

EXHIBIT “A”

EXHIBIT “A”

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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).

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

4 7. The Board filed an investigative case against Dr. Sarfo in 2014 (Case
5 #14-15034).

6 8. All of these complaints were initiated through overly broad
7 investigatory letters requesting unlimited medical records for an uncertain
8 period of time. Dr. Sarfo never received a copy of the underlying complaint
9 in any of these cases.

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

12 10. In that case, the Board publicly alleged numerous violations of Nevada
13 Revised Statutes (NRS) Chapter 630, against Dr. Sarfo, including six (6)
14 violations of NRS 630.301(4), malpractice, as defined by Nevada
15 Administrative Code §630.040, and one (1) violation of NRS §630.3062(1),
16 keeping legible and complete medical records.

17 11. Ultimately, that case ended when Dr. Sarfo entered a no contest plea
18 for one count of failure to maintain timely, legible, accurate and complete
19 medical records relating to the diagnosis, treatment and care of a patient, a
20 violation of NRS 630.3062(1). For this, he received a public reprimand and

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

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

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

10 14. During this time period, Dr. Sarfo did have troubles transitioning from
11 paper charts to electronic medical records, causing some of his records to be
12 lost, disorganized or otherwise incomplete. This was an administrative issue
13 which his practice worked hard to resolve; one that the Board was completely
14 aware of while it was ongoing.

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

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

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

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

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

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

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

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

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

20

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

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

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

11 27. Through counsel, Dr. Sarfo asked that the Board delay the deadline
12 under the Order, pending the district court's review of the Petition in this
13 case; the Board's counsel denied the request.

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

17 29. The district court heard the motion for injunctive relief on April 26,
18 2017.

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

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

4 32. Dr. Sarfo have no other speedy or available remedy at law.
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EXHIBIT “1”

EXHIBIT “1”

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

5 *Counsel for Kofi Sarfo, MD*
6

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

9 **KOFI SARFO, M.D.;**

10 Petitioner,

11 vs.

12
13 **NEVADA STATE BOARD OF**
MEDICAL EXAMINERS,

14 Respondents.
15
16
17

Case Number: _____

Department Number: _____

18
19 **DECLARATION OF KOFI SARFO, MD IN SUPPORT OF PETITION FOR WRIT**
20 **AND MOTION TO HAVE PETITION HEARD ON SHORTENED TIME**

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

- 22
- 23 1. That I am a physician duly licensed to practice in the State of Nevada.
 - 24 2. That I am the Petitioner in the above-entitled matter and am familiar with the facts and
25 circumstances of the action herein.
 - 26 3. That I have been licensed as a physician in the State of Nevada since 2004.
 - 27 4. That I have an extensive history with investigations conducted by the Nevada State Board
28 of Medical Examiners (“Board”).



- 1 5. The Board was a serial filer of investigatory and administrative cases against me.
- 2 6. The Board has filed investigatory and administrative cases in 2010 (Case #10-12353),
3 2011 (Case # 11-13343), 2012 (Case #s 12-13762, 12-14231, and 12-29257-1), and 2014 (14-
4 15034).
- 5 7. Only one of these investigatory complaints actually matriculated into a formal
6 administrative complaint – case number 12-29257.
- 7 8. In that case, the Board alleged numerous violations of Nevada Revised Statutes (NRS)
8 Chapter 630, including six (6) violations of NRS 630.301(4), malpractice, as defined by Nevada
9 Administrative Code §630.040, and one (1) violation of NRS §630.3062(1), keeping legible and
10 complete medical records.
- 11 9. The Board made this administrative complaint public.
- 12 10. I suffered severe hardships once this complaint was made public.
- 13 11. I had to disclose the complaint to all hospitals where I have privileges, as well as all
14 insurers with whom I am contracted to provide medical services.
- 15 12. The administrative complaint, alone, jeopardized my ability to work at various hospitals
16 and surgery centers, as well as my ability to remain under contract with various payors.
- 17 13. Ultimately, that case ended when I entered a no contest plea for one count of failure to
18 maintain timely, legible, accurate and complete medical records relating to the diagnosis,
19 treatment and care of a patient, a violation of NRS 630.3062(1).
- 20 14. I received a public reprimand and had to pay the Board’s investigatory costs for this case.
- 21 15. During this time period, I did have troubles transitioning from paper charts to electronic
22 medical records, causing some of my records to be lost, disorganized or otherwise incomplete.
23 This was an administrative issue which my practice worked hard to resolve.
- 24 16. On March 15, 2017, I received a letter from Don Andreas, Deputy Chief of Investigations
25 for the Board.
- 26 17. In this March 15, 2017, letter I was asked to provide a “written response” to allegations
27 that I engaged “poor documentation, fail[ure] to keep legible, accurate and complete medical
28 records, and ...billing for services not rendered” for five patients.



