CASE NO. 73117

IN THE SUPREME COURT OF THE STATE OF NEVADA

KOFI SARFO, M.D., an individual,

Appellant,

v.

STATE BOARD OF MEDICAL EXAMINERS,

Respondent.

APPELLANT'S OPENING BRIEF

On appeal from the Eight Judicial District Court,
Clark County, Nevada
District Court Case No. A-17-752616-W
The Honorable Michael Villani

HAFTERLAW
JACOB L. HAFTER, Esq.
Nevada Bar Number 9303
6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
jhafter@hafterlaw.com

October 18, 2017

NRAP 26.1 DISCLOSURE

Appellant, Kofi Sarfo, M.D., is an individual and there are no corporate entities that are related to this case. This office represented Dr. Sarfo in the district court proceedings.

DATED this 18th day of October, 2017.

HAFTERLAW

By: _____

JACOB L. HAFTER, ESQ.
Nevada Bar Number 9303
6851 Charleston Boulevard
Las Vegas, Nevada 89117
jhafter@hafterlaw.com
Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Nev.R.App.P. 3A(b)(3), as the order appealed is an order refusing to grant injunctive relief.

The Order being appealed was issued on or about May 9, 2017, by the Honorable Michael Villani of the Eighth Judicial District Court for the State of Nevada. See Joint Appendix ("SARFO") at 266 – 269 (Vol.1).

Appellant timely filed a Notice of Appeal on May 22, 2017. SARFO_359 (Vol. 2).

NRAP 28(a)(5) ROUTING STATEMENT

This case involves fundamental questions of how physician discipline cases are initiated in Nevada. It is alleged that the Nevada State Board of Medical Examiners ("Board"), fails to provide physicians with adequate notice of the allegations made against a physician when it initiates an investigation against the physician. Accordingly, as this case raises issues related to due process and public policy, this case should be retained under NRAP 17(a)(13) and (14).

ISSUES PRESENTED

This appeal asks this Court to find that the district court erred for the following reasons:

1. The district court extended this Court's decision in Hernandez v. Bennet-Haron, 287 P.3.d 305, 128 Nev.Adv.Op 54 (2012), to support a determination that due process protections need not be made available in disciplinary investigations conducted by the Board, even though in this case, the entity that is conducting the investigation, the Investigatory Committee of the Board, has the authority to file administrative charges against Dr. Sarfo, the target of the investigation;
2. The district court erred in determining that the confidentiality provisions of NRS §630.336(4) are so broad that they prevent the physician who is the target of an investigation from obtaining a copy of the complaint made against the physician; and
3. The district court erred in awarding the Board attorney's fees and costs in this case when Dr. Sarfo was confronted with an overly broad investigation where he was not provided adequate notice of the allegations made against him.

STATEMENT OF THE CASE

This case challenges the McCarthyistic tactics of the Nevada State Board of Medical Examiners ("Board") in their initial investigation of complaints received by a third party. Specifically, the Board has a known practice where they retain any complaints received by a third party against a physician as confidential, refusing to even provide the target physician a copy of the complaint. Rather, the Board will notify the licensee that a complaint has been filed, provides a cursory summary of the allegations made in the complaint, and asserts that a violation of the Medical Practice Act, NRS Chapter 630, et. seq., occurred. Based on this scant disclosure, the Board then demanded, through both a written letter request, and a formal Board order, that the physician provide the complete medical records of various patients related to the complaint and a statement as to how the licensee did ***not*** violate the Medical Practice Act, with respect to the identified patients. These requests were open ended as to both the allegations and time.

The Board took the position that disclosure of the actual complaint received to Dr. Sarfo would violate the confidentiality provisions of NRS §630.336(4); this practice misconstrues the Legislative intent behind NRS §630.336(4). This practice also violates this State's physicians' procedural due process rights, destroys any safeguards that may otherwise be in place in

the investigation and discipline of physicians, and empowers the Board to engage in overly broad investigatory requests that not only exceed the scope of the third party complaint but are harassing and overly burdensome to this State's physicians. As a result, the Board uses this insufficient notice to springboard into a fishing expedition, using anything in the physicians medical records to substantiate a claim of wrongdoing, leading to the filing of a formal complaint, where they can assess the physician fees and costs, most of which are used to offset the salaries (and justify the need for) the investigators and attorneys that oversee this entire process.

Accordingly, upon receiving such an investigatory letter, Dr. Sarfo tried to work out his concerns with the Board; when that was not successful, Dr. Sarfo filed the instant writ petition and an immediate motion for injunctive relief, preventing the compliance with the Board's administrative order demanding various productions in a very limited time frame. Upon filing the motion for injunctive relief, the Board did, finally, enter into a stipulation to delay the deadline for compliance with the Board order and limiting the scope of the request for records, however, refused to provide more information about the complaint.

The district court denied the motion for injunctive relief, finding that Dr. Sarfo is not entitled to due process protections in the investigatory phase

of a Board investigation. The district court further found that the confidentiality provisions of NRS §630.336(4) are so broad that even the target physician who is the subject of a complaint is not entitled to receive a copy of that complaint.

The district court then added insult to injury when it awarded the Board attorney's fees and costs, finding that this case was frivolous, despite the fact that there is a plethora of case law that supports physicians' due process rights in administrative proceedings and the complete lack of case law related to this issue.

