with actual notice as to the allegations which are being investigated. How does a physician know that the complaint alleged actually exists? How can the licensee be rest assured that the Board is not just engaged in its own agenda to persecute a physician? How can the licensee be confident that any administrative charges that come from the response to an investigation letter are related to the subject matter of the original complaint? Discipline of physicians should not be a fishing expedition for the Board to find any or all technical violations it may generate evidence to support. Board investigations should not be taken from the playbook of McCarthyism.

It is for this reason that notice of actual allegations is a fundamental requisite of due process that is employed as a procedural safeguard in any judicial action. See Browning v. Dixon, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998). There is no rational basis for why the complaint or the complaintant's identity need be kept confidential from the physician who is the target of the investigation. Because Board investigations center on patient care, the identity of the patient is always known. If the complaint is filed by a whistleblower, the whistleblower would have statutory protection for such activities, making anonymity a non-issue. The only people who are protected by the confidentiality is someone who would file a false complaint, or a competitor who is trying to use the administrative process to harm his or her competition. That is not a compelling government interest over the due process rights that the physician has in this case.

In fact, the case of Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965, 12 Cal. Daily Op. Serv. 2302, 2012 Daily Journal D.A.R. 2566 (9th Cir., 2012), is highly instructive. There, the 9th Circuit was asked whether the IRS's Office of Foreign Assets Control ("OFAC") violated the procedural due process rights of AHIF-Oregon¹ by using

¹ AHIF-Oregon incorporated as a non-profit public benefit corporation under Oregon law in 1999. AL Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965 (9th Cir., 2012). AHIF-Oregon describes itself as "an Oregon non-profit charitable organization that seeks to promote greater understanding of the Islamic religion through operating prayer houses, distributing religious publications, and engaging in other charitable activities." Id.



1 classified information without any disclosure of its content and by failing to provide adequate
2 notice and a meaningful opportunity to respond.

3 The 9th Circuit apply the balancing test set forth in Mathews v. Eldridge, 424 U.S. 319,
4 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *See* California ex rel. Lockyer v. Fed. Energy Regulatory
5 Comm’n, 329 F.3d 700, 709 n. 8 (9th Cir.2003) (explaining that, for procedural due process
6 claims, the Mathews test is “a general test that applies in all but a few contexts”); Nat’l Council
7 of Resistance of Iran v. Dep’t of State (NCORI), 251 F.3d 192, 208–09 (D.C.Cir.2001) (applying
8 the Mathews test in a similar context); Am.–Arab Anti–Discrimination Comm. v. Reno (ADC),
9 70 F.3d 1045, 1061 (9th Cir.1995) (same); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 528–29,
10 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality) (holding that the proper test for balancing
11 national security interests with a person’s due process rights is the Mathews balancing test).
12 Under the Mathews balancing test, the Court “must weigh (1)[the person’s or entity’s] private
13 property interest, (2) the risk of an erroneous deprivation of such interest through the procedures
14 used, as well as the value of additional safeguards, and (3) the Government’s interest in
15 maintaining its procedures, including the burdens of additional procedural requirements.” Foss
16 v. Nat’l Marine Fisheries Serv., 161 F.3d 584, 589 (9th Cir.1998) (citing Mathews, 424 U.S. at
17 334–35, 96 S.Ct. 893).

18 The Ninth Circuit stated that “[t]he first two Mathews factors support AHIF–Oregon’s
19 position”, “OFAC’s use of classified information violates its procedural due process rights.” Al
20 Haramain Islamic Found, 686 F.3d at 980. The Court stated, however, “the third Mathews
21 factor—the government’s interest in maintaining national security—supports OFAC’s position.
22 Given the extreme importance of maintaining national security, we cannot accept AHIF–
23 Oregon’s most sweeping argument—that OFAC is not entitled to use classified information in
24 making its designation determination.” *Id.* (citing, generally, Gen. Dynamics Corp. v. United
25 States, — U.S. —, 131 S.Ct. 1900 1905, 179 L.Ed.2d 957 (2011) (“[P]rotecting our national
26 security sometimes requires keeping information about our military, intelligence, and diplomatic
27 efforts secret.”)).

28 However, the 9th Circuit stated that this result is a case by case basis. To support this

position, the Court cited to American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9thCir, 1995), where, despite the argument that national security was at risk, when reviewing the confidential information in camera, on a case by case basis, even the government's interest of national security did not outweigh the due process concerns. The Court "held that the government's claims of national security were 'insufficient to tip the Mathews scale towards the Government.'" Id. at 1070.

"Due process requires notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " United Student Aid Funds, Inc. v. Espinosa, — U.S. —, 130 S.Ct. 1367 1378, 176 L.Ed.2d 158 (2010) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

In this case, Dr. Sarfo has no ability to object to the arduous demands of the Board in this case. The Board issued an Order based on a "secret" complaint, and Dr. Sarfo needs to drop everything and copy hundreds, if not thousands of pages of medical records AND respond to vague allegations contained in the March 14, 2017, letter that he engaged "poor documentation, fail[ure] to keep legible, accurate and complete medical records, and ...billing for services not rendered" for these five patients within 21 days of when the Board sent the letter. See Exhibit "B". While Dr. Sarfo has responded with a letter, see Exhibit "D", he is still under obligation to produce all of the records for the five (5) patients, without limitation to time or procedure.

C. THE BOARD'S APPROACH ELIMINATES ANY SAFEGUARDS THE LICENSEE MAY HAVE AGAINST OVERZEALOUS PROSECUTION

"[T]he legal process due in an administrative forum 'is flexible and calls for such procedural protections as the particular situation demands.'" Minton v. Bd. of Med. Examiners, 110 Nev. 1060 1082, 881 P.2d 1201, 1204 (1982); see also Dutchess Bus Servs, Inc. v. Bd. of Pharmacy, 124 Nev. 701, 713, 191 P.3d 1159, 1167 (2008) (providing that the discovery provisions of the Nevada Rules of Civil Procedure do not apply to administrative agencies). Relying on this standard, the Nevada Supreme Court in Minton, used the Mathews balancing

1 test to determine whether a given procedure appropriately safeguards an individual's due process
2 guarantees. Id. The Court then stated that "[u]nder the second prong of the due process test,
3 however, the absence of safeguards must suggest a risk of erroneous deprivation." Id. (emphasis
4 added).

5 Here there are NO safeguards. Dr. Sarfo must respond to the inquiry letter and must
6 provide all records for the five patients listed. There are no limits to time or procedure. Dr.
7 Sarfo cannot confirm that the complaint addresses what the broad scope of the request. And,
8 there is no way for Dr. Sarfo to truly understand what violations of the Medical Practice Act the
9 Board is investigating with any particularity, especially when we are dealing with patients who
10 have years of treatment history with Dr. Sarfo.

11 This State needs safeguards to protect its physicians (or those who are left and those
12 who were brave enough to come in the first place). The Board is known for abusive practices
13 and unconstitutional laws. See, e.g., Tate v. State Bd. of Medical Examiners, 356 P.3d 506, 131
14 Nev. Adv. Op. 67 (Nev., 2015)(striking NRS §630.356(2) as being an unconstitutional violation
15 of the separation of powers doctrine). It is not uncommon for the Board to target a physician,
16 usually, they are a solo practitioner or practitioner in a small practice with only one or two
17 partners, as opposed to being in a large group, and make onerous demands from that physician
18 without an understanding as to why the Board is making such a request. These fishing
19 expeditions expose the physician to severe mental anguish, as well as resources expended to
20 respond to the inquiry. Worse, rare if ever, has the physician been provided with notice of the
21 allegations made against him or her; rather, it is shoot first, respond second. This is nothing
22 more than the Board's abuse of its powers.

23 Petitioner should know – he has been here before. The Board and the Petitioner have a long
24 history. The Board was a serial filer of cases against Dr. Sarfo. They filed investigatory cases
25 in 2010 (Case #10-12353), 2011 (Case # 11-13343), 2012 (Case #s 12-13762, 12-14231, and 12-
26 29257-1), and 2014 (14-15034). Finally, after exhaustive defense efforts, the Board appeared to
27 have stopped with its frivolous investigations against Dr. Sarfo.

28 Naturally, one thing, "where there is smoke..." – right? So, it should be disclosed that



one of these investigatory complaints *did* actually matriculate into a formal administrative complaint – case number 12-29257. In that case, the Board alleged numerous violations of Nevada Revised Statutes (NRS) Chapter 630, including six (6) violations of NRS 630.301(4), malpractice, as defined by Nevada Administrative Code 630.040, and one (1) violation of NRS 630.3062(1), keeping legible and complete medical records. Ultimately, however, that case ended with Dr. Sarfo entering a no contest plea for one count of failure to maintain timely, legible, accurate and complete medical records relating to the diagnosis, treatment and care of a patient, a violation of NRS 630.3062(1). So, after defending himself in over the course of five years, at the cost of thousands of dollars, the only way that the Board protected the public is through a reprimand about poor documentation – something that Dr. Sarfo was aware of because of administrative issues in his practice converting to electronic medical records. Does that really serve the public interest, or is it more governmental waste and abuse of power simply because a Board investigator dug his heels in?

And, now, it is very likely that he will do it again. There is nothing to prevent the Board from engaging in the same scorch the Earth McCarthyian hunt that they did previously. And for what? Without a copy of the complaint and without a specific request limited to time or procedure, there are absolutely no safeguards to protect Dr. Sarfo in this process.