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

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

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

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

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

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

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

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

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

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

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

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

24 30. If the Board has a concern about a particular procedure I provided these patients, or a
25 specific allegation of misconduct, I would be more than happy to address that concern with
26 particularity.
27
28

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

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

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

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

8 Dated this 16th day of March, 2017.

9
10 Signature:

_____ KOFI SARFO, MD

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



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

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

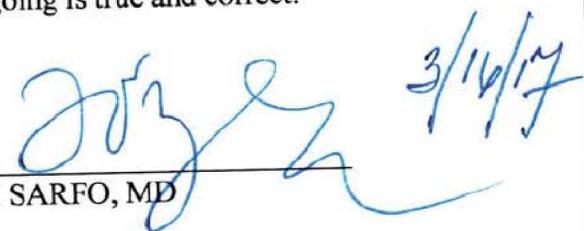
7 32. If I do not comply with the Board's request within 21 days of March 15, 2017, I can
8 face additional disciplinary sanctions.

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

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

11 Dated this 16th day of March, 2017.

12 Signature:

13  3/16/17
14 KOFI SARFO, MD

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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]

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”

EXHIBIT “D”

EXHIBIT “D”



JACOB HAFTER, Esq.
jhafter@hafterlaw.com

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

March 16, 2017

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

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

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

Dear Mr. Andreas:

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

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

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

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

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

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

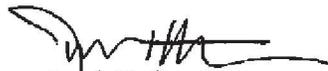
It should noted, however, that Dr. Sarfo is respectful of his obligations as a licensee in this State. For that reason, we are providing you with this letter and the following explanation.

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. At this point, physicians need to stop allowing the Board to steamroll all over them. Dr Sarfo is willing to stand up for himself and physicians across this great State to try to reign you into a reasonable regulatory practice.

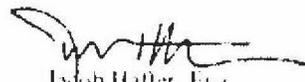
It should be noted, however, that Dr Sarfo is respectful of his obligations as a doctor in this State. For that reason, we are providing you with this letter and the following explanation:

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

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

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

Very truly yours,


Jacob Haller, Esq.

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


KOFI SARFO, M.D.

3/16/17

EXHIBIT “E”

EXHIBIT “E”

SB 250 - 2003

Introduced on Mar 10, 2003

By Townsend, O'Connell

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

DECLARED EXEMPT

Fiscal Notes [View Fiscal Notes](#)

Effect On Local Government: *No.*

Effect on the State: *Yes.*

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

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.

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

May 30, 2003 Placed on General File.

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

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

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

May 31, 2003 In Assembly.

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

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

Jun 02, 2003 Placed on Second Reading File.

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

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

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

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

Jun 02, 2003 In Senate.

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

Jun 04, 2003 Enrolled and delivered to Governor.

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

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



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

BILL SUMMARY
72nd REGULAR SESSION
OF THE NEVADA STATE LEGISLATURE

SENATE BILL 250

Topic

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

Summary

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

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

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

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

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

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

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

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

Effective Date

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

LEGISLATIVE HEARINGS

MINUTES AND EXHIBITS

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

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

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

COMMITTEE MEMBERS PRESENT:

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

STAFF MEMBERS PRESENT:

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

OTHERS PRESENT:

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

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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

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

MR. HILLERBY:

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

CHAIRMAN TOWNSEND:

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

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

DR. HUG-ENGLISH:

Our board fines the actual costs of the hearing.