STATEMENT OF THE PERTINENT FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

The following facts are supported by Dr. Sarfo's declaration, SARFO_102-106 (Vol. 1), the letter sent by Don Andreas on March 14, 2017, SARFO_108-109 (Vol. 1), the Order from the Investigative Committee dated March 14, 2017, SARFO_111-112 (Vol. 1), [1] and Dr. Sarfo's March 16, 2017, response, SARFO_114-116 (Vol. 1):

[1] Query whether such was a final order that was subject to judicial review pursuant to NRS §630.356(1). Because those orders are usually orders that are issued at the end of a disciplinary matter, it was believed that the Order issued by the Board was not such an order that would entitled Dr. Sarfo to

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.

4. The Board filed an investigative case against Dr. Sarfo in 2010 (Case #10-12353).

5. The Board filed an investigative case against Dr. Sarfo in 2011 (Case # 11-13343).

6. The Board filed a two investigative cases against Dr. Sarfo in 2012 (Case #s 12-13762, 12-14231), as well as a formal administrative complaint against him in the same year (Case #12-29257-1).

7. The Board filed an investigative case against Dr. Sarfo in 2014 (Case #14-15034).

8. All of these complaints were initiated through overly broad investigatory letters requesting unlimited medical records for an uncertain period of time.

---

judicial review; hence, the instant writ petition was filed as a way of challenging that order.

9. Despite all of these cases, only the administrative case (#12-29257-1) resulted in any discipline.

10. In that case, the Board publicly alleged numerous violations of Nevada Revised Statutes (NRS) Chapter 630, against Dr. Sarfo, 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.

11. Dr. Sarfo suffered severe hardships once this complaint was made public. He had to disclose the complaint to all hospitals where he had privileges, as well as all insurers with whom he contracted to provide medical services.

12. This one administrative complaint, alone, jeopardized his ability to work at various hospitals and surgery centers, as well as his ability to remain under contract with various payors.

13. Ultimately, that case ended when Dr. Sarfo entered a no contest plea for **one** (1) 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). For this, he received a public reprimand and was required to pay the Board's investigatory costs for this case.

14. During this time period, Dr. Sarfo had troubles transitioning from paper charts to electronic medical records (a problem that was not unique to Dr. Sarfo) causing some of his records to be lost, disorganized or otherwise incomplete. This was an administrative issue which his practice worked hard to resolve; one that the Board was completely aware of while it was ongoing.

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 insurance 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 was concerned that if he released these records, without any limitation to duration of time or the like, 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 refused to provide the unfettered medical records.[2]

SUMMARY OF ARGUMENT

The district court erred in this case because it extended this Court's decision in Hernandez v. Bennet-Haron, 287 P.3.d 305, 128 Nev.Adv.Op 54 (2012), to support a determination that due process protections need not be made available in disciplinary investigations conducted by the Board. This was an error, as the district court failed to recognize that unlike in Hernandez, the entity that is conducting the investigation in this case, the Investigatory Committee of the Board, has the authority to file administrative charges against a target physician, and is the entity that actually prosecutes the administrative complaints filed against physicians.

The district court further erred in determining that the confidentiality provisions of NRS §630.336(4) are so broad that they prevent the physician who is the target of an investigation from obtaining a copy of the complaint made against the physician. Sharing a third party complaint with the target of

[2] Dr. Sarfo has since made the disclosure of the requested records covering a limited two (2) year period of time – a limitation that was only effectuated as a result of this case being filed in the district court and the stipulation that came therefrom. *See* SARFO_147 – 150 (Vol. 1).

the complaint so he or she can provide an adequate response does not destroy the confidentiality of the investigation.

Finally, the district court erred in awarding the Board attorney's fees and costs in this case because Dr. Sarfo did obtain partial relief from this action – the Board agreed to limit the requested medical records to a two year period of time. Prior to filing this action, the Board refused to alter their demand for medical records. Additionally, while there is ample case law regarding the need to provide physicians with due process protections, there is no case law on this issue; hence, Dr. Sarfo filed the action in good faith.

STANDARD OF REVIEW

As this Court has stated in a similar case denying a motion for preliminary injunction related to the Board's attempt to discipline a physician, this Court "review[s] appeals from district court decisions regarding petitions for judicial review under the same standard utilized by the district court." Tate v. State Board of Medical Examiners, 356 P.3d 506, 131 Nev. Adv. Op. 67 (Nev., 2015) (*citing* Nassiri v. Chiropractic Physicians' Bd., ––– Nev. ––––, ––––, 327 P.3d 487, 489 (2014)). This Court will "review factual determinations for clear error, we review questions of law, including statutory construction, de novo." Id. Whether a statute is unconstitutional is a question

of law, reviewed de novo. Flamingo Paradise Gaming, LLC v. Chanos, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009). Words in a statute should be accorded their plain meaning unless doing so would be contrary to the spirit of the statute. *See* Berkson v. LePome, 126 Nev. 492, 497, 245 P.3d 560, 563 (2010). Statutes should be construed so as to avoid absurd results. *See* State v. Tatalovich, ––Nev. ——, ——, 309 P.3d 43, 44 (2013). Absent a contrary and specific constitutional limitation, "statutes are to be construed in favor of the legislative power." Galloway v. Truesdell, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967).

