EXHIBIT “A”

EXHIBIT “A”

STATEMENT OF FACTS

The following facts are supported by Dr. Sarfo's declaration, a true and correct copy of which is attached hereto as Exhibit "1", the letter sent by Don Andreas on March 14, 2017, a true and correct copy of which is attached hereto as Exhibit "C", the Order from the Investigative Committee dated March 14, 2017, a true and correct copy of which is attached hereto as Exhibit "D", and his March 16, 2017, response, a true and correct copy of which is attached hereto as Exhibit "E".

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 in 2010 against Dr. Sarfo (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. Dr. Sarfo never received a copy of the underlying complaint in any of these cases.

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. Ultimately, that case ended when Dr. Sarfo entered 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). For this, he received a public reprimand and

was required to pay the Board's investigatory costs for this case. The Board dismissed all of the other counts.

12. 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.

13. 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.

14. During this time period, Dr. Sarfo did have troubles transitioning from paper charts to electronic medical records, 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 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, pending the district court's review of the Petition in this case; the Board's counsel denied the request.

28. After the writ petition was filed, the Board entered into a stipulation and order staying compliance with the Order until 20 days after notice of entry of order denying any motion for injunctive relief.

29. The district court heard the motion for injunctive relief on April 26, 2017.

30. The district court denied the motion for injunctive relief, and notice of entry of that order was filed on May 22, 2017.

31. Absent intervention from this Court, if Dr. Sarfo does not comply with the Board's request by June 11, 2017, he may face additional disciplinary sanctions.

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

EXHIBIT “1”

EXHIBIT “1”

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

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

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

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

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

Dated this 16th day of March, 2017.

Signature: _____ 3/16/17

KOFI SARFO, MD

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

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]
[redacted] DOB: [redacted]
[redacted] DOB: [redacted]
[redacted] DOB: [redacted]
[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
1105 Terminal Way
Reno, NV 89502
Phone: 775-688-2559
Fax: 775-688-2553

Respectfully,

Don Andreas
Deputy Chief of Investigations
Las Vegas Office

EXHIBIT “C”

EXHIBIT “C”

The Investigative Committee of the Board of Medical Examiners of the State of Nevada

* * * * *

In the Matter of the Investigation of: **Kofi Sarfo, MD** License No. 11205	Case No. 17-17051

ORDER TO PRODUCE MEDICAL RECORDS

The Investigative Committee (IC) of the Board of Medical Examiners of the State of Nevada sends greetings to:

Kofi Sarfo, MD

2909 West Charleston Blvd.

Las Vegas, NV 89102

Pursuant to the authority of Nevada Revised Statute (NRS) 630.311(1), the IC directs you to produce and deliver to the Nevada State Board of Medical Examiners, the materials as set forth in this Order:

1. Properly authenticated and complete copies of any and all medical records of [redacted] DOB: [redacted] DOB: [redacted]; DOB: [redacted]; [redacted]; DOB: [redacted]; [redacted]; DOB: [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

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

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

Dated this 14th[th] day of March 2017.

NEVADA STATE BOARD OF MEDICAL EXAMINERS
INVESTIGATIVE COMMITTEE

Wayne Hardwick

Wayne Hardwick, M.D., Chairman
Nevada State Board of Medical Examiners
Investigative Committee

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.

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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 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 case, 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 Hafter, Esq.

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

KOFI SARFO, M.D.

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. Many times 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 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 arbitrary and 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. Please have you provide a copy of the complaint, along with specifics as to time and procedure codes which are the basis 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 Hatter, Esq.

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

3/16/17

KOFI SARFO, M.D.

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: (See full bill history below) 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.**

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
Bill Text (HTML)	As Introduced	1st Reprint	Second Reprint	Third Reprint	As Enrolled
Amendments (HTML)	Amend. No.502	Amend. No.952	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.

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

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

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 discuses 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.

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."

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?

IN THE SUPREME COURT OF THE STATE OF NEVADA

KOFI SARFO, M.D.,

Appellant,

v.