CHAIRMAN TOWNSEND:

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

CHAIRMAN TOWNSEND:

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

SENATOR O'CONNELL:

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

CHAIRMAN TOWNSEND:

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

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

SCOTT YOUNG, COMMITTEE POLICY ANALYST:

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

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

CHAIRMAN TOWNSEND:

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

MR. POWERS:

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

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

SENATOR O'CONNELL:

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

MR. POWERS:

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

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SENATOR CARLTON:

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

MR. POWERS:

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

SENATOR CARLTON:

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

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

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

CHAIRMAN TOWNSEND:

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

MR. LEE:

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

SENATOR O'CONNELL:

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

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

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

CHAIRMAN TOWNSEND:

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

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

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

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

SENATOR CARLTON:

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

MR. CRAIGIE:

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

MR. POWERS:

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

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

CHAIRMAN TOWNSEND:

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

MR. POWERS:

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

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

CHAIRMAN TOWNSEND:

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

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

MR. POWERS:

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

CHAIRMAN TOWNSEND:

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

SENATOR O'CONNELL:

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

CHAIRMAN TOWNSEND:

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

MR. LEE:

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

CHAIRMAN TOWNSEND:

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

MR. LEE:

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

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

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

SENATOR O'CONNELL:

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

DR. HUG-ENGLISH:

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

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

SENATOR O'CONNELL:

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

DR. HUG-ENGLISH:

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

SENATOR O'CONNELL:

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

MR. LEE:

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

SENATOR O'CONNELL:

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

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MR. LEE:

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

SENATOR O'CONNELL:

Your advertising budget is \$260,660?

MR. LEE:

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

CHAIRMAN TOWNSEND:

Is your advertising strategy the same as it has been?

MR. LEE:

Yes, we do public service announcements (PSAs).

SENATOR O'CONNELL:

Can you not get free public service announcements?

MR. LEE:

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

SENATOR CARLTON:

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

CHAIRMAN TOWNSEND:

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

MR. LEE:

Correct, for each year of the biennium.

CHAIRMAN TOWNSEND:

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

DR. HUG-ENGLISH:

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

CHAIRMAN TOWNSEND:

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

DR. HUG-ENGLISH:

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

CHAIRMAN TOWNSEND:

Have you talked to your lessor about abandoning the facility?

MR. LEE:

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

CHAIRMAN TOWNSEND:

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

DR. HUG-ENGLISH:

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

CHAIRMAN TOWNSEND:

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

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DR. HUG-ENGLISH:

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

CHAIRMAN TOWNSEND:

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

DR. HUG-ENGLISH:

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

CHAIRMAN TOWNSEND:

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

MR. LEE:

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

CHAIRMAN TOWNSEND:

You are proposing to double your rent?

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MR. LEE:

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

CHAIRMAN TOWNSEND:

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

MR. LEE:

Yes.

CHAIRMAN TOWNSEND:

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

MR. LEE:

Correct.

CHAIRMAN TOWNSEND:

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

DR. HUG-ENGLISH:

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

CHAIRMAN TOWNSEND:

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

DR. HUG-ENGLISH:

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

CHAIRMAN TOWNSEND:

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

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

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

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

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

DR. HUG-ENGLISH:
I am not sure.

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

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

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

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

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

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CHAIRMAN TOWNSEND:

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

MR. LEE:

No.

CHAIRMAN TOWNSEND:

Do you only pay for inside counsel?

DR. HUG-ENGLISH:

Correct.

CHAIRMAN TOWNSEND:

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

SENATOR O'CONNELL:

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

DR. HUG-ENGLISH:

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

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SENATOR O'CONNELL:

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

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

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

CHAIRMAN TOWNSEND:

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

DR. HUG-ENGLISH:

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

CHAIRMAN TOWNSEND:

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

DR. HUG-ENGLISH:

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

CHAIRMAN TOWNSEND:

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

DR. HUG-ENGLISH:

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

CHAIRMAN TOWNSEND:

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

DR. HUG-ENGLISH:

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

CHAIRMAN TOWNSEND:

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

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

MR. LEE:

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

CHAIRMAN TOWNSEND:

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

MR. LEE:

We have revenue other than registration of physicians.