A preliminary injunction is available when it appears from the complaint that the moving party has a reasonable likelihood of success on the merits and the nonmoving party's conduct, if allowed to continue, will cause the moving party irreparable harm for which compensatory relief is inadequate. NRS §33.010; Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). As a constitutional violation may be difficult or impossible to remedy through money damages, such a violation may, by itself, be sufficient to constitute irreparable harm. *See* Monterey Mech. Co. v. Wilson, 125 F.3d 702, 715 (9th Cir.1997). Whether to grant or deny a preliminary injunction is within the district court's discretion. Nevadans for Sound Gov't, 120 Nev. at 721, 100 P.3d at 187. In

the context of an appeal from a preliminary injunction, this Court reviews questions of law de novo and the district court's factual findings for clear error or a lack of substantial evidentiary support. Id.

ARGUMENT

A. A PHYSICIAN MUST HAVE PROPER DUE PROCESS PROTECTIONS IN ALL ASPECTS OF THE PHYSICIAN DISCIPLINE PROCESS

The Fourteenth Amendment prevents states from depriving individuals of protected liberty or property interests without affording those individuals procedural due process. Board 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. Board 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. Board of Med. Exam'rs of the State of Nev., 105 Nev. 213, 216, 773 P.2d 726, 727 (1989); Potter v. State Board 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, *supra*, 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.

For these reasons, "[d]ue 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)). It is for this reason that notice of actually 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 complainant'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-Oregon[3] by using classified

[3] 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

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

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

---

prayer houses, distributing religious publications, and engaging in other charitable activities." Id.

requirements." Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 589 (9th Cir.1998) (*citing* Mathews, 424 U.S. at 334–35, 96 S.Ct. 893).

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

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.

In this case, it is the Board's position, as will be discussed below, that the third party complaint which the Board uses to initiate an investigation is confidential, even from the target physician of the complaint.[4] 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

[4] This is NOT the common practice for many other administrative agencies. For example, the Division of Real Estate provides its licensees with copies of the complaints received so that they can provide a proper response. Even the State Bar of Nevada provides a licensee with the actual copy of the third party complaint so that a proper response can be made.

should not be taken from the playbook of McCarthyism.

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* SARFO_108 (Vol. 1). This fails to meet the procedural protections required by the due process clause of the US and Nevada constitutions.

3. <u>The District Court's reliance on Hernandez was Faulty.</u>

The most shocking part of this case is the complete disregard that both the Board and the district court had for Dr. Sarfo's due process rights, yet alone the rights of all of Nevada's physicians. The Board argued, successfully, that due process protections do not apply to Dr. Sarfo, or, for that fact, any Nevada physician, as such protections "need not be made available in proceedings that merely involve fact-finding or investigatory

exercise by the government agency," SARFO_156 (Vol. 1) at 6:20-23 (*citing* Hernandez v. Bennett-Haron, 128 Nev. ___, ___, 287 P.3d 305, 310 (2010)). This was an argument that was adopted by the district court.

However, this case is different than the case of Hernandez. If the Board was merely looking for a copy of medical records, such may be a logical and legally accurate statement; however, their pursuit is far greater. The Board asked Dr. Sarfo to not only provide the medical records (without limitation as to time period), but, also, requested that he "provide a written response to the allegations" that his "medical records have poor documentation, failed to keep legible, accurate and complete medical records and [that he] may be billing for services not rendered." SARFO_108 (Vol. 1). Additionally, the Order which is the subject of this proceeding demands "a formal written response to the allegations regarding the letter dated March 14, 2017." SARFO_111-112 (Vol. 1). These distinctions are material.

In making its argument to the Board, the Board drastically misstated the case law. For example, the Board states that this Court, relying on "the substantial body of federal law," has determined that "investigations conducted by administrative agencies, even though they may lead to criminal prosecutions, do not trigger due process rights." SARFO_155 - 156 (Vol. 1) (*citing* Aponte v. Calderon, 284 F.3d 184, 193 (1st Cir., 2002)). However,

that is not what the Aponte Court said, or what this Court meant when it cited Aponte in the Hernandez case. *See* Hernandez v. Bennett-Haron, 128 Nev. ___, ___, 287 P.3d 305, 310 (2010). Rather, this Court specifically stated in Hernandez, a case challenging the coroner's inquest process, that:

> …in Aponte v. Calderon, 284 F.3d 184 (1st Cir.2002), the United States Court of Appeals for the First Circuit synthesized the distinction between the investigatory proceedings addressed in Hannah and the adjudicatory proceedings discussed in Jenkins in resolving due process issues pertaining to a commission created by executive order of the Governor of Puerto Rico to address issues related to the use of public resources and government corruption. Aponte, 284 F.3d at 186, 191–95. The commission in Aponte was empowered to conduct investigations, make factual findings, and ultimately issue recommendations with regard to, among other things, "further proceedings, either administrative, civil, or criminal, against certain persons." Id. at 187. ***The commission could not, however, initiate or file civil, criminal, or administrative charges or make adjudications of criminal liability or probable cause determinations.*** Id.

Id., 287 P.3d at 313 (***emphasis added***).