NEVADA STATE BOARD OF MEDICAL EXAMINERS,

Respondent.

Dist. Ct. Case No.: A-17-752616-W

Case No.: 73117

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May 30 2017 11:46 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

EMERGENCY MOTION FOR INJUNCTIVE RELIEF PURSUANT TO NRAP 8

RESPONSE NEEDED BY:

JUNE 9, 2017

COMES NOW, Appellant KOFI SARFO, M.D., and hereby files this **EMERGENCY MOTION FOR INJUNCTIVE RELIEF**[1] seeking an order prohibiting Respondents, and any of their collective agents, employees, attorneys, and anyone acting on their behalf, from enforcing the March 14, 2017, Order issued by the Investigative Committee of the Nevada State Board of Medical Examiners ("Board"), until this matter can be heard by this Court.

[1] Appellant was given one day to refile a previously filed motion for injunctive relief. Unfortunately, the Jewish holiday of Shavuos starts at sundown of the day the order was issued. Mr. Hafter has done his best to streamline this Motion, in light of a court calendar in the morning and a deposition scheduled for all afternoon.

Docket 73117 Document 2017-17938

I. INTRODUCTION

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. To be clear, Dr. Sarfo is not asking this Court to prevent the Board from completing their legislative duty; rather, he is asking this Court to prevent them from doing so in a manner which violates Dr. Sarfo's constitutional due process rights by enforcing an administrative order that is overly broad, as to time, and was initiated by an anonymous complaint, depriving him from understanding the true nature of the allegations being made against him. Further, Dr. Sarfo is seeking protection from the Board's threat that an improper response could lead to a variety of charges, including not cooperating with the Board during an investigation. Dr. Sarfo objects to a blanket demand for five patient records, without limitation to a particular procedure, visit or, for that matter, time frame which is allegedly the subject to the investigation.[2]

[2] It should be noted that, to some respects, Dr. Sarfo has already prevailed in this case (notwithstanding the Board's overzealous motion for attorneys fees and for personal sanctions against Mr. Hafter because of Mr. Hafter's advocacy for physicians' constitutional rights at their expense, which is currently pending in the district court). Because of this writ proceeding, the Board agreed to limit the scope of their inquiry to a two year period, as opposed to an open ended period investigation. See Stipulation and Order filed March 29, 2017, Exhibit "E". This is important, as, prior to filing this action, in pre-litigation conversations with their in-house counsel, the Board refused to alter the scope of the Order which is the subject of this proceeding.

It should also be noted that Dr. Sarfo has nothing to hide. For that reason, this office brought to the April 26, 2017, hearing, an electronic copy of the two year excerpt of the medical records for the five patients. While

The Board has a stated 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, request the complete medical records of various patients, and ask for an explanation as to how the licensee did not violate the Medical Practice Act, NRS Chapter 630, et. seq., with respect to the identified patients. These requests are open ended as to both the allegations and time.

This practice misconstrues the Legislative intent behind NRS §630.336(4) – the section of the Medical Practice Act upon which the Board relies to maintain confidentiality of the third party complaint. 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 enables overly broad requests that exceed the scope of the third party complaint. As a result, the Board has the ability to engage in a fishing expedition, using anything in the physicians medical records to substantiate a claim of wrongdoing, leading to the filing of a formal

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the district court refused to accept the CD-Rom of records, Dr. Sarfo is willing to provide these records to the Court under seal, hold in safe keeping while this matter is considered by the Court. Dr. Sarfo would hate for this Court to allow a doubt as to his willingness to cooperate with a lawfully conducted investigation to cloud its consideration of the substantive arguments he is making in this case.

The records which Dr. Sarfo brought to the district court proceeding consisted of the following records: Patient AN – 2 parts, 110 pages, Patient MP – 4 parts, 183 pages, Patient PB – 8 parts, 365 pages, Patient MB – 8 parts, 338 pages, and Patient ST – 9 parts, 408 pages, for a total of 1,406 pages.

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.