D. THE BOARD’S LETTER AND ORDER ARE VAGUE AND OVERBROAD

Perhaps this wouldn’t be such an issue if the Board’s March 14, 2017 letter, see Exhibit “B”, wasn’t so overly broad. As the Court will note, in Dr. Sarfo’s response, Mr. Hafter notes that his office repeatedly objects to vague and overbroad investigatory letters. See Exhibit “D”. That is because they always do this. The Board doesn’t limit the investigation to a particular procedure that it may have questions about, or a specific time line for an inquiry; rather, it asks for the complete medical record, regardless of whether the physician treated the patient for a day or a century.

The request in this case is for five (5) complete patient medical records. There is no limitation to time. There is no limitation to procedure. There is no limitation to billing records.

1 There is no limitation to anything. There is no assurance that the complaint received was only
2 limited to a specific course of conduct – one which the Board is investigating.

3 This is an overly broad request.

4
5 **IV.**

6 **CONCLUSION**

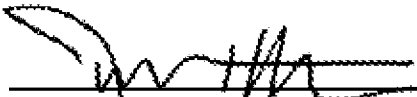
7 For all of the above reasons, this Court should issue a Writ of Prohibition, or Mandamus,
8 preventing the Board from enforcing its Order Dr. Sarfo from producing any records under the
9 March 14, 2017, Order, or providing any further information in response to the March 14, 2017,
10 inquiry letter.

11 Further, this Court should find that the interpretation of NRS §602.336(4) preventing the
12 disclosure of a complaint that the Board is investigating to the target physician is an erroneous
13 interpretation under the concept of both procedural due process and the legislative history for the
14 statute, and ordering that all future investigatory letters to Nevada's physicians include a copy
15 of the complaint which triggered the investigation.

16 Dated this 16th day of March, 2017.

17 **HAFTERLAW**

18
19 By:


20 JACOB L. HAFTER, ESQ.
21 Nevada Bar No. 9303

22 **EXHIBITS**

23 **Exhibit "A"**

Declaration by Dr. Sarfo

24 **Exhibit "B"**

March 14, 2017, Letter from Don Andreas

25 **Exhibit "C"**

Order from the Investigative Committee dated March 14, 2017,

26 **Exhibit "D"**

Dr. Sarfo's March 16, 2017, Response Letter

27 **Exhibit "E"**

28 Excerpts from 2003 Legislative History of SB250 – Amending NRS
§630.336(4)

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document, ***PETITION FOR WRIT OF PROHIBITION***:

☒ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

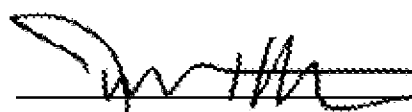
-or-

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Dated this 16th day of March, 2017.

HAFTERLAW

By:



JACOB L. HAFTER, ESQ.
Nevada Bar No. 9303

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

EXHIBIT "A"

EXHIBIT "A"

DECL
JACOB L. HAFTER, ESQ.
Nevada Bar No. 9303
HAFTERLAW
6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
Telephone: (702) 405-6700
Facsimile: (702) 685-4184
jhafter@hafterlaw.com

Counsel for Kofi Sarfo, MD

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

KOFI SARFO, M.D.;

Petitioner,

vs.

**NEVADA STATE BOARD OF
MEDICAL EXAMINERS,**

Respondents.

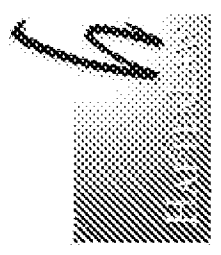
Case Number: _____

Department Number: _____

**DECLARATION OF KOFI SARFO, MD IN SUPPORT OF PETITION FOR WRIT
AND MOTION TO HAVE PETITION HEARD ON SHORTENED TIME**

I, KOFI SARFO, MD, declare and affirm as follows:

1. That I am a physician duly licensed to practice in the State of Nevada.
2. That I am the Petitioner in the above-entitled matter and am familiar with the facts and circumstances of the action herein.
3. That I have been licensed as a physician in the State of Nevada since 2004.
4. That I have an extensive history with investigations conducted by the Nevada State Board of Medical Examiners ("Board").



1 5. The Board was a serial filer of investigatory and administrative cases against me.

2 6. The Board has filed investigatory and administrative cases in 2010 (Case #10-12353),
3 2011 (Case # 11-13343), 2012 (Case #s 12-13762, 12-14231, and 12-29257-1), and 2014 (14-
4 15034).

5 7. Only one of these investigatory complaints actually matriculated into a formal
6 administrative complaint – case number 12-29257.

7 8. In that case, the Board alleged numerous violations of Nevada Revised Statutes (NRS)
8 Chapter 630, including six (6) violations of NRS 630.301(4), malpractice, as defined by Nevada
9 Administrative Code §630.040, and one (1) violation of NRS §630.3062(1), keeping legible and
10 complete medical records.

11 9. The Board made this administrative complaint public.

12 10. I suffered severe hardships once this complaint was made public.

13 11. I had to disclose the complaint to all hospitals where I have privileges, as well as all
14 insurers with whom I am contracted to provide medical services.

15 12. The administrative complaint, alone, jeopardized my ability to work at various hospitals
16 and surgery centers, as well as my ability to remain under contract with various payors.

17 13. Ultimately, that case ended when I entered a no contest plea for one count of failure to
18 maintain timely, legible, accurate and complete medical records relating to the diagnosis,
19 treatment and care of a patient, a violation of NRS 630.3062(1).

20 14. I received a public reprimand and had to pay the Board's investigatory costs for this case.

21 15. During this time period, I did have troubles transitioning from paper charts to electronic
22 medical records, causing some of my records to be lost, disorganized or otherwise incomplete.
23 This was an administrative issue which my practice worked hard to resolve.

24 16. On March 15, 2017, I received a letter from Don Andreas, Deputy Chief of Investigations
25 for the Board.

26 17. In this March 15, 2017, letter I was asked to provide a "written response" to allegations
27 that I engaged "poor documentation, fail[ure] to keep legible, accurate and complete medical
28 records, and ...billing for services not rendered" for five patients.

1 18. Included with the letter as an order from the Investigative Committee, demanding that I
2 provide the complete medical records for these five patients.

3 19. No other information was provided about the allegations or the complaint which initiated
4 Mr. Andreas' letter.

5 20. I am very familiar with these patients. I have a longstanding relationship with these
6 patients.

7 21. I have spoken to these patients and they deny making any complaints to the Board.

8 22. In fact, four of the five have offered to write letters of support in this matter.

9 23. Coincidentally, these patients all have a certain type of insurance with a certain carrier.

10 24. I have been battling this insurance carrier for years to simply be paid for the services that
11 I render to their patients.

12 25. This carrier refuses to pay for services I render to their patients, or, when they do pay,
13 they pay less than the contracted amount, or, they will pay only to later seek to take back those
14 payments on some technicality or falsified claim.

15 26. Accordingly, I have been battling with this insurance company for years to simply be
16 paid for the services I have rendered to their patients.

17 27. I have reported their malfeasance to the Department of Insurance.

18 28. I believe that the insurance company is the origin of the complaint in this new Board
19 matter and has done so simply to cause me aggravation, cost me money and, potentially,
20 jeopardize my ability to practice medicine in this State.

21 29. I am concerned that if I release these records, the Board will find any reason to use them
22 against me, including the issues with documentation from years ago which I have already
23 addressed with the Board.

24 30. If the Board has a concern about a particular procedure I provided these patients, or a
25 specific allegation of misconduct, I would be more than happy to address that concern with
26 particularity.

1 31. It is not fair that I must turn over all my records for these patients and the Board can use
2 this to find any technical violation of the Medical Practice Act against me, all based on an
3 anonymous complaint, or, for that matter, a fictional complaint.

4 32. If I do not comply with the Board's request within 21 days of March 15, 2017, I can face
5 additional disciplinary sanctions.

6 33. I have no other speedy or available remedy at law.

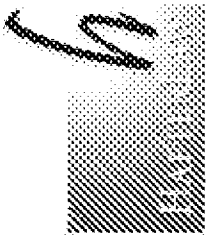
7 I declare under penalty of perjury that the foregoing is true and correct.

8 Dated this 16th day of March, 2017.

9
10 Signature:

KOFI SARFO, MD

6851 W. Charleston Boulevard
Las Vegas, Nevada 89128
(702) 405-6700 Telephone
(702) 685-4184 Facsimile



1 30. If the Board has a concern about a particular procedure I provided these patients, or a
2 specific allegation of misconduct, I would be more than happy to address that concern with
3 particularity.

4 31. It is not fair that I must turn over all my records for these patients and the Board can use
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8 face additional disciplinary sanctions.

9 33. I have no other speedy or available remedy at law.

10 I declare under penalty of perjury that the foregoing is true and correct.

11 Dated this 16th day of March, 2017.

12 Signature:

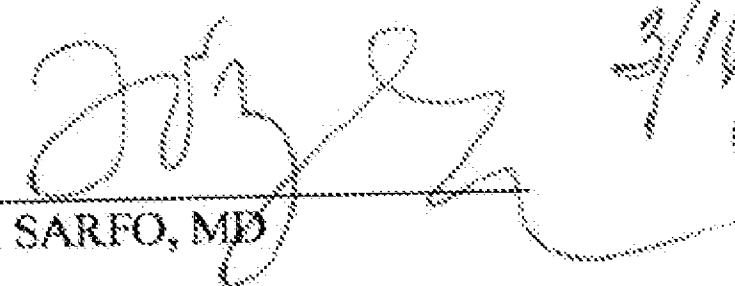
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KOFI SARFO, MD

EXHIBIT “B”

EXHIBIT “B”



Nevada State Board of Medical Examiners

March 14, 2017

Kofi Sarfo, MD
2909 West Charleston Blvd.
Las Vegas NV 89102

RE: BME CASE #: 17-17057

PATIENTS: [REDACTED] DOB: [REDACTED]

DOB: [REDACTED]

DOB: [REDACTED]

DOB: [REDACTED]

DOB: [REDACTED]

Dear Dr. Sarfo:

We have received information regarding the medical treatment of the above named patients. The complaint alleges that your medical records have poor documentation, failed to keep legible, accurate and complete medical records and you may be billing for services not rendered. Furthermore, it is alleged that your patient notes/billings appear to make services potentially fabricated and then billing for services not rendered. Therefore, your treatment may have fallen below the standard of care and your medical records may be difficult to decipher

In order to determine whether or not there has been a violation of the Medical Practice Act, please provide a written response to the allegation noted above, including your treatment plan, as well as complete copies of the medical records for these patients. Include copies of any x-ray or other films you produced during treatment of these patients. Please include any further information you believe would be useful for the Board to make a determination in this matter. Please reply to this request within 21 days.