That is not the case here. While the IC is engaging in an investigation, the Investigative Committee is a subsect of the Board, and has the authority to initiate or file administrative charges. In fact, it is the IC that actually prosecutes ALL administrative discipline cases brought before the Board. Because of that any statements that are made by Dr. Sarfo in the initial phase

of the investigation process can be used against him in that adjudication process, making the Board's actions during its investigation, actions which exceed mere fact finding, if not an extension of the adjudicative process. As this Court noted "the [U.S.] Supreme Court 'has steadfastly maintained [the] distinction between general fact-finding investigations,' which do not implicate due process rights, 'and adjudications of legal rights' for which due process concerns may be implicated." Id., (*citing* Aponte at 192–93). Because of this, this Court determined that, as it applied to the Coroner Inquest process, since "[t]he sole product of the inquest process are factual findings which, in and of themselves, are not binding or entitled to preclusive effect in any future proceeding" id, there are no due process rights which attach in that administrative setting.

In making this distinction, this Court dedicated three paragraphs of its opinion in Hernandez to discussing the U.S. Supreme Court case of Jenkins v. McKeithen, 395 U.S. 411, 89 S.Ct. 1843 (1969). That distinction is relevant to this proceeding and is as follows:

> Nearly a decade later, in Jenkins v. McKeithen, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969), the Court applied the Hannah test to determine whether a Louisiana statute creating a body called the Labor–Management Commission of Inquiry ran afoul of, among other things, the Fourteenth Amendment's Due Process Clause. ***There, the commission was charged with investigating and determining***

whether probable cause existed regarding certain criminal law violations and making suggestions as to prosecution. Id. at 416–17, 89 S.Ct. 1843. With regard to the proceedings, the commission had the authority to call witnesses. Id. at 417, 89 S.Ct. 1843. And while the witnesses had the right to have counsel present and to offer advice, cross-examination was limited. Id. at 417–18, 89 S.Ct. 1843.

At the outset, the Jenkins Court noted that the stated purpose of the commission at issue was to investigate and make findings of fact " 'relating to violations or possible violations of criminal laws,' " id. at 414, 89 S.Ct. 1843, and to supplement and assist the efforts of district attorneys and other law enforcement personnel. Id. at 414–15, 89 S.Ct. 1843. The commission's authority was specifically limited to criminal violations, and it could not take action with regard to any strictly civil aspects of any labor problem. Id. at 415, 89 S.Ct. 1843. ***Although its adjudication of any criminal violations was not binding and could "not be used as prima facie or presumptive evidence of guilt or innocence in any court of law," the commission's findings could include conclusions with regard to specific individuals and it could make recommendations for future actions.*** Id. at 417, 89 S.Ct. 1843. ***The Court noted that the commission was required to report its findings to the proper authorities "if it finds there is probable cause to believe that violations of the criminal laws have occurred."*** Id.

Thus, in ***stark contrast*** to the investigatory agency at issue in Hannah, ***the Jenkins Court held that the commission "very clearly exercises an accusatory function***; it is empowered to be used and allegedly is used to find named individuals guilty of violating the criminal laws" and "to brand them as criminals in public." Id. at 427–28, 89 S.Ct. 1843. Therefore,

> the Court held that based on the commission allegedly making "an actual finding that a specific individual is guilty of a crime, ***we think that due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights.***" Id. at 429, 89 S.Ct. 1843.

Hernandez, 287 P3d at 312-313. In this case, just like that of Jenkins, the result of the Investigative Committee's actions are accusatory, as they will not only report its findings to the Board and make a recommendation as to whether Dr. Sarfo should be held liable for a violation of the Medical Practice Act, but, they will then proceed to file an administrative complaint against a physician and prosecute that complaint.

As an aside, it must be recognized that the due process that was afforded in the Hernandez and Aponte cases, cases upon which the Board relies, was far more expansive than what Dr. Sarfo has been provided with in this case. Those cases involve contested proceedings where the specific nature and scope of the investigation was clearly provided. In Hernandez, the subject of the investigation was asked to answer very specific fact finding questions regarding a specific event – the use of fatal force – in a proceeding that was open to the public and involved interaction between the subject of the investigation and the party that was conducting the investigation. In Aponte, similarly, the issue of concern was the interview process which was

undertaken by a Blue Ribbon Commission created by the Governor of Puerto Rico to fight government corruption, an interview that allowed for dialogue and allegation disclosure to the subject of the investigation. This case is completely different. Here, Dr. Sarfo's response to the March 14, 2017, Order and associated letter may be his only opportunity to give his side of the story before the Board files a formal administrative complaint – an action that, in and of itself, can have drastic consequences on a person's career and livelihood, and a response which may be incorporated into a formal complaint, depending on Dr. Sarfo's response.

In another legal fallacy, the Board argues that "any effects that the investigation or threat of discipline may have on Sarfo's ability to practice medicine is not irreparable harm because it can be adequately remedied by monetary damages." SARFO_164 at 13:15 (Vol. 1) If this were not such a misstatement of the law, it would almost be laughable. First, as the Board is well aware, because of cases that it has litigated against this office, the Board is immune from money damages as a result of its investigative and disciplinary proceedings. *See, e.g.*, Buckwalter v. Nev. Board of Med. Examiners, 678 F.3d 737, 12 Cal. Daily Op. Serv. 4563, 2012 Daily Journal D.A.R. 5376 (9th Cir., 2012).