As it relates to Petitioner, on March 14, 2017, the Investigative Committee of the Board issued an Order requiring Dr. Sarfo to produce the entire medical records for five (5) patients, and requiring him 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 (the "Order"). No further information about the complaint was given. There was no limitation as to dates, or reference to any particular procedures which are alleged to have been billed for by not occurred. If Dr. Sarfo does not comply, he will be subject to new additional charges of violation of the Medical Practice Act, specifically, violating NRS §3065(2)(a). This deadline has been extended to June 11, 2017, or twenty days from the notice of entry of order denying the motion for preliminary injunction filed in the district court.

II. LEGAL STANDARD

NRAP 3A(b)(3) states that "[a]n order granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction" provides this Court with jurisdiction. NRAP 8(a)(2) states "[a] motion for the relief mentioned in Rule 8(a)(1) may be made to the Supreme Court or to one of its justices." The requirements for the contents of the Motion are also set forth under NRAP 8(a)(1).

As to the motion for a stay or injunction, in determining whether to grant such, this court considers the following factors: (1) whether the object of the appeal will be defeated if the stay is not granted, (2) whether appellants will suffer irreparable or serious injury if the stay is denied, (3) whether real party in interest will suffer irreparable or serious injury if the stay is granted, and (4) whether appellant is likely to prevail on the merits in an appeal. NRAP 8(c); see also Fritz Hansen A/S v. Dist. Ct., 116 Nev. 650, 657 6 P.3d 982, 986 (2000).

III. ARGUMENT

A. APPELLANT HAS A LIKELIHOOD OF SUCCESS ON THE MERITS

Taking the last issue first, the problems with the Board's action in this case are numerous.

First, the Board'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 is erroneous and violates the legislative intent of the statute. Second, the Board's practice of keeping complaints confidential, even from the target physician of the complaint, violates this State's physicians' procedural due process rights. Third, the refusal to provide a target physician with a copy of the complaint fails to safeguard the physician from overzealous prosecution. And, fifth, the Board's demand for five (5) patient files without limitation to time frame or procedure is an overbroad request,

especially in light of the scant of information conveyed about the underlying complaint.

1. Legal Standard for a Petition for Writ

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

A writ of prohibition is the appropriate remedy for an administrative body's improper exercise of jurisdiction. See NRS 34.320; see also Smith, 107 Nev. at 677, 818 P.2d at 851. "A writ of mandamus is available . . . to control an arbitrary or capricious exercise of discretion." Humphries v. Eighth Judicial Dist. Court, 129 Nev., Adv. Op. 85, 312 P.3d 484, 486 (2013) (*quoting* Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 124 Nev. 193,

197, 179 P.3d 556, 558 (2008)). "An exercise of discretion is considered arbitrary if it is founded on prejudice or preference rather than on reason and capricious if it is contrary to the evidence or established rules of law." Nev. Dep't of Pub. Safety v. Coley, 132 Nev., Adv. Op. 13, 368 P.3d 758, 760 (2016) (internal quotations omitted). Further, it should be noted that "[a] writ of prohibition [may] issue to interdict retrial in violation of a defendant's constitutional right not to be put in jeopardy twice for the same offense." Glover v. Eighth Judicial Dist. Court, 125 Nev. 691, 701, 220 P.3d 684, 692 (2009).

2. The Board's Refusal to Disclose the Complaint to the Physician that is the Subject of the Complaint is Erroneous

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. Specifically, the Legislature has stated precise reasons for giving the Board its authority; patient safety and protection of the public are primary reasons for the existence of the Board. Id.[3]

The Board's investigatory powers are also are set forth by statute. Investigations are triggered by the filing of a complaint with the Board. Self-reporting is required in certain instances. See NRS §630.30665 and 630.3068.

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[3] While this is the intent, Appellant makes no concession that the Board is capable of actually protecting the public, or that the cases it chooses to prosecute actually furthers this goal. Unfortunately, the Board's disciplinary process is more apt to protect politically connected physicians and ensure their dominance over the market, rather than truly ensure patient safety. See, e.g., the Endoscopy crisis of the late 2000's.