The Nevada State Board of Medical Examiners investigates all information received concerning possible violations of the Nevada Revised Statutes, Chapter 630. We make no determination as to whether or not there has been a violation of the Medical Practice Act, prior to the completion of our investigation. Providing the requested information is deemed a professional obligation of any physician under investigation by the Board and shall not be deemed to be cooperation subject to the whistle-blower protections provided to physicians in NRS 630.364 (3).

Please be advised that the particular allegation referenced above, if in fact it did occur, and depending on the facts associated with the situation, could be a violation of the codes, including, but not limited to: NRS 630.301(4), NRS 630.3062(1) & NRS 630.305(1)(d).

■ LAS VEGAS OFFICE
Board of Medical Examiners
Building A, Suite 2
6010 S. Rainbow Boulevard
Las Vegas, NV 89118
Phone: 702-486-3300
Fax: 702-486-3301

□ RENO OFFICE
Board of Medical Examiners
Suite 301
1106 Terminal Way
Reno, NV 89502
Phone: 775-688-2550
Fax: 775-688-2550

Respectfully,



Don Andreas
Deputy Chief of Investigations
Las Vegas Office

EXHIBIT "C"

EXHIBIT "C"

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In the Matter of the Investigation of:

Kofi Sarfo, MD

License No. 11205

Kofi Sarfo, MD

ORDER TO PRODUCE MEDICAL RECORDS

Kofi Sarfo, MD
2909 West Charleston Blvd.
Las Vegas, NV 89102

1. Properly authenticated and complete copies of any and all medical records of [REDACTED] DOB: [REDACTED]; [REDACTED] DOB: [REDACTED]; [REDACTED]; DOB: [REDACTED]; [REDACTED]; DOB: [REDACTED]; [REDACTED]; DOB: [REDACTED]; [REDACTED] and a formal written response to the allegations regarding the letter dated March 14, 2017.

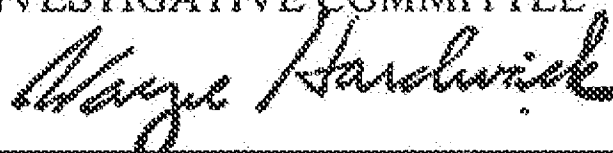
Said records shall be provided to an investigator of the Nevada State Board of Medical Examiners within 21 days of service of this Order delivered to The Nevada State Board of Medical Examiners located at 6010 S. Rainbow Blvd. Bldg. A Suite 2, Las Vegas, NV 89118. Failure to comply and

1 produce said records in the aforesaid manner may subject you to potential disciplinary action, to
2 include a violation of NRS 630.3065(2)(a); further the Investigative Committee may seek
3 administrative sanctions as set forth in NRS 630.352.

4 Additionally, compliance with this order of the board is deemed compulsory and shall not be
5 deemed to be cooperation subject to the protections provided to a physician pursuant to NRS
6 630.364(3).

7 Dated this 14thth day of March 2017.

8 NEVADA STATE BOARD OF MEDICAL EXAMINERS
9 INVESTIGATIVE COMMITTEE

10 

11 _____
12 Wayne Hardwick, M.D., Chairman
13 Nevada State Board of Medical Examiners
14 Investigative Committee
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EXHIBIT “D”

EXHIBIT “D”



JACOB HAFTER, Esq.
jhafter@hafterlaw.com

Admitted to Practice Law in Nevada, Pennsylvania, New Jersey,
New Jersey, and before the U.S. Patent & Trademark Office

March 16, 2017

VIA email: dandreas@medboard.nv.gov and U.S. Mail

Don Andreas
Deputy Chief of Investigations
Nevada State Board of Medical Examiners
Building A, Suite 2
6010 S. Rainbow Boulevard
Las Vegas, Nevada 89118

Re: Kofi Sarfo, M.D.
BME CASE #17-17057

Dear Mr. Andreas:

Please be advised that this office represents Kofi Sarfo, M.D., with respect to the above-referenced case number. Please accept this letter as a formal response to your letter dated March 14, 2017, wherein you inquired of Dr. Sarfo to provide a "written response" to allegations that Dr. Sarfo engaged "poor documentation, fail[ure] to keep legible, accurate and complete medical records, and ...billing for services not rendered" for five patients. Dr. Sarfo vehemently denies these vague and ambiguous allegations.

First, as this office has stated on numerous occasions in response to your inquiry letters, letters which are similar, if not identical to the instant March 14, 2017 letter to which this letter is intended to provide a response, we believe that your inquiry is overly vague and non-descript in nature, making it difficult to provide a comprehensive or appropriately targeted response.¹ As you are further aware, we are strong advocates for due process. Due process requires adequate notice of the allegations made against an individual, and a vague inquiry letter fails to meet this constitutional requirement. It would be far more appropriate and fair if a true and correct copy of the actual complaint was forwarded along with your inquiry letter. As such, without seeing the actual complaint or any other information related to this matter, we reserve the right to supplement this response should you be willing to provide additional details regarding the allegations in this case.

Your investigatory letter is not only vague as to the allegations, it is vague as to time. You failed to state the time period for which your inquiry covers. As we know, Dr. Sarfo had some administrative

¹ We have been through this before in 2010, 2011, 2012, and 2014. And, yet, you continue to send these vague and ambiguous investigation letters fishing for an opportunity to find a violation of the Medical Practice Act.

issues a few years ago which affected his charting and documentation. That has been dealt with by Dr. Sarfo, and we are not inclined to re-open that issue, as it has been resolved between Dr. Sarfo and the Board.

That being said we will not be providing the records at this point in time. Concurrent with the filing of this letter, we are filing a Petition for Writ of Prohibition, asking a court to stop the Board of Medical Examiners from its pursuit of this case, as it has been presented to date. At some point, physicians need to stop allowing the Board to steamroll all over them. Dr. Sarfo is willing to stand up for himself and physicians across this great State to try to reign you into a reasonable regulatory practice.

It should be noted, however, that Dr. Sarfo is respectful of his obligations as a licensee in this State. For that reason, we are providing you with this letter and the following explanation.

Dr. Sarfo has been in a bitter battle with various insurance companies about their unscrupulous reimbursement practices. It is believed that this action is nothing more than an insurance company trying to harm Dr. Sarfo for his refusal to lay down to their bullying. Dr. Sarfo has a close and friendly relationship with the five patients that are included in your investigatory letter. He is confident in the quality of his care for these patients and that he provided all care that was billed by his office. If anything, some of the same issues that were present in the 2010, 2011, 2012 and 2014 cases regarding documentation may also be present in these cases, if you look far enough back at the records.

Accordingly, we respectfully request that this matter be closed without further action, or that you provide a copy of the complaint, along with specifics as to time and procedure codes which are the focus of this current investigation and allow Dr. Sarfo to provide a subsequent response.

Thank you for your cooperation in this matter. Please feel free to contact me if you have any questions or wish to discuss this matter further.

Very truly yours,



Jacob Hafner, Esq.

I, KOFI SARFO, M.D., have read the aforementioned response and agree with the response contained therein.

KOFI SARFO, M.D.

March 16, 2017
Page 2 of 2

issues a few years ago which affected his charting and documentation. That has been dealt with by Dr. Sarfo, and we are not inclined to re-open that issue, as it has been resolved between Dr. Sarfo and the Board.

That being said we will not be providing the records at this point in time. Concurrent with the filing of this letter, we are filing a Petition for Writ of Prohibition asking a court to stop the Board of Medical Examiners from its pursuit of this case, as it has been presented to date. We hope all physicians need to stop allowing the Board to steamroll all over them. Dr. Sarfo is willing to stand up for himself and physicians across this great State to try to reign you into a reasonable regulatory practice.

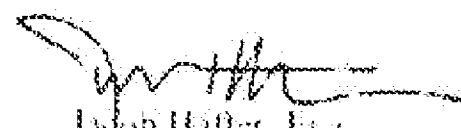
It should be noted, however, that Dr. Sarfo is respectful of his obligations as a licensee in the State. For that reason, we are providing you with this letter and the following explanation.

Dr. Sarfo has been in a bitter battle with various insurance companies about their disposition of reimbursement practices. It is believed that this action is nothing more than an insurance company trying to harm Dr. Sarfo for his refusal to lay down to their bullying. Dr. Sarfo has a close and friendly relationship with the five patients that are included in your investigatory letter. He is confident in the quality of his care for these patients and that he provided all care that was billed by his office. If anything, some of the same issues that were present in the 2010, 2011, 2012 and 2014 cases regarding documentation may also be present in these cases, if you look far enough back at the records.

Accordingly, we respectfully request that this matter be closed without further action, or that you provide a copy of the complaint, along with specifics as to time and procedural codes which are the focus of this current investigation and allow Dr. Sarfo to provide a subsequent response.