Second, this argument is completely different than what the Ninth Circuit has said regarding physician discipline. *See, e.g.*, Chudacoff v. Univ. Med. Ctr. of S. Nev., 649 F.3d 1143, 1149 (9th Cir. 2011). The Chudacoff case is one involving physician discipline by a hospital medical staff. There, affirming what the district court found below through the use of the same argument that is in the due process section of this brief, relying on Board of Regents of State Colls. v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), the Court found that even a hospital disciplinary action, or threat thereof, could result in the termination of one's career, requiring that the amount of process must accord "sufficient respect for a professional's life and livelihood." If that applies to a hospital medical staff, how much more so does it apply to the actions of the Board?

It is critical for this Court to understand that the credentialing practices in the medical world are the most intense and hyper-critical of that of any licensed profession. The mere filing of an administrative complaint must be reported to hospitals, insurance companies and credentialing agencies. Because of an honest disclosure that one has been merely investigated, a physician can be removed from an insurance panel, be subject to increased medical malpractice premiums and be subject to medical staff actions at

various hospitals; again, all of which is merely because of the ***existence*** of an administrative complaint, regardless of the final result of its adjudication. This is, in fact, the very irreparable harm to which Dr. Sarfo is subject – a harm which the Board denies Dr. Sarfo can prove. It is well known within the medical community that any application for hospital privileges, application for malpractice coverage, application for inclusion on an insurance panel or, even, application for a medical license in another state asks whether the applicant has even been investigated by a licensing board. Accordingly, how Dr. Sarfo responds to the vague inquiry which he received may alter his medical practice, regardless of whether he is ultimately able to prevail through a formal adjudication procedure.

What the Board cannot comprehend is that having to fight against them for years in defense of a disciplinary matter is an extreme hardship, in and of itself. Setting aside the legal fees, having to endure the mental strain and public humiliation of such fight is an actual injury which cannot be remedied through money damages. And, often, a physician is never compensated for this hardship, even when they prevail against the Board. For example, in the case of Dr. James Tate, he beat (or is anticipated to beat) the Board on three separate occasions, over the course of eight years, and the Board was never

held accountable for such abusive prosecution.[5] They were never required to compensate Dr. Tate for his legal defense costs, or even issue a public apology. Dr. Tate, in fact, died before he had an opportunity to watch the oral arguments before this Court in his third case – an oral argument which I am confident that he would have enjoyed hearing.[6]

---

[5] The first case, a case from 2008, involved Dr. Tate's care of a British tourist at UMC. *See* Tate v. BME, Case Number A-12-654858-J. In that case, the Board gave Dr. Tate a public reprimand, a $5,000 fine, an additional CME requirement and charged him for the fees and costs of the case. In that case, Judge Cadish held that the Board's "imposition of all costs of the investigation and prosecution in the amount of $29,623.39 against Dr. Tate" was arbitrary and capricious. In ordering such, Judge Cadish stated that "the imposition of all costs of the investigation and prosecution …. is arbitrary and capricious under Nevada Revised Statutes 233B.153(3)(f) as there is no evidence in the record to support the amount awarded, and Dr. Tate was not provided an opportunity to review and examine the amounts of costs/fees and related time entries prior to the imposition of these costs against Dr. Tate."

Dr. Tate's second case went up to the Nevada Supreme Court. *See* Case Number 61283. In that case, the Nevada Supreme Court, in an unpublished decision, reversed and remanded the entire action of the Board, calling it arbitrary and capricious.

In the last case, Case A-14-697512-J, it was determined that the Board did, in fact, act in a manner that violated Dr. Tate's due process rights through the manner in which the discipline was imposed. This decision is being appealed for other reasons.

[6] It should be noted that one of the reasons why this case has taken so long is that Dr. Tate, through this office, challenged the constitutionality of NRS §630.356(2), a statute that prevented this Court from enjoining Board discipline while the matter is under judicial review. In an appeal taken from the denial of a motion for preliminary injunction, this Court agreed with Dr.

At some point, perhaps the Board will realize that its continued and ongoing abusive disciplinary process in this State has severe consequences on our access to health care. There is a reason why we are at the very bottom of states with respect to access to health care and why we have a shortage of physicians. Physicians do not want to come to a state that has a known history and current practice of disregarding physicians' due process rights. Physicians invest too much time and money into their career to risk it all on the strong arm tactics of an administrative agency that blatantly disregards its physicians' due process rights.

4. 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. Board of Med. Examiners, 110 Nev. 1060 1082, 881 P.2d 1201, 1204 (1982); *see also,* Dutchess Bus Servs, Inc. v. Board 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

---

Tate, finding that the statute was a violation of the separation of powers clause. *See* Tate v. State Board of Medical Examiners, 356 P.3d 506, 131 Nev. Adv. Op. 67 (Nev., 2015).

administrative agencies). Relying on this standard, the Nevada Supreme Court in Minton, used the Matthews balancing test to determine whether a given procedure appropriately safeguards an individual's due process guarantees. Id. The Court then stated that "[u]nder the second prong of the due process test, however, the absence of safeguards **must** suggest a risk of erroneous deprivation." Id. (emphasis added).

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

This State needs safeguards to protects its physicians (or those who are left and those who were brave enough to come in the first place). The Board is known for abusive practices and unconstitutional laws. See, e.g., Tate v. State Board of Medical Examiners, 356 P.3d 506, 131 Nev. Adv. Op. 67 (Nev., 2015)(striking NRS §630.356(2) as being an unconstitutional violation of the separation of powers doctrine). It is not uncommon for the Board to target a physician, usually, they are a solo practitioner or practitioner in a

small practice with only one or two partners, as opposed to being in a large group, and make onerous demands from that physician without an understanding as to why the Board is making such a request. These fishing expeditions expose the physician to severe mental anguish, as well as resources expounded to respond to the inquiry. Worse, rare if ever, has the physician been provided with notice of the allegations made against him or her; rather, it is shoot first, respond second. This is nothing more that the Board's abuse of its powers.

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

Naturally, one things, "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 heals in?

And, now, it is very likely that the Board 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? To squeeze a plea bargain for a technical violation of how medical records should be kept? 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.

B. THE BOARD'S INTERPRETATION OF NRS 630.336(4) IS WRONG

It is well understood that the Board has a duty to regulate the profession of allopathic medicine in the State of Nevada. See NRS §630.003. Moreover, "[t]he powers conferred upon the Board by this chapter must be liberally construed to carry out these purposes for the protection and benefit of the public." NRS §630.003(2).

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

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

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." (***emphasis added***). Accordingly, the Board has construed this statute to mean that the complaint is so confidential that it must be withheld from the target of the complaint, in addition to the general public. As a result, the Board initiates investigations without ever showing the licensee the complaint that precipitated the investigation, or disclosing who made the complaint.

This case, in part, challenges 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 this 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 F.2d 467 (3d Cir.1986) (Pennsylvania has a substantial interest in preserving ***limited*** confidentiality); People ex rel. Ill. Jud. Inquiry Board v. Hartel, 72 Ill.2d 225, 20 Ill.Dec. 592, 380 N.E.2d 801 (1978) (state constitutional requirement that judicial discipline proceedings be kept confidential must be implemented ***except as overriding federal due process requirements compel court to do otherwise***), *cert. denied*, 440 U.S. 915, 99 S.Ct. 1232, 59 L.Ed.2d 465 (1979); Kamasinski v. Judicial Review Council, 797 F.Supp. 1083 (D.Conn.1992) (state's interest in prohibiting disclosure

prior to determination of probable cause is sufficiently compelling to survive the strictest First Amendment scrutiny); *see also*, Kamasinski v. Judicial Review Council, 843 F.Supp. 811 (D.Conn.), aff'd, 44 F.3d 106 (2d Cir.1994)). However, in all those cases, the proceedings were not to keep the target out, but, rather, to keep the public out from the proceeding. In this case, the same applies – the confidentiality should not to exclude the target licensee, but, rather, the public in an attempt to protect the licensee from the fallout that comes with such accusations.

Ultimately, however, this is not a question of policy, but one of statutory interpretation. To best understand what the Legislature meant, we should look at legislative history.

Senate Bill 77 in 1987 amended NRS §630.336 to state:

> 1. Any proceeding of a committee of the board investigating complaints is not subject to the requirements of NRS 241.020, unless the licensee under investigation requests that the proceeding be subject to those requirements. Any deliberations conducted or vote taken by:
>
> (a) The board or panel regarding its decision; or
>
> (b) The board or any investigative committee of the board regarding its ordering of a physician to undergo a physical or mental examination or any other examination designated to assist the board or committee in determining the fitness of a physician,
>
> are not subject to the requirements of NRS 241.020.

> 2. Except as otherwise provided in subsection 3, all applications for a license to practice medicine, any charges filed by the board, financial records of the board, formal hearings on any charges heard by the board or a panel selected by the board, records of such hearings and any order or decision of the board or panel must be open to the public.
>
> 3. The following may be kept confidential:
>
> (a) Any statement, evidence, credential or other proof submitted in support of or to verify the contents of an application;
>
> (b) All investigations and records of investigations;
>
> (c) Any report concerning the fitness of any person to receive or hold a license to practice medicine;
>
> (d) Any communication between:
>
> (1) The board and any of its committees or panels; and
>
> (2) The board or its staff, investigators, experts, committees, panels, hearing officers, advisory members or consultants and counsel for the board; and
>
> (e) Any other information or records in the possession of the board.
>
> 4. 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 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. As part of the Keeping our Doctors in Nevada campaign, 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 physician, physician assistant or practitioner of respiratory care to undergo a physical or mental examination or any other examination designated to assist the Board or committee in determining the fitness of a physician, physician assistant or practitioner of respiratory care are not subject to the requirements of NRS 241.020.
>
> 2. Except as otherwise provided in subsection 3 or 4, all applications for a license to practice medicine or respiratory care, any charges filed by the Board, financial records of the Board, formal hearings on any charges heard by the Board or a panel selected by the Board, records of such hearings and any order or decision of the Board or panel must be open to the public.
>
> 3. The following may be kept confidential:
>
> (a) Any statement, evidence, credential or other proof submitted in support of or to verify the contents of an application;
>
> (b) Any report concerning the fitness of any person to receive or hold a license to practice medicine or respiratory care; and
>
> (c) Any communication between:
>
> (1) The Board and any of its committees or panels; and
>
> (2) The Board or its staff, investigators, experts, committees, panels, hearing officers, advisory members or consultants and

counsel for the Board.

> 4. Except as otherwise provided in subsection 5, 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.
>
> 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* SARFO_124 (Vol. 1). 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. If the Court will recall, 2003 is when major revisions to the laws governing tort reform occurred as a result of the Keep Our Doctors in Nevada campaign. A significant issue for physicians at the time was how frivolous complaints were treated by the Board. Protecting the public 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, NRS §630.336(4) was added to prevent complaints from becoming public before they were vetted by the Board. 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.

In the district court, the Board failed to adequately rebut this legislative history. SARFO_161-162 (Vol. 1). The only argument related to the legislative history of NRS §630.336(4) raised by the Board is the citation to an April 11, 2003 legislative session.[7] Id. This session, however, has nothing to do with the confidentiality of a complaint, or the Board's need to keep the actual language of the complaint from the target physician. Id. Rather, the Board's cited legislative session dealt with the immunity of the complainant. If anything, however, such a citation supports Dr. Sarfo's position. ***Because*** the complainant has immunity, why must their identity ***or the substance of their complaint*** be withheld from the physician? What could the physician do? How is the public served with maintaining the confidentiality of a complaint where the complainant has immunity?

[7] Dr. Sarfo attached the entire minutes of that session to his Reply Brief. SARFO_185 – 230 (Vol. 1).

Rather, as Dr. Sarfo has illustrated, the confidentiality of the complainant and the substance of the complaint is put in place to protect physicians from the ramifications of frivolous complaints that become public. Accordingly, the district court erred in finding that NRS §630.336(4) is so broad that it prevents the target physician from seeing the actual substance of the complaint before a response is provided.

C. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY'S FEES AND COSTS

In its minute order[8] granting the Board's motion for attorney's fees and costs, the district court stated:

> This Court denied the request for Preliminary Injunction finding, (1) due process protections need not be made available in proceedings that merely involve fact-finding or investigatory exercise by the government agency. Hernandez v. Bennett-Haron, 287 P.3d 305, 128 Nev. Adv. Op. 54 (2012); (2)

[8] The district court ordered that "Counsel for Defendant is directed to submit a proposed order consistent with the foregoing within ten (10) days after counsel is notified of the ruling and distribute a filed copy to all parties involved pursuant to EDCR 7.21." SARFO_357-358 (Vol. 2). The Board, however, never filed an order in compliance with this order. Accordingly, Dr. Sarfo was never able to amend the notice of appeal or case appeal statement to include the award of fees and costs as part of this appeal. Dr. Sarfo should not be punished for the Board's failure to comply with the district court's order. Therefore he includes the award of fees and costs, as set forth in the minute order, in this appeal.

> pursuant to NRS 630.140(1), the Board is empowered to hold hearings and conduct investigations pertaining to its duties imposed under the law, including issuing orders to aid in its investigations, such as compelling a physician to appear before the committee. *See* NRS 630.311(1); and (3) the board is prohibited from disclosing to Dr. Sarfo the identity of the person who files the complaint, or the actual complaint disclosing such.
>
> Respondents now seek an award of fees and costs alleging that Petitioner maintained the action without a reasonable basis in law pursuant to NRS §18.010. Under NRS §18.010(2)(b), the district court may award attorney fees to a prevailing party when it finds that a claim was frivolous or brought or maintained without reasonable ground or to harass the prevailing party. The COURT FINDS that the Board was the prevailing party and ***that Petitioner did not bring this matter with a reasonable basis in law***, as the Board was merely performing its required investigative duties pursuant to NRS 630.311 (1).

Minute Order, SARFO_ 357 (Vol. 2) (***emphasis added***).

This is a completely erroneous finding. Dr. Sarfo was reasonable in bringing a writ petition to assert his constitutional due process rights against an overly zealous administrative agency. There must be a way to challenge the over-zealous investigatory efforts of the Board.[9]

[9] The only other way which this office could image that a physician could obtain judicial relief from an investigation that is believed to be overly broad or is otherwise unreasonable is through a challenge of the Board's order demanding records and a response pursuant to NRS §630.356(1)("Any person aggrieved by a final order of the Board is entitled

First, the Board is not a prevailing party, as the case has not been finalized. Pursuant to NRS §18.010, fees can only be awarded to a prevailing party. The only issue that has been determined is Dr. Sarfo's request for injunctive relief.

The reality is that Dr. Sarfo prevailed when the Board entered into a stipulation and order restricting the scope of the materials that they sought. *See* SARFO_147-150 (Vol. 1). Prior to filing this lawsuit, the Board sought "all" records for the five (5) patients, some of which spanned several years. While Dr. Sarfo, through counsel, requested that the scope be limited to a reasonable period before filing this case, the Board refused to work with Mr. Hafter. Only once the instant case was filed and a hearing was set did the Board agree to limit the scope of its request. But for this case, Dr. Sarfo would have had to provide a far more expansive response to the Board.