CHAIRMAN TOWNSEND:

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

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MR. LEE:

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

CHAIRMAN TOWNSEND:

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

MR. LEE:

Correct.

CHAIRMAN TOWNSEND:

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

MR. LEE:

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

CHAIRMAN TOWNSEND:

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

DR. HUG-ENGLISH:

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

CHAIRMAN TOWNSEND:

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

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MR. LEE:

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

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

CHAIRMAN TOWNSEND:

Is cost the issue?

DR. HUG-ENGLISH:

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

CHAIRMAN TOWNSEND:

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

SENATOR O'CONNELL:

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

CHAIRMAN TOWNSEND:

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

DR. HUG-ENGLISH:

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

CHAIRMAN TOWNSEND:

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

SENATOR O'CONNELL:

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

CHAIRMAN TOWNSEND:

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

DR. HUG-ENGLISH:

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

SENATOR O'CONNELL:

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

CHAIRMAN TOWNSEND:

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

SENATOR O'CONNELL:

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

Senate Committee on Commerce and Labor
April 16, 2003
Page 28

CHAIRMAN TOWNSEND:

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

RESPECTFULLY SUBMITTED:

Makita Schichtel,
Committee Secretary

APPROVED BY:

Senator Randolph J. Townsend, Chairman

DATE: _____

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 KOFI SARFO, M.D.,

4 Appellant,

5 v.

6 NEVADA STATE BOARD OF
7 MEDICAL EXAMINERS,

8 Respondent.

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

Case No.: 73117

Electronically Filed
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

9
10
11
12
13
14
15 COMES NOW, Appellant KOFI SARFO, M.D., and hereby files this
16 **EMERGENCY MOTION FOR INJUNCTIVE RELIEF**¹ seeking an order
17 prohibiting Respondents, and any of their collective agents, employees,
18 attorneys, and anyone acting on their behalf, from enforcing the March 14,
19 2017, Order issued by the Investigative Committee of the Nevada State Board
20 of Medical Examiners (“Board”), until this matter can be heard by this Court.
21

22
23 ¹ Appellant was given one day to refile a previously filed motion for
24 injunctive relief. Unfortunately, the Jewish holiday of Shavuot 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.

1 **I. INTRODUCTION**

2 This case challenges the McCarthyistic tactics of the Nevada State
3 Board of Medical Examiners (“Board”) in their initial investigation of
4 complaints received by a third party. To be clear, Dr. Sarfo is not asking
5 this Court to prevent the Board from completing their legislative duty; rather,
6 he is asking this Court to prevent them from doing so in a manner which
7 violates Dr. Sarfo’s constitutional due process rights by enforcing an
8 administrative order that is overly broad, as to time, and was initiated by an
9 anonymous complaint, depriving him from understanding the true nature of
10 the allegations being made against him. Further, Dr. Sarfo is seeking
11 protection from the Board’s threat that an improper response could lead to a
12 variety of charges, including not cooperating with the Board during an
13 investigation. Dr. Sarfo objects to a blanket demand for five patient records,
14 without limitation to a particular procedure, visit or, for that matter, time
15 frame which is allegedly the subject to the investigation.²

16 _____
17 ² It should be noted that, to some respects, Dr. Sarfo has already
18 prevailed in this case (notwithstanding the Board’s overzealous motion for
19 attorneys fees and for personal sanctions against Mr. Hafter because of Mr.
20 Hafter’s advocacy for physicians’ constitutional rights at their expense,
21 which is currently pending in the district court). Because of this writ
22 proceeding, the Board agreed to limit the scope of their inquiry to a two year
23 period, as opposed to an open ended period investigation. See Stipulation
24 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

1 complaint, where they can assess the physician fees and costs, most of which
2 are used to offset the salaries (and justify the need for) the investigators and
3 attorneys that oversee this entire process.