I thank you for your cooperation in this matter. Please feel free to contact me if you have any questions or wish to discuss this matter further.

Very truly yours,


Jacob Hallet, Esq.

I, KOI SARFO, MD, have read the aforementioned response and agree with it, in part, as contained therein.

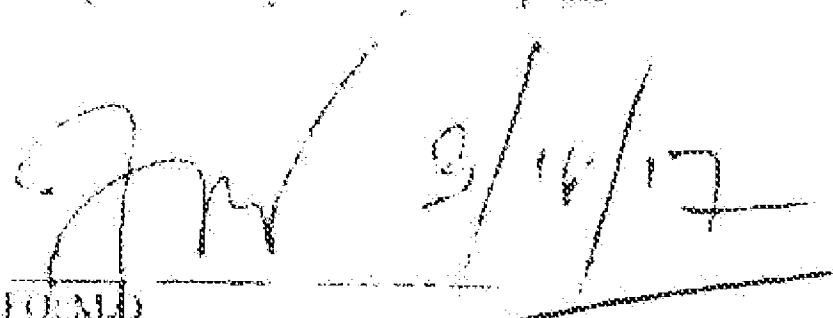

KOI SARFO, MD

EXHIBIT “E”

EXHIBIT “E”

SB 250 - 2003

Introduced on Mar 10, 2003

By Townsend, O'Connell

Revises various provisions relating to regulated businesses and professions. (BDR 57-835)

DECLARED EXEMPT

Fiscal Notes [View Fiscal Notes](#)

Effect On Local Government: *No.*

Effect on the State: *Yes.*

Most Recent History Action: Approved by the Governor. Chapter 508. Sections 1 to 182, inclusive, effective June 12, 2003 for the purpose of adopting regulations and on July 1, 2003, for all other purposes.
(See full bill history below) Section 183 effective July 1, 2003. Section 184 effective June 12, 2003.

Hearings

Senate Commerce and Labor	Mar-11-2003	No Action
Senate Commerce and Labor	Mar-14-2003	No Action
Senate Commerce and Labor	Mar-28-2003	No Action
Senate Commerce and Labor	Apr-11-2003	Do pass
Senate Commerce and Labor	Apr-16-2003	No Action
Senate Commerce and Labor	Apr-17-2003	After Passage Discussion
Assembly Health and Human Services	Apr-30-2003	Mentioned no jurisdiction
Assembly Judiciary	May-16-2003	Discussion only
Senate Finance	May-19-2003	No Action
Senate Finance	May-27-2003	No Action
Senate Finance	May-28-2003	Amend, and do pass as amended
Assembly Commerce and Labor	Jun-01-2003	Amend, and do pass as amended
Senate Finance	Jun-02-2003	Concur

Votes (2/3 Majority Required)

Senate Final Passage	May-31	16 Yea ,	5 Nay ,	0 Excused ,	0 Not Voting ,	0 Absent
Assembly Final Passage	Jun-02	42 Yea ,	0 Nay ,	0 Excused ,	0 Not Voting ,	0 Absent

Bill Text (PDF)	As Introduced	1st Reprint	Second Reprint	Third Reprint	As Enrolled
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Bill Text (HTML)	As Introduced	1st Reprint	Second Reprint	Third Reprint	As Enrolled
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Amendments (HTML) [Amend. No.502](#) [Amend. No.982](#) [Amend. No.987](#)

Bill History

Mar 10, 2003 Read first time. Referred to Committee on Commerce and Labor. To printer.

Mar 11, 2003 From printer. To committee.

Mar 31, 2003 Notice of exemption.

Apr 18, 2003 From committee: Do pass.

Apr 21, 2003 Read second time.

Apr 22, 2003 Read third time. Amended. (Amend. No. 502.)

Apr 23, 2003 From printer. To engrossment. Engrossed. First reprint. To committee.

May 30, 2003 From committee: Amend, and do pass as amended.

May 30, 2003 Placed on General File.

May 30, 2003 Read third time. Amended. (Amend. No. 952.) To printer.

May 31, 2003 From printer. To re-engrossment. Re-engrossed. Second reprint.

May 31, 2003 Read third time. Passed, as amended. Title approved, as amended. (Yeas: 16, Nays: 5)
To Assembly.

May 31, 2003 In Assembly.

May 31, 2003 Read first time. Referred to Committee on Commerce and Labor. To committee.

Jun 02, 2003 From committee: Amend, and do pass as amended.

Jun 02, 2003 Placed on Second Reading File.

Jun 02, 2003 Read second time. Amended. (Amend. No. 987). To printer.

Jun 02, 2003 From printer. To re-engrossment. Re-engrossed. Third reprint.

Jun 02, 2003 Declared an emergency measure under the Constitution.

Jun 02, 2003 Read third time. Passed, as amended. Title approved, as amended. (Yeas: 42, Nays: None).
To Senate.

Jun 02, 2003 In Senate.

Jun 02, 2003 Assembly Amendment No. 987 concurred in. To enrollment.

Jun 04, 2003 Enrolled and delivered to Governor.

Jun 12, 2003 Approved by the Governor. Chapter 508.

Sections 1 to 182, inclusive, effective June 12, 2003 for the purpose of adopting regulations and on July 1, 2003, for all other purposes. Section 183 effective July 1, 2003. Section 184 effective June 12, 2003.



PREPARED BY
RESEARCH DIVISION
LEGISLATIVE COUNSEL BUREAU
Nonpartisan Staff of the Nevada State Legislature

BILL SUMMARY
72nd REGULAR SESSION
OF THE NEVADA STATE LEGISLATURE

SENATE BILL 250

Topic

Senate Bill 250 revises various provisions relating to regulated businesses and professions.

Summary

Senate Bill 250 enacts certain provisions concerning the disclosure of information pertaining to regulated businesses and professions. For example, the bill provides that confidential personal medical information or records of a patient may not be disclosed to the public by a regulatory body. The bill also provides that proceedings to determine whether to commence disciplinary action against a licensee are not subject to Nevada's Open Meeting Law unless the licensee requests that the proceedings be subject to the Open Meeting Law. However, if a regulatory body determines that disciplinary action should be initiated, the disciplinary proceeding must be conducted pursuant to the Open Meeting Law.

The bill also limits the use of private reprimands by a regulatory body, and prohibits a regulatory body from entering into a consent or settlement agreement concerning an alleged violation of a statute or regulation without first discussing and approving the agreement in a public meeting. Any such agreement is a public record, unless the agreement provides that the licensee enter a diversionary program for the treatment of alcohol, chemical, or substance abuse dependency. In addition, S.B. 250 authorizes a regulatory body to recover reasonable attorneys' fees and costs incurred during certain disciplinary proceedings. The measure specifies that the complaint or other documents filed by a board to initiate disciplinary action and all other documents and information considered by a board when determining whether to impose discipline are public records. The bill also makes various changes concerning unprofessional conduct by chiropractic physicians.

Senate Bill 250 makes various changes concerning the operation of the Board of Medical Examiners. Among other provisions, the bill requires the Board to employ a person to serve as its Chief Administrative Officer and provides that all employees of the Board serve at its pleasure. Further, S.B. 250 prohibits the Board from adopting any regulation prohibiting a practitioner from collaborating or consulting with another provider of health care.

Additionally, the bill requires an applicant for licensure as a physician to submit certain information to the Board regarding malpractice claims, disciplinary actions in other jurisdictions, and complaints filed against the applicant with a hospital, clinic, or medical facility. A physician also must report to the Board certain information regarding malpractice actions brought against the physician within 45 days after the physician receives notice of the action. A physician who fails to notify the Board in a timely manner may be fined an amount up to \$5,000. If there has been a settlement or judgment against a physician involving a claim for malpractice, the Board must conduct an investigation to determine whether to impose disciplinary action against the physician. Similar provisions are applicable to osteopathic medicine applicants and licensees.

Furthermore, S.B. 250 requires the Legislative Commission to cause to be performed a performance audit of the Board of Medical Examiners. The audit must commence prior to October 1, 2003. Additional audits must be conducted every eight years with a written report submitted to the Commission. The bill requires the Board to pay the cost of each of these audits.

The measure also amends laws regarding professional liability insurance and malpractice. The bill directs courts to construe liberally in favor of imposing sanctions regarding statutory provisions that give the courts authority to discipline attorneys for certain misconduct. These sanctions are designed to deter frivolous or vexatious claims or defenses.

Senate Bill 250 requires an insurer that offers a claims-made policy to certain medical practitioners to also offer an extended reporting endorsement without a time limit for reporting a claim. The insurer also must make certain disclosures to a practitioner regarding the premiums for such a policy.

Finally, the bill requires an insurer to provide a premium reduction for certain medical practitioners who implement a qualified risk management system. Insurers also are required to provide the Commissioner of Insurance with certain information each year regarding loss prevention and loss control programs.

Effective Date

Portions of this bill are effective on passage and approval. Other provisions are effective on July 1, 2003.