Certain other parties, such as hospitals and insurers, 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 by any member of the public. See NRS §630.309.

NRS §630.336(4) states that "… 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." The Board has interpreted this statute to mean that all materials related to the matter are considered confidential, to the point that the subject physician about who the complaint was made, is NOT entitled to see the actual complaint made (or a verbatim copy). The Petition underlying this case challenges, in part, this practice. Fundamental principles of due process require that a physician who is subject to a complaint should be entitled to see the contents of the complaint, at the same time that the physician is ordered to respond to the allegations contained therein.

As a result, this is a case of statutory interpretation. "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 shows how NRS §630.336(4) can lead to two reasonable interpretations. The Board believes that every document related to a

complaint, including the original incoming complaint, are confidential from everyone but the Board, including the subject of the complaint. Dr. Sarfo disagrees; rather, Dr. Sarfo's interpretation is far more reasonable, suggesting that the documents and other materials should be kept confidential from non-related parties. Just as the documents provided by Dr. Sarfo in response to the complaint are confidential, notwithstanding Dr. Sarfo's knowledge of them, Dr. Sarfo can see the complaint, just as long as he does not disseminate it.

While confidentiality of Board investigations has not been discussed by the Nevada Supreme Court, the confidentiality of judicial discipline proceedings has. See Whitehead v. Nevada Com'n on Judicial Discipline, 893 P.2d 866, 111 Nev. 70 (Nev., 1995). In that case, the Nevada Supreme Court, building upon case law from throughout the land, 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. (citations omitted). However, in that case and all of the cited cases, the proceedings were not designed to exclude the target, but, rather, to keep the public out from the proceeding. In this case, the same applies – the confidentiality should not to exclude the subject physician, but, rather, the public in an attempt to protect the licensee from the fallout that comes with such accusations.

The legislative history of NRS §630.336(4) is telling. In 1987, Senate Bill 77 amended NRS §630.336 to address the confidentiality of various investigative documents and proceedings. This was the first time that a

confidentiality component to investigations, specifically, was codified. In 1989, only subsection 3 of NRS §630.336 was amended. The amendment was more technical, than anything.

It was in 2003 when the major revision to this law occurred. In that change, NRS §630.336 was amended to elaborate on the confidential nature of investigations. When reviewing the legislative history, however, 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 "H"** at page 172 of April 16, 2003 hearing. There is no discussion how the Board sought confidentiality to preclude the subject physician from seeing the complaint.

Moreover, the Board fails to demonstrate how showing the subject physician the complaint at the same time the physician is asked to respond to the complaint violates the confidentiality of the document in violation of state law. Just like when a secretary or other employee at the Board sees the complaint, showing it to the subject physician would not jeopardize the confidentiality of the document. The physician is a related party, and related parties are permitted to see the complaint.

Accordingly, statutory interpretation would require that a subject physician be allowed to see the complaint.

3. The Board's Investigation Process Violates Physicians' Due Process Rights

Basic constitutional due process rights also requires that the subject physician be entitled to see the actual complaint before being required to respond. See, e.g., U.S. Const. XIV; Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). 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, this 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)).

a. The Protected Property Interest

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). 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); see also, 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). 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

b. 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 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 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 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 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.

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. 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, this 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 protect 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 Bd. 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.

Petitioner should know – he has been here before. The Board and the Petitioner 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. Such termination, however, did not make up for the expense and stress of having to continually defend his medical license against the Board.

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, despite public allegations that Dr. Sarfo engaged in numerous cases of malpractice and other statutory violations, that case ended with Dr. Sarfo entering a no contest plea for ***one*** count of failure to maintain timely, legible, medical records. 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 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.