4 As it relates to Petitioner, on March 14, 2017, the Investigative
5 Committee of the Board issued an Order requiring Dr. Sarfo to produce the
6 entire medical records for five (5) patients, and requiring him to provide a
7 “written response” to allegations that he engaged “poor documentation,
8 fail[ure] to keep legible, accurate and complete medical records, and
9 ...billing for services not rendered” for five patients (the “Order”). No
10 further information about the complaint was given. There was no limitation
11 as to dates, or reference to any particular procedures which are alleged to
12 have been billed for by not occurred. If Dr. Sarfo does not comply, he will
13 be subject to new additional charges of violation of the Medical Practice Act,
14 specifically, violating NRS §3065(2)(a). This deadline has been extended to
15 June 11, 2017, or twenty days from the notice of entry of order denying the
16 motion for preliminary injunction filed in the district court.

17 18 **II. LEGAL STANDARD**

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

1 As to the motion for a stay or injunction, in determining whether to
2 grant such, this court considers the following factors: (1) whether the object
3 of the appeal will be defeated if the stay is not granted, (2) whether appellants
4 will suffer irreparable or serious injury if the stay is denied, (3) whether real
5 party in interest will suffer irreparable or serious injury if the stay is granted,
6 and (4) whether appellant is likely to prevail on the merits in an appeal. NRAP
7 8(c); see also Fritz Hansen A/S v. Dist. Ct., 116 Nev. 650, 657 6 P.3d 982,
8 986 (2000).

9 10 **III. ARGUMENT**

11 **A. APPELLANT HAS A LIKELIHOOD OF SUCCESS ON THE** 12 **MERITS**

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

15 First, the Board's reliance on NRS §630.336(4)'s requirement that
16 complaints and investigations related thereto remain confidential to prevent
17 disclosure of the complaint to the physician that is the subject of the
18 complaint is erroneous and violates the legislative intent of the statute.
19 Second, the Board's practice of keeping complaints confidential, even from
20 the target physician of the complaint, violates this State's physicians'
21 procedural due process rights. Third, the refusal to provide a target physician
22 with a copy of the complaint fails to safeguard the physician from
23 overzealous prosecution. And, fifth, the Board's demand for five (5) patient
24 files without limitation to time frame or procedure is an overbroad request,

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

3
4 **1. Legal Standard for a Petition for Writ**

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

19 A writ of prohibition is the appropriate remedy for an administrative
20 body’s improper exercise of jurisdiction. See NRS 34.320; see also Smith,
21 107 Nev. at 677, 818 P.2d at 851. “A writ of mandamus is available . . . to
22 control an arbitrary or capricious exercise of discretion.” Humphries v. Eighth
23 Judicial Dist. Court, 129 Nev., Adv. Op. 85, 312 P.3d 484, 486 (2013)
24 (quoting Int’l Game Tech., Inc. v. Second Judicial Dist. Court, 124 Nev. 193,

1 197, 179 P.3d 556, 558 (2008)). “An exercise of discretion is considered
2 arbitrary if it is founded on prejudice or preference rather than on reason and
3 capricious if it is contrary to the evidence or established rules of law.” Nev.
4 Dep’t of Pub. Safety v. Coley, 132 Nev., Adv. Op. 13, 368 P.3d 758, 760
5 (2016) (internal quotations omitted). Further, it should be noted that “[a] writ
6 of prohibition [may] issue to interdict retrial in violation of a defendant’s
7 constitutional right not to be put in jeopardy twice for the same offense.”
8 Glover v. Eighth Judicial Dist. Court, 125 Nev. 691, 701, 220 P.3d 684, 692
9 (2009).

10
11 **2. The Board’s Refusal to Disclose the Complaint to the Physician**
12 **that is the Subject of the Complaint is Erroneous**

13 It is well understood that the Board has a duty to regulate the profession
14 of allopathic medicine in the State of Nevada. See NRS §630.003.
15 Specifically, the Legislature has stated precise reasons for giving the Board
16 its authority; patient safety and protection of the public are primary reasons
17 for the existence of the Board. Id.³

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

21
22 ³ While this is the intent, Appellant makes no concession that the Board
23 is capable of actually protecting the public, or that the cases it chooses