Second, just because the district court was not willing to preserve the rights of the physicians in this State does not mean that the action was

---

to judicial review of the Board's order."). Query whether the Order demanding a response to an investigatory inquiry, such as the one in this case, SARFO_110 (Vol. 1), would qualify as a final order. It is believed that the Board would argue that only orders which are issued after a hearing would be subject to review under this statute. Unfortunately, there is way to obtain clarification on how to deal with these issues without going through this process. To claim that such would a frivolous case, as the district court did in this case, however, was intended to harass the Board is just unfathomable.

frivolous. In fact, few and far between are the situations where a district court will have the courage to rule correctly against an administrative agency. This office has a great track record of litigating against the Board in State court; a track record that comes from the Supreme Court, not the district courts. District courts are hesitant to find statutes or policies unconstitutional; this Court is not. See, e.g., Tate v. State Board of Medical Examiners, 356 P.3d 506, 131 Nev. Adv. Op. 67 (Nev., 2015). In fact, this case is tracking the history of Tate, exactly. In that case, Dr. Tate filed a Petition for Judicial Review challenging the Board's disciplinary process. As part of that proceeding, Dr. Tate filed a motion for injunction. The district court denied it. Dr. Tate filed an interlocutory appeal. The Nevada Supreme Court ruled in Dr. Tate's favor, finding NRS §630.356(2) unconstitutional. In fact, Petitioner never expected the district court to rule against the Board; this proceeding was nothing but a necessary hurdle to bring these issues to the Supreme Court so that the merits of the claim that the Board's investigatory process violates physicians' due process rights may be heard.

To that end, Petitioner's claims in this case are not meritless. In fact, Petitioner provided substantial case law that shows that when an investigatory body's role is more than just fact finding, where it is able to initiate, file and/or prosecute an administrative charge, due process rights do

attach to the investigatory proceedings. *See* Hernandez v. Bennett-Haron, 128 Nev. ___, ___, 287 P.3d 305, 310 (2010) (*citing* Aponte v. Calderon, 284 F.3d 184 (1st Cir.2002)); *see also*, Jenkins v. McKeithen, 395 U.S. 411, 89 S.Ct. 1843 (1969). Unfortunately, the district court never assessed, as a matter of fact, the precise nature of the Investigatory Committee. That is a question of fact which Dr. Sarfo still has not been able to adequately address – a question which will dominate the remaining proceedings of this case once it is remanded following the pending interlocutory appeal.

What was most offensive about the Board's motion for fees was their on-going personal attack against Mr. Hafter. It is unfortunate that the insecurities of the Board, and its counsel, are so great that its only response to a constitutional challenge is to personally attack the physician's attorney. However, this case involves due process rights – a core and critical Constitutional right – one that makes this country distinct (and better) than any communist regime or dictatorship. At some point, the Board will realize that it cannot trample on the rights of physicians just because it is the government. And Mr. Hafter will continue to file case after case after case against the Board for as long as it takes to get them to realize that.

Perhaps the vitriol comes from the fact that Mr. Hafter has prevailed on several occasions against the Board. Because of Mr. Hafter's zealous

defense of physicians, the regulations which the Board adopted in violation of the Open Meeting Law in 2009 were voided. Because of Mr. Hafter's efforts, discipline imposed against physicians has been overturned as arbitrary and capricious. Because of Mr. Hafter's efforts, this Court struck NRS §630.356(2) as unconstitutional. *See* Tate v. State Board of Medical Examiners, 356 P.3d 506, 131 Nev. Adv. Op. 67 (Nev., 2015). And in each and every case, the Board cried to the court, as it is doing now, that Mr. Hafter's actions were frivolous.

The real sad nature of how this case has evolved is that a physician who simply wanted a fair shot of defending himself against the Board in the defense of his profession is now saddled with thousands of dollars in fees and costs in addition to the costs he has paid to bring this case. What does that say to the rest of our physicians? What does that say to physicians thinking of coming to Nevada to practice? It says that if you fight to get a fair shot at defending yourself against an allegation brought by the Board, you will be penalized. That is not fair or just.

Finally, the amount of the fees sought are simply ridiculous. The Board has two (2) in-house attorneys,[10] both of whom have litigation

[10] Now they have three (3) in-house attorneys.

experience. The Board has access to the Attorney General's office. However, they chose not to use those resources. Instead, the Board retained a firm who decided to run up the fees, assigning multiple partners and associates to work the case. If the case is really as frivolous as the Board suggests, why did it take so many attorneys to fight a single preliminary injunction motion? Dr. Sarfo should not have to pay for the outlandish billing practices of a private firm who had a blank check.

CONCLUSION

For the foregoing reasons, the district court's order denying injunctive relief and the district court's order for attorney's fees and costs should be reversed and the matter should be remanded for further proceedings.

DATED THIS 18TH day of October, 2017.

HAFTERLAW

By: _____

JACOB L. HAFTER, ESQ.
Nevada Bar Number 9303
6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[XX] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style]

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[**XX**] **Proportionately spaced, has a typeface of 14 points or more, and contains 11,396 words**; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed _____ pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies

with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED THIS 18TH day of October, 2017.

HAFTERLAW

By: _____

JACOB L. HAFTER, ESQ.
Nevada Bar Number 9303
6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
702-405-6700 telephone
jhafter@hafterlaw.com

Counsel for Appellant

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HAFTERLAW, and that on this 18TH day of October, 2017, I served a copy of the **APPELLANT'S OPENING BRIEF** and the **JOINT APPENDIX** 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 to all registered parties in this case. and/or

□ Electronic Delivery—Such was sent to the e-mail address as follows:

HAFTERLAW

By: _____
JACOB L. HAFTER, ESQ.