B. APPELLANT IS ABOUT TO SUFFER IMMEDIATE AND IRREPARABLE INJURY, LOSS, OR DAMAGE

In this instant action, Appellant seeks this Court's intervention to stop enforcement of the Order requiring the production of five (5) patients' complete medical records ***and*** respond to vague allegations of wrongdoing. If Dr. Sarfo fails to comply with the order, he can be subject to discipline independent of any discipline the Board may seek as a result of the underlying investigation. As such would adversely affect his license to practice medicine, as discussed above, Dr. Sarfo's interests are severe and equal to 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 Dr. Sarfo's ability to practice anywhere in the country, as most jurisdictions have reciprocal discipline amongst physicians. It could also limit Dr. Sarfo's ability to work in hospitals, and participate in payor panels. To that end, the

interests are tantamount to maintaining Dr. Sarfo's professional's life and livelihood.

C. PUBLIC INTEREST WEIGHS IN FAVOR OF THE PRELIMINARY INJUNCTION

Notwithstanding, public interest weighs in favor of the preliminary injunction. Harm to a community has long been recognized as sufficient harm to warrant an injunction. *See, e.g.*, Funk Jewelry Co. v. State ex rel. La Prade, 46 Ariz. 348, 357, 50 P.2d 945, 948 (Ariz.1935); Caribbean Marine Services Co., Inc., *supra*, 844 F.2d at 674 ("Our cases have emphasized, however, that when the public interest is involved, it must be a necessary factor in the district court's consideration of whether to grant preliminary injunctive relief."). "The decision whether to grant . . .relief turns also on whether or not the balance of irreparable damage favors issuance of a preliminary injunction, and on relevant public interests." Friends of the Earth, Inc. v. Coleman, 518 F.2d 323, 330 (9th Cir. 1975).

Here, the harm to the community in light of the run-away abuse of power by the Respondents. Without any care or deference to the record, as discussed above, the Board will be engaging in a McCarthyistic witch hunt, the catalyst for which can never be legitimized or validated. We wonder why physicians do not want to come to Nevada and why Nevada is amongst the anchors of the worst of the worst of this Country's health care system – in part it is because of the poor regulatory environment physicians face here in Nevada. We need to ensure that they are checks and balances in physician

regulation that both protect the public and ensure a fair disciplinary process; without such, our quality of health care in this State will never improve.

It may be argued that Dr. Sarfo cannot demonstrate that the government's interest in protecting the public in this case outweighs the potential harm to the physician. This case involves a complaint alleging that Dr. Sarfo engaged "poor documentation, fail[ure] to keep legible, accurate and complete medical records, and …billing for services not rendered." See Exhibit "B". We know that the poor documentation and failure to keep legible records is completely false given the over 1,400 pages of documents generated from an electronic medical records system covering two years of care of five patients which Dr. Sarfo offered to be deposited with the Court while this matter is pending. And whether Dr. Sarfo billed for services not rendered (a charge which he vehemently denies) is not something that suggests an imminent public safety risk. Dr. Sarfo is not being accused of providing improper or inadequate patient care. He is not accused of harming any patients. He is not accused of being incompetent or an otherwise danger to society. Surely, his right to receive adequate notice of the actual allegations made against him so that he can prepare a proper response – his basic due process rights and the basic due process rights of all of this great State's physicians – outweigh the Board's pursuit of the allegations in this case.

Again, it should be noted, especially in conclusion, that Dr. Sarfo brought this writ petition and associate motion in an effort to take a stand against the Board on behalf of all physicians. As someone who experienced

past malicious prosecution,[4] Dr. Sarfo understands the invasive nature of the Board's investigations. He also realizes that our regulatory process is a factor in our State's physician shortage. He hopes that by challenging the Board's disciplinary process, the Board will become a better place for physicians to practice, improving this State's access to quality health care. So, not only are his efforts intended to defend against a violation of his due process rights, they are intended to help make physician discipline in this State a more fair process, improving the public's access to health care. Surely, this cannot outweigh the public's interest in seeing the Board investigate an "anonymous" grievance related to Dr. Sarfo's billing and record keeping practices.