LEGISLATIVE HEARINGS

MINUTES AND EXHIBITS

**MINUTES OF THE
SENATE COMMITTEE ON COMMERCE AND LABOR**

**Seventy-second Session
April 16, 2003**

The Senate Committee on Commerce and Labor was called to order by Chairman Randolph J. Townsend, at 7:07 a.m., on Wednesday, April 16, 2003, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4401, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Randolph J. Townsend, Chairman
Senator Warren B. Hardy II, Vice Chairman
Senator Ann O'Connell
Senator Raymond C. Shaffer
Senator Joseph Neal
Senator Michael Schneider
Senator Maggie Carlton

STAFF MEMBERS PRESENT:

Scott Young, Committee Policy Analyst
Courtney Wise, Committee Policy Analyst
Kevin Powers, Committee Counsel
Maryann Elorreaga, Committee Secretary
Makita Schichtel, Committee Secretary

OTHERS PRESENT:

Fred L. Hillerby, Lobbyist, Nevada State Board of Dental Examiners, Nevada
State Board of Nursing, and Nevada State Board of Pharmacy
Keith L. Lee, Lobbyist, State Board of Medical Examiners
Cheryl A. Hug-English, M.D., President, Board of Medical Examiners
Matthew L. Sharp, Lobbyist, Nevada Trial Lawyers Association
Lawrence P. Matheis, Lobbyist, Nevada State Medical Association
Scott M. Craigie, Lobbyist, Nevada State Medical Association

Senate Committee on Commerce and Labor
April 16, 2003
Page 2

CHAIRMAN TOWNSEND:

Today we will readdress the issues of medical malpractice, insurance reform, and boards. We will open the hearing on Senate Bill (S.B.) 364. In the staff-prepared workbook titled "Discussion Information, Senate Committee on Commerce and Labor, Wednesday, April 16, 2003" (Exhibit C. Original is on file in the Research Library.) under tab A, there is a proposed amendment to S.B. 250 from the board of chiropractors. It is not the purpose of S.B. 364 to clean up the practices of every board. We are here to address technical changes only.

SENATE BILL 364: Makes various changes to provisions relating to investigations and proceedings for disciplinary action by regulatory bodies which regulate certain professions, occupations and businesses. (BDR 54-707)

SENATE BILL 250: Revises various provisions relating to regulated businesses and professions. (BDR 57-835)

FRED L. HILLERBY, LOBBYIST, NEVADA STATE BOARD OF DENTAL EXAMINERS, NEVADA STATE BOARD OF NURSING, AND NEVADA STATE BOARD OF PHARMACY:

We have two recommendations. Section 25 of S.B. 364 shows a deletion of language on lines 10 to 17. That deletion would allow frivolous cases to be made public. The new language on lines 18 to 21 states any complaint will be made public. We would like to add to lines 18 to 21, "if discipline is imposed," so billing errors and other minor infractions would not become public record.

CHAIRMAN TOWNSEND:

If a complaint is filed and the board takes any action, whether a reprimand, negotiated settlement, suspension, revocation, or fine; the information becomes public. If no action is taken, there is no public record.

What is protected under attorney-client privileges? Attorney-client privilege involves several parties, including the licensee's attorney, the complainant's attorney, and the board's attorney.

MR. HILLERBY:

I believe various boards investigate in different manners. The dental board assigns one dentist to gather information on a complaint, who then gives those findings to an attorney. The attorney finds pertinent information from those

Senate Committee on Commerce and Labor
April 16, 2003
Page 10

passion and a commitment to the medical field, that person has also agreed to some restrictions in their lives.

MR. HILLERBY:

I will get an answer for you. The voluntary program is a one-shot program. If the problem reoccurs, a formal disciplinary action is inevitable.

CHAIRMAN TOWNSEND:

You are describing the way your board operates. This committee deals with many boards. We want boards to be consistent. We feel consistent boards will help the patients.

I want to explore boards as they deal with disciplinary actions and fees. If a disciplinary meeting incurs costs, and fees are assessed to the person, those need to be actual costs. If a board is meeting anyway, they do not need to fine hotel bills, food, and other expenses to the complainant. Actual costs would include filing of documents, hours spent in preparation, and administrative costs.

DR. HUG-ENGLISH:

Our board fines the actual costs of the hearing.

CHAIRMAN TOWNSEND:

I will recess the meeting at 8:13 a.m. I reconvene the meeting at 8:29 a.m.

CHAIRMAN TOWNSEND:

We will open the hearing on S.B. 250.

SENATOR O'CONNELL:

I would like to look at section 28 of the bill.

CHAIRMAN TOWNSEND:

In our work document (Exhibit C), there is a page of recommended revisions, one of which discusses one or more forms of discipline by the Medical Board if a physician is found to have committed malpractice rather than imposing the entire list of penalties." Currently the bill states, "the Board shall by order" after which it lists six requirements. The amendment adds the words "one or more of the following actions as it deems appropriate." This would give the board an option as to which sanctions to impose.

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Another important change is in section 27. It changes the word "filed" to "served," so a physician would have to be served a complaint, therefore would know a complaint had been filed against that person. The physician would then be able to report the complaint to the board.

SCOTT YOUNG, COMMITTEE POLICY ANALYST:

The new section of the bill, outlined in the work session document, calls for an audit. This is imported from S.B. 389.

Back to section 28, there is a similar provision in section 40, which relates to osteopaths. The osteopathic board recommended we change language in section 40 to refer to a settlement, as well as a judgment. They do not wish to bring undue pressure on a physician to settle a case to avoid going through the procedure set out in section 40. They also recommended the board investigate rather than hear a formal hearing. If a physician had a settlement or judgment for malpractice, the board would be required to investigate and then choose the appropriate sanction. In addition, the board asked to strike the language "or negligence" and leave in the word "malpractice" instead.

CHAIRMAN TOWNSEND:

Since the boards deal with both categories of physicians, they need to be consistent. What is the status of redefining the word "malpractice," Mr. Powers?

MR. POWERS:

"We were going to remove from S.B. 250 those provisions that were already included or dealt with in S.B. 97, that went through the judiciary committee and involved the definition of malpractice and professional negligence. "

SENATE BILL 97: Makes various changes relating to certain actions against providers of health care. (BDR 1-248)

SENATOR O'CONNELL:

Is that provision in the original or amended S.B. 97?

MR. POWERS:

"The definitions for professional negligence and medical malpractice that are presently in S.B. 250 were in S.B. 97 as introduced. I am unaware of the contents of the amendment to S.B. 97."

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SENATOR CARLTON:

Are those definitions the ones from the past 50 years, or are we creating new definitions in S.B. 97?

MR. POWERS:

"My recommendation to the committee would be, in S.B. 250; we develop our own definitions that are appropriate to the insurance context, that are not tied necessarily to tort law Senate Bill 97 could treat those tort law issues"

SENATOR CARLTON:

Do the definitions in S.B. 97 still exist?

MATTHEW L. SHARP, LOBBYIST, NEVADA TRIAL LAWYERS ASSOCIATION:

In A.B. No. 1 of the 18th Special Session, there is a definition of professional negligence and malpractice, which was based on years of common law. Senate Bill 97, patterned from California law, has different definitions than the existing law. Our previous proposal was to keep this bill consistent with existing law, as opposed to S.B. 97. The amendments passed last week by the Senate Committee on Judiciary to S.B. 250 would not change the definition of malpractice.

CHAIRMAN TOWNSEND:

We need to keep sections 28 and 40 of the bill consistent regarding the process of the boards. The real issue in the board of osteopathic medicine's amendment is opening an investigation versus a hearing. This is a policy issue. Currently in S.B. 250, a hearing is required. Mr. Lee, would your investigative board include the entire board, or just the disciplinary committee?

MR. LEE:

It would include the entire board. I suggest we do not change the process. Even if you mandate we shall conduct a hearing upon a settlement or malpractice judgment, we must still develop our own investigative trial. Our staff must build a case against the physician. We cannot rely on the fact there is a judgment or settlement on the physician. As we need to do the initial investigation to get the matter ready for a hearing, we ask that you not change this process.

SENATOR O'CONNELL:

Does the osteopathic board's process differ from the medical board?

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LAWRENCE P. MATHEIS, LOBBYIST, NEVADA STATE MEDICAL ASSOCIATION:

I believe the process is similar, except they assign one investigator rather than the three used by the medical board.

CHAIRMAN TOWNSEND:

It is not our wish to interfere with the process. We want you to conduct hearings on valid complaints, then to continue the discipline process with the list of options written in the bill.

I believe we have addressed all proposed changes to S.B. 250 listed on page 2 of the work document, except for the last one dealing with reports being made public.

SCOTT M. CRAIGIE, LOBBYIST, NEVADA STATE MEDICAL ASSOCIATION:

I have a handout regarding that issue (Exhibit E). The last discussion item mentioned on page 2 of the work session document reads, "Amendment to require all reports of the Board investigations after a judgment or settlement of a malpractice claim, and peer review actions in hospital settings, to be public." We suggest taking out the words "and peer review actions in hospital settings," and replacing them with "sanctions reportable to the National Practitioner Data Bank." Dr. Havins and Mr. Matheis agree with this preferred language.

SENATOR CARLTON:

If we have gone through the investigative process, passed the findings to the board, noticed the disciplinary meeting on the board agenda, and reported the results to the National Practitioner Data Bank, it is already made public. How does your suggestion change anything?

MR. CRAIGIE:

We can take out the language, but I also want to remove the language about peer-review actions.

MR. POWERS:

Senator Carlton, I may be able to help clarify. We have moved into a different context. This is no longer items that have to be made public or that involve disciplinary action. This is a duty of the physician to report certain things to the board, and then the board has to respond to those reports with an investigation ... S.B. 250 says the physician has to report a judgment of malpractice to the

board. The prior amendment was to include judgment or settlement of malpractice ... Mr. Craigie's [suggestion] is judgment or settlement of malpractice or sanctions that are reportable to the National Practitioner Data Bank. So, if the practitioner was sanctioned by a hospital internally through his own peer-review process, and that was reportable to the National Practitioner Data Bank, the physician would then have a duty to report that to the Board of Medical Examiners and the osteopathic board.

CHAIRMAN TOWNSEND:

Let us turn to the next page of the work session document, regarding collection and trending of underpricing information and reporting to the Legislature, also found under tab B.

MR. POWERS:

"That is correct, it is under tab B. This proposed amendment was also included in S.B. 122, which was a part of the amendment."

SENATE BILL 122: Makes various changes regarding malpractice insurance and actions. (BDR 57-265)

CHAIRMAN TOWNSEND:

That has already been addressed. We have talked about including provisions from S.B. 364. We will open the hearing on S.B. 389. Committee, we will combine these bills into one working document.

SENATE BILL 389: Makes various changes regarding certain physicians and other regulated professions. (BDR 54-709)

MR. POWERS:

What this [bill] will be, Mr. Chairman, is a gut and replace, because we will be fusing together so many different bills. Again, it will be on 8½" by 11" paper. It will be the entire document, roughly 130 pages or so, and this committee will have an opportunity to see that, I hope not later than Monday ... It will be an entire bill; it will be every provision in the bill ...

CHAIRMAN TOWNSEND:

What suggestions does the committee have on S.B. 389?

SENATOR O'CONNELL:

I would think the most important issue is the amount of money to subsidize doctors to keep them in the State.

CHAIRMAN TOWNSEND:

This concept has been in progress for over a year to help specialty doctors with clean records and skyrocketing insurance. We want a short-term, 1- or 2-year resolution. Mr. Lee, at the end of the fiscal year, how much money will the Board of Medical Examiners have? What are your projected costs, and how much will be in your reserve account? Also, please explain the reduction in fees.

MR. LEE:

At the end of June 2003, we will have approximately \$3.3 million in the reserve fund. I have a budget handout for your committee titled, "Nevada State Board of Medical Examiners Profit & Loss Budget vs. Actual" (Exhibit F). On page 1, the left corner shows the date 4/10/03. The first column of numbers shows where we were versus budget on 4/10/03. We project we will come close to the figures in the second column, leaving us with about the same amount of reserve as we ended with last year, according to the audited financial statement, of \$3.3 million.

CHAIRMAN TOWNSEND:

Without referencing the handout, about how much a year does it cost you to operate in hard costs, not including reserves or contingent liability?

MR. LEE:

It costs us about \$2 million a year to operate. We project next year's budget to be around \$2.8 million, which will include additional staff. We will have approximately a \$400,000 to \$500,000 reduction in revenue based on a reduction in fees each year, resulting in close to \$1,000,000 less in fees over the biennium.

We project that our current \$3.3 million budget for next year will be reduced by \$1.3 for a total of \$2 million.

By June 2005, we should have about \$780,000 in the reserve fund, not including any money taken out for a subsidy fund. I misstated this number in my testimony last week.

SENATOR O'CONNELL:

I believe the national recommendation is that a board should operate on \$1 million. Why do you require \$2 million?

DR. HUG-ENGLISH:

We received a letter stating we should have at least \$1 million in reserve, which is a bit less than a year's operating expense for the board. You may be referring to the federation, which says we should have a substantial amount in reserve. Our reserves have been depleted by previous lengthy litigation, which occurred before I was associated with the board.

We reached our goal for the reserve, and now want to decrease fees to our physicians. Our goal is to no longer have large amounts of reserve. As we decrease in fee structure, this becomes possible. If we take money from our subsidy, we will not have enough to operate in the next couple of years.

SENATOR O'CONNELL:

Are you saying you need the \$2 million in reserve for these pending lawsuits?

DR. HUG-ENGLISH:

No. I am saying the reserve will be decreased over the next biennium. The fund, which will be reduced to about \$700,000, would not exist if we take money from it now for the subsidy.

SENATOR O'CONNELL:

Is the reason for the reduction additional costs to hire new people?

MR. LEE:

There are two factors involved. First, there is a cost of between \$800,000 and \$1,000,000 in relicensing fees. Also, we have an increase in our operational budget for adding staff, opening our Las Vegas office, and for other projects. We see our expenses increasing while our revenues are reduced by a significant amount from the lowering of licensing fees.

SENATOR O'CONNELL:

Is it only the costs of the audit, adding staff, and opening the Las Vegas office that are impacting your reserves?

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MR. LEE:

We are considering regulations, which would impose post-licensure competency testing. We have budgeted \$100,000 for this program if it is passed. We have increased the drug and alcohol diversion program by \$60,000, and increased our advertising and public relations costs by \$40,000. These are increases we feel are necessary.

SENATOR O'CONNELL:

Your advertising budget is \$260,660?

MR. LEE:

We are budgeting \$100,000 in each year of the coming biennium, for a total of \$200,000.

CHAIRMAN TOWNSEND:

Is your advertising strategy the same as it has been?

MR. LEE:

Yes, we do public service announcements (PSAs).

SENATOR O'CONNELL:

Can you not get free public service announcements?

MR. LEE:

My experience is PSAs normally run between 1 a.m. and 3 a.m. to satisfy the Federal Communications Commission requirements. Even if the airtime is free, the production costs are not. If we want to get appropriate coverage to the general public, we cannot rely on PSAs.

SENATOR CARLTON:

I have looked into PSAs. The dollars spent on these can sometimes obtain tripled benefits. Prime-time exposure costs more, but PSAs can offer more value for the money.

CHAIRMAN TOWNSEND:

Did you say you wish to increase your advertising budget by 40 percent?

MR. LEE:

Correct, for each year of the biennium.

CHAIRMAN TOWNSEND:

I have heard the radio ads, but have never seen the television ads. Is it the same message, that you can call the board to find the qualifications of a doctor?

DR. HUG-ENGLISH:

Yes, but in a different format. We increased the budget based on feedback that we should offer the public more information on how we operate and how the public can notify us. We have gotten a significant amount of positive feedback from callers. We wish to serve the public. This ad has been running for 2 years. At some point we need to update our ad, which will be an additional cost.

CHAIRMAN TOWNSEND:

We would like a copy of the television spot. Rent is listed at almost \$55,000 a year. When does the Reno facility lease expire, and from whom do you lease?

DR. HUG-ENGLISH:

It expires in 2006. I do not know our lessor. I do not believe it is a government agency.

CHAIRMAN TOWNSEND:

Have you talked to your lessor about abandoning the facility?

MR. LEE:

I believe there are 4 years remaining on the lease. It is a commercial building on Terminal Way, and I do not believe we rent from a governmental agency.

CHAIRMAN TOWNSEND:

I was under the impression the government either owned or subleased the building.

DR. HUG-ENGLISH:

I do not believe that is the case. And I was wrong; we do have 4 years remaining on the lease.

CHAIRMAN TOWNSEND:

If you add a facility in Las Vegas, you will have to double your rent. Our goal is for you to close the Reno facility, to keep that from happening.

DR. HUG-ENGLISH:

I have concerns about closing the Reno office. We have significant staff, investigators, and computer systems in our Reno office. The costs to move these would be extensive.

CHAIRMAN TOWNSEND:

Let me be very clear on this. You had an office in Las Vegas. You closed it and located it in the north, which may have been ill-advised. Dr. Hug-English, you may not have been a part of that decision. About 70 percent of the population, as well as your licensees, are in the Las Vegas area. That is where the office needs to be, to serve that public. Your licensees should not be paying the costs of two offices. You need a plan to transition to that area. Do you agree?

DR. HUG-ENGLISH:

I understand the point you are making. I do think that this office has functioned extremely well. I think we have managed for both parts of the State. If we are talking about a transition, I would suggest that ... I think our rent in the lease is almost \$100,000 a year, so if we are looking at another 4 years of that with our contract, that is quite high to close this office, continue to pay that lease and open another one. I think if we are talking about having a satellite office, which we have done in the past, then that might be a good transition step for the next several years, or at least something to look at.

CHAIRMAN TOWNSEND:

I must be confused. In reading from category 538 for rent on the first page of your handout, it states your rent to be \$54,900. Are you paying \$100,000 a year, or \$55,000 a year?

MR. LEE:

You are looking at the budget for 2002 to 2003. If you look on page 3, the budget for 2003 to 2004, our rent is stated at \$95,000, escalating to \$100,000 for the next year.

CHAIRMAN TOWNSEND:

You are proposing to double your rent?

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MR. LEE:

No. The actual rent for this year ending June 2003 was \$75,000. It increases to \$95,000 next year. I am relying on the budget for these numbers. I have never seen the lease agreement.

CHAIRMAN TOWNSEND:

I am reading off of your handout, which states July 2002 to June 2003, rent is \$54,900. Is that what you paid?

MR. LEE:

Yes.

CHAIRMAN TOWNSEND:

Yet you have budgeted \$75,000 for the year.

MR. LEE:

Correct.

CHAIRMAN TOWNSEND:

For the next year, you have budgeted \$95,000. Is the reason for the increase in rent adding a satellite office?

DR. HUG-ENGLISH:

I think part of the increase is more office space for additional investigators.

CHAIRMAN TOWNSEND:

Fine. I see on your 2002 to 2003 budget, you budgeted \$95,500 for legal. What does this include? Would this pay for outside legal counsel?

DR. HUG-ENGLISH:

I believe it relates to outside legal counsel, including the attorney general who sits on the board. The board has its own attorney, in addition to the deputy attorney general who attends the meetings.

CHAIRMAN TOWNSEND:

Does the \$95,500 go to outside legal counsel, or to the deputy attorney general?

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DR. HUG-ENGLISH:
I think that would encompass both.

CHAIRMAN TOWNSEND:
For this year, you have personnel costs at \$1,263,000. Is there any legal staff included in personnel?

DR. HUG-ENGLISH:
I believe it includes the salary for the deputy attorney general and outside counsel, as well as our own legal counsel. I believe that category of legal expense is related to the attorney general's office and other legal expenses for hearings.

CHAIRMAN TOWNSEND:
What is the current salary for the executive director?

DR. HUG-ENGLISH:
I am not sure.

CHAIRMAN TOWNSEND:
Is it over \$100,000? Is it over \$150,000? Is it over \$200,000?

DR. HUG-ENGLISH:
I think it is over \$100,000 and under \$200,000, but I will have to check.

CHAIRMAN TOWNSEND:
I want that salary figure, along with job benefits, contract expiration date, and a copy of the contract.

Can you tell me why we have a deputy attorney general and an independent legal counsel? Why do we need two? Is the workload this big?

MR. LEE:
As I have said, the only role the deputy attorney general plays is to advise the board at their meetings, mostly on open meeting law situations. The deputy attorney general is not involved in any other function of the board, I do not believe.

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CHAIRMAN TOWNSEND:

Do you have your own in-house counsel who is not a deputy attorney general?
And do you have outside counsel in addition?

MR. LEE:

No.

CHAIRMAN TOWNSEND:

Do you only pay for inside counsel?

DR. HUG-ENGLISH:

Correct.

CHAIRMAN TOWNSEND:

I would like you to break down all the legal costs for us.

SENATOR O'CONNELL:

In your break out of costs, please include a breakdown of the staff and retirement categories. As I look at the budget, I think of the bigger problem of how to retain our doctors. The priorities shown in the budget, in view of our crises, seem insignificant. Are these budget items truly necessary? Instead, should you not be trying to get the message to our doctors that we will do everything within our power to help them remain in this State?

DR. HUG-ENGLISH:

I agree there is a crisis. We want to keep our doctors in Nevada. The medical board exists to license and discipline physicians. It is not appropriate to think our role should include work to keep our doctors here. I am a physician, and have strong concerns about keeping doctors here. However, it is not the proper use of this State board's money to give towards that purpose. I think it creates a possible conflict between physicians by getting involved. I have heard physicians say, "Why should I, as a family practitioner, help subsidize obstetric doctors who make three times the salary I do?" I believe there is a potential for skewing north/south issues and creating controversy between the areas. Physicians in the north, who have contributed money for licensing fees, feel it is not appropriate to use those funds for specific subgroups of physicians in the south. These are tough issues. Using this board's money for retention creates conflict.

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SENATOR O'CONNELL:

It is like a form of insurance. Some say, "Why do I have to pay mandated insurance to cover someone who is unemployed?" The real issue is, how do we care for our residents? The solutions we are contemplating are found in other states. These are not new solutions.

I realize what you consider to be the functions of the board. I would like to hear your solution to the problem. You are the board that regulates and oversees the doctors. You do not seem to be a part of the solution, and this concerns me.

We are dealing with life and death problems in southern Nevada. Anything you can do to become part of the solution would be welcomed.

CHAIRMAN TOWNSEND:

Returning to the budget, why do you have \$30,000 budgeted for in-State travel? How many airline tickets between Las Vegas and Reno are you using?

DR. HUG-ENGLISH:

I believe that includes board members traveling to Las Vegas and investigators traveling throughout the State for investigations.

CHAIRMAN TOWNSEND:

You have budgeted \$75,000 for diversion. What is the purpose of this?

DR. HUG-ENGLISH:

The board contributes funds to the diversion program to run the program, monitor the physicians, and educate the hospitals and clinics throughout the State. The board feels this is a valuable program.

CHAIRMAN TOWNSEND:

It seems you would pool the licensee's money to promote the activity. Are you actually paying for the program? What about the person participating in the program?

DR. HUG-ENGLISH:

The person in the program contributes for meeting and drug-screen testing costs.

CHAIRMAN TOWNSEND:

They contribute? The diversion program should be operating at a zero cost because the participants should be paying for it, as well as for the promotion of the program.

DR. HUG-ENGLISH:

Sometimes these people are without resources. They are jobless. We try to set up payment plans. We do expect them to contribute, but we are flexible.

CHAIRMAN TOWNSEND:

If you disagree with the concept of using the board's money to deal with insurance problems facing some of our physicians in need of help, I can respect that opinion.

How much money will you have next year? According to your proposed budget for 2003 to 2004, you will be left with \$1.3 million. For 2004 to 2005, you will be left with \$1.2 million. Your current reserve is \$3.3 million. It leaves you with reserves of \$786,000. What about revenue?

MR. LEE:

That number includes revenues. If you look at category 401 for registration fees for medical doctors, you will see we drop \$400,000 from year ending June 2003 to year ending June 2004, and another drop of \$400,000 for the next year. This puts us at \$800,000 less in revenue.

CHAIRMAN TOWNSEND:

It is not adding up. You itemize expenses and reserves, but not revenues.

MR. LEE:

We have revenue other than registration of physicians.

CHAIRMAN TOWNSEND:

We do not seem to be on the same page. It looks to me like you would be about \$3.9 million over budget, minus any reserves you may need. You say your current reserve is \$3.3 million minus \$1.3 million for the year 2003 to 2004, minus \$1.2 million for 2004 to 2005. These are your figures, which leave a reserve of \$786,000. Yet you have no income reported.

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MR. LEE:

We do show income of \$1,528,100 for 2003 to 2004. We show personnel expenses of \$1,675,000. We show other operating expenses of \$1,009,000, for a total expense of \$2,850,000. If you take the \$1,500,000 in revenue from this figure, it leaves a deficit of \$1,326,000.

CHAIRMAN TOWNSEND:

Your budget, then, is not \$1.5 million a year. Your budget is \$2.8 million a year.

MR. LEE:

Correct.

CHAIRMAN TOWNSEND:

That is not what you said. Earlier, I asked you for the budget. You answered \$1.5 million.

MR. LEE:

I believe I said it was \$2 million this year, and \$2.8 million next year.

CHAIRMAN TOWNSEND:

Under tab A of the handout, Mr. Craigie asks the Board of Medical Examiners to open their meeting to members of the general public who wish to watch, listen, and/or participate from locations around the State. The Internet is available from this building. Other buildings are available for teleconferencing, but not for Internet access. If we want the public to have teleconferencing access, there are a few options of locations.

DR. HUG-ENGLISH:

Correct. Our issue is the addition of the Internet. Teleconferencing is not a problem. We have the capability to do this from a number of locations.

CHAIRMAN TOWNSEND:

I understand your licensees are not always able to go to the Grant Sawyer State Office Building in Las Vegas to watch these meetings. They wish to watch the meetings from their office or clinic via Internet.

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MR. LEE:

I doubt most physicians can take time away from patients to watch a meeting over the Internet. We have some Saturday meetings to accommodate their busy schedules, as well as the schedules of board members.

This building is the only one available for Internet access. We have teleconferencing access available for a reasonable fee.

CHAIRMAN TOWNSEND:
Is cost the issue?

DR. HUG-ENGLISH:

The issue is the mechanics of setting up the meetings for public access. If this committee requires us to hold meetings in this building with Internet access, we will do so. Our concern is the limit of where we could hold meetings. I thought the intent was to make the meetings more accessible. Teleconferencing is a good option. I agree with Mr. Lee, many doctors will not have time to access meetings over the Internet from their computers. They may, however, go to a teleconference site to make a presentation.

CHAIRMAN TOWNSEND:

You are in Reno. I am in Reno. The problem is not in Reno. I am trying to find a solution for the problem.

SENATOR O'CONNELL:

I think we can take the Internet requirement out of the bill. It would be helpful as a goal to work toward, but teleconferencing is the most important step we can take now. I feel strongly that we are rearranging the chairs on the Titanic.

CHAIRMAN TOWNSEND:

Dr. Hug-English, I want the exact date of your lease termination date put into the bill, as the latest date the new office in Las Vegas will open. We encourage you to get a satellite office open soon. By the time you open the Las Vegas office, we ask that you have all hearings on the Internet, possibly from the Grant Sawyer building. I suggest, by giving your employees several years' notice that you will be moving your office, they will have a chance to prepare. We are trying to deal with the problem of Las Vegas doctors feeling isolated from the board. Someone, perhaps not you, signed a lease 2 years ago for 6 years knowing about the current problem. Is this transitional deadline fair?

DR. HUG-ENGLISH:

Chairman Townsend, I think this is reasonable. I think that transitional period is reasonable. I appreciate, Senator O'Connell, your willingness on the Internet [issue] to change that. I am not suggesting that we cannot do it in the future. I am just suggesting that right now it would be really difficult to get that in place. I think we should look towards it. I would imagine that over the next few years it might become far more accessible than it is now. So, I think it is a reasonable compromise.

CHAIRMAN TOWNSEND:

I understand the difficulty for your board. It is not easy for our staff in Carson City to commute to Reno and board a plane to fly to Las Vegas. I have yet to hear any of them complain about the inconvenience. Are there other questions about the bill?

SENATOR O'CONNELL:

Is there any problem in section 27, subsection 4, with keeping the language, "The commission of repeated acts of malpractice or gross malpractice, but only if such acts are established by clear and convincing evidence?" Or in section 12, requiring the medical board to maintain a Web site?

CHAIRMAN TOWNSEND:

I have no problem with the addition to section 27. How will you handle the Web site?

DR. HUG-ENGLISH:

We are currently working to improve our Web site. It is a work in progress, and we are trying to make it more user-friendly.

SENATOR O'CONNELL:

Regarding the provision that states the executive director should serve at the pleasure of the Governor; can the board dismiss that person?

CHAIRMAN TOWNSEND:

The board hired this individual; they should be able to fire them.

SENATOR O'CONNELL:

That just leaves the major issue of what to do about subsidy.

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CHAIRMAN TOWNSEND:

I suggest Mr. Powers draw an amendment to S.B. 250, at which time we can add or delete language as the committee chooses. We will adjourn the meeting at 9:59 a.m.

RESPECTFULLY SUBMITTED:

Makita Schichtel,
Committee Secretary

APPROVED BY:

Senator Randolph J. Townsend, Chairman

DATE: _____

IAFD

JACOB L. HAFTER, ESQ.
Nevada State Bar No. 9303
HAFTERLAW
6851 West Charleston Boulevard
Las Vegas, Nevada 89117
Tel: (702) 405-6700
Fax: (702) 685-4184
jhafter@hafterlaw.com

Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

KOFI SARFO, M.D.,

Petitioner,

vs.

**NEVADA STATE BOARD OF
MEDICAL EXAMINERS,**

Respondents.

CASE NO.:

DEPT NO.:

**INITIAL APPEARANCE FEE
DISCLOSURE (NRS CHAPTER 19)**

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for parties appearing in the above-entitled action as indicated below:

KOFI SARFO, M.D. \$270.00

TOTAL REMITTED: \$270.00

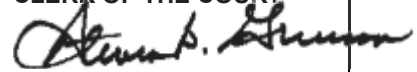
Dated this 16th day of March, 2017.

HAFTERLAW

By: 

Jacob L. Hafter, Esq.
Nevada Bar Number 9303
6851 West Charleston Blvd.
Las Vegas, Nevada 89117





NEO
JACOB L. HAFTER, ESQ.
Nevada State Bar No. 9303
HAFTERLAW
6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
Phone: (702) 405-6700
Fax: (702) 685-4184
jhafter@hafterlaw.com

Counsel for Petitioner

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

KOFI SARFO, M.D.,

Petitioner,

vs.

**STATE OF NEVADA BOARD OF
MEDICAL EXAMINERS,**

Respondents.

Case No.: A-17-752616-W

Dept. No.: XVII

**NOTICE OF ENTRY OF ORDER
DENYING PETITIONER'S MOTION
FOR PRELIMINARY INJUNCTION**

TO: DEFENDANTS and their Counsel:

PLEASE TAKE NOTICE of the attached order which was entered by the District Court
on May 12, 2017, DENYING Petitioner's Motion for Preliminary Injunction.

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1 Dated this 22nd day of May, 2017.

2
3 **HAFTERLAW**

4
5 By: 

6 Jacob L. Hafter, Esq.
7 Nevada Bar Number 9303
8 6851 West Charleston Blvd.
9 Las Vegas, Nevada 89117
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6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile



CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), on this 22nd day of May, 2017, I served a copy of the foregoing
NOTICE OF ENTRY OF ORDER ON MOTION FOR PRELIMINARY INJUNCTION as follows:

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☒ Electronic Service through the Court's electronic filing system. and/or

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service; and/or

☒ Electronic Mail —By electronic mail delivery to the addresses listed below.

MICHAEL SULLIVAN, ESQ
ROBINSON, BELAUSTEGUI, SHARP & LOW
Counsel for Respondents

Dated this 22nd day of May, 2017.

HAFTERLAW

By: _____

Jacob L. Hafter, Esq.
Nevada Bar Number 9303
6851 West Charleston Blvd.
Las Vegas, Nevada 89117

EXHIBIT “A”

EXHIBIT “A”


CLERK OF THE COURT

1 ORDR
2 Michael E. Sullivan, Esq. (SBN 5142)
3 Therese M. Shanks, Esq. (SBN 12890)
4 **ROBISON, BELAUSTEGUI, SHARP & LOW**
5 A Professional Corporation
6 71 Washington Street
7 Reno, Nevada 89503
8 Tel: (775) 329-3151
9 Fax: (775) 329-7941
10 Email: msullivan@rbsllaw.com
11 tshanks@rbsllaw.com
12 Attorneys for Defendant Nevada State
13 Board of Medical Examiners

8
9 EIGHTH JUDICIAL DISTRICT COURT

10 STATE OF NEVADA

11
12 KOFI SARFO, M.D.,

Case No.: A-17-752616-W

13 Petitioner,

Dept. No.: XVII

14 vs.

15 NEVADA STATE BOARD OF MEDICAL
16 EXAMINERS,

ORDER DENYING REQUEST FOR
PRELIMINARY INJUNCTION AND
REQUEST FOR STAY

17 Respondents.
18
19 _____ /

20
21 Before the Court is Petitioner Kofi Sarfo, M.D.'s ("Dr. Sarfo") MOTION FOR
22 PRELIMINARY INJUNCTION, which seeks to prevent respondent Nevada State Board
23 of Medical Examiners (the "Board") from enforcing an order issued by the Board's
24 Investigative Committee requiring Dr. Sarfo to produce various patient records. Dr.
25 Sarfo contends that due process somehow prohibits the Board from making or enforcing
26 such an order. Dr. Sarfo also contends that due process requires that he know the
27 identity of the complainant who initiated the Board's investigation.

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1 This matter came before the Court on April 26, 2017, at 8:30 a.m. Dr. Sarfo was
2 represented by Jacob Hafter, Esq. of HafterLaw, LLC, and the Board was represented
3 by Michael Sullivan, Esq. of Robison, Belaustegui, Sharp & Low. Robert Kilroy, Esq.,
4 also appeared telephonically on behalf of the Board.

5 The Court having considered the pleadings and papers on file herein, and the
6 arguments made in open court, and good cause appearing finds as follows:

7 1. Dr. Sarfo cannot prevail on the merits of his writ petition which challenges
8 the Investigative Committee's actions as violating due process. Hernandez v. Bennett-
9 Haron, 287 P.3d 305, 128 Nev. Adv. Op. 54 (Nev., 2012) controls the issues presented
10 in this case. In Hernandez, the Nevada Supreme Court held that due process
11 protections "need not be made available in proceedings that merely involve fact-finding
12 or investigatory exercise by the government agency." Id. at 310-11.

13 2. Pursuant to NRS 630.140(1), the Board is empowered to "hold hearings
14 and conduct investigations pertaining to its duties imposed under this chapter." NRS
15 630.140(1).

16 3. Pursuant to NRS 630.311(1), the Board's Investigative Committee "shall
17 review each complaint and conduct an investigation to determine if there is a
18 reasonable basis for the complaint. . . .The committee may issue orders to aid its
19 investigation including, but not limited to, compelling a physician to appear before the
20 committee." NRS 630.311(1)

21 4. Pursuant to NRS 630.3065(2), "knowingly or willfully failing to comply
22 with" a "regulation, subpoena or order of the Board or a committee designated by the
23 Board to investigate a complaint against a physician" is "grounds for initiating
24 disciplinary action or denying licensure."

25 5. NRS 630.336(4) provides that with respect to ". . . a complaint filed with
26 the Board pursuant to NRS 630.307, all documents and other information filed with the
27 complaint and all documents and other information compiled as a result of an
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1 investigation conducted to determine whether to initiate disciplinary action are
2 confidential."

3 6. Accordingly, the statutes make plain that the Board is empowered to issue
4 the order of which Dr. Sarfo complains, the investigation itself is confidential, and the
5 Board is prohibited from disclosing to Dr. Sarfo the identity of the person who filed the
6 complaint, *or the actual complaint disclosing such.*

7 7. This Court finds that the Investigative Committee has no authority to
8 adjudicate any legal rights. See NRS 630.311(1). It is tasked with gathering facts and
9 investigating whether there is any merit to a complaint filed with the Board against a
10 physician. *Id.* The Board, through its Investigative Committee, has a duty to do so, and
11 physicians licensed by the Board have a duty to comply with its orders. It is the law of
12 this state, plainly stated in Hernandez, that the actions of the Investigative Committee
13 of which Dr. Sarfo complains are merely fact-finding and investigatory exercises, and do
14 not implicate any due process rights.

15 8. Because Dr. Sarfo's due process rights are not implicated, Dr. Sarfo
16 cannot prevail on the merits of his writ petition which challenges the Investigative
17 Committee's actions as violating due process.

18 9. This Court further finds that the public interest weighs in favor of upholding
19 the Board's statutory duty to protect the public by investigating all complaints filed
20 against a physician by members of the public, and issuing enforceable orders to aid its
21 investigation. NRS 630.003(1)(b); NRS 630.311(1). Accordingly, injunctive relief is not
22 appropriate. See NRS 33.010.

23 10. Dr. Sarfo has informed this Court that he intends to appeal this Court's
24 order, and has requested that this Court enter a stay of the administrative proceedings
25 before the Board pending appeal. This Court does not find that a stay is warranted at
26 this time *and DENIES Dr. Sarfo's motion for stay pending appeal*
27 *Pursuant to NLRP 8(a).*

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1 Accordingly, IT IS HEREBY ORDERED, ADJUDICATED AND DECREED that:

2 Dr. Sarfo's Motion for a Preliminary Injunction is **DENIED**.

3 Dr. Sarfo's request for a stay is also **DENIED**.

4 **IT IS SO ORDERED.**

5 Dated this 9 day of May, 2017.

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7 
8 DISTRICT COURT JUDGE JB

9 Respectfully submitted by:

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11
12 Michael E. Sullivan, Esq. (SBN 5142)
13 Therese M. Shanks, Esq. (SBN 12890)
14 **ROBISON, BELAUSTEGUI, SHARP & LOW**
15 A Professional Corporation
16 71 Washington Street
17 Reno, Nevada 89503
18 Tel: (775) 329-3151
19 Fax: (775) 329-7941
20 Email: msullivan@rbsllaw.com
21 tshanks@rbsllaw.com

22 *Attorneys for Defendant Nevada State*
23 *Board of Medical Examiners*

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