D. <u>THE OBJECT OF THE APPEAL WILL BE DEFEATED IF THE STAY IS NOT GRANTED</u>

One of the reasons that it is so hard to challenge the Board's investigative procedures is because the deadlines come and go. Without a

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[4] 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). Out of all of these investigations, only one matriculated into a formal administrative complaint – case number 12-29257. And, yet, even still, despite being the subject of a formal complaint where the Board alleged numerous violations of Nevada Revised Statutes (NRS) Chapter 630, including <u>six (6) violations</u> of NRS 630.301(4), <u>malpractice</u>, 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).

pending deadline, the Board may argue that there is no active controversy, making the issue moot. With the June 11, 2017, deadline pending, absent an injunction, this case will be moot and this State's allegedly violations of its physicians' due process rights will go continue.

IV. CONCLUSION

For the foregoing reasons, Dr. Sarfo respectfully requests this Court to issue an order prohibiting Respondents, and any of their collective agents, employees, attorneys, and anyone acting on their behalf, from enforcing the March 14, 2017, Order issued by the Investigative Committee of the Nevada State Board of Medical Examiners until this matter can be heard by this Court.

DATED THIS 30TH day of May, 2017.

HAFTERLAW

By: _____

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EXHIBITS

Exhibit "A"	Statement of Facts
Exhibit "1"	*Declaration of Dr. Sarfo*
Exhibit "B"	March 14, 2017 letter sent by Don Andreas o
Exhibit "C"	March 14, 2017 Order from the Investigative Committee
Exhibit "D"	March 16, 2017, Response to the Board
Exhibit "E"	Stipulation and Order
Exhibit "F"	Transcript of Proceedings
Exhibit "G"	Notice of Entry of Order Denying Preliminary Injunction
Exhibit "H"	Legislative History – SB250 (2003)

NRAP 27(e) CERTIFICATE

Pursuant to NRAP 27(e)(3), the names, telephone numbers, and addresses of the attorneys for all parties are as follows:

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Counsel for Respondent

This Motion is being filed as an emergency because the Board is still insisting on compliance with the March 14, 2017, Order, an order which he is unable to respond to without disclosure of the actual complaint currently pending against him. Per stipulation and order, Dr. Sarfo has until June 11, 2017, to comply with the Order.

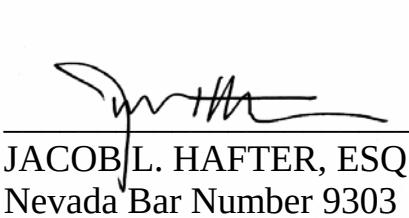
The parties and this Court have been made known re made about this emergency filing at the time when the district court refused to issue a preliminary injunction. At the hearing, Mr. Hafter requested that a stay be

issued pending appeal, in conformance with NRAP 8. See Exhibit "F". The district court denied that request. See Exhibit "G".

A copy of this motion has been emailed to counsel for Respondents, as well.

DATED THIS 30th day of May, 2017.

HAFTERLAW

By: 

JACOB L. HAFTER, ESQ.
Nevada Bar Number 9303

VERIFICATION

STATE OF NEVADA)
)
COUNTY OF CLARK)

Under penalty of perjury, the undersigned declares that he is the attorney for the Dr. Sarfo, and knows the contents thereof, that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true. This verification made by the undersigned attorney, pursuant to NRS §15.010, on the ground that the matters stated, and relied upon, in the foregoing Appellant are all contained in the prior pleadings and other records of the court and district court, true and correct copies of which have been included in the appendix submitted with the petition.

DATED THIS 30TH day of May, 2017.

HAFTERLAW

By: _____

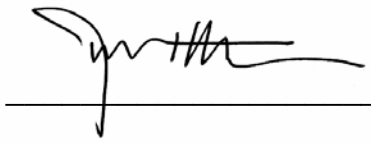
JACOB L. HAFTER, ESQ.
Nevada Bar Number 9303
6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
Counsel for Appellant Kofi Sarfo, MD

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 30th day of May, 2017, I served a copy of the **EMERGENCY PETITION FOR WRIT PURSUANT TO NRAP 27(e)** via the Court's electronic court filing system and via electronic mail to:

Michael Sullivan, Esq.
Therese Shanks, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503
(775) 329-3151
msullivan@rbsllaw.com

Counsel for Nevada State Board of Medical Examiners

HAFTERLAW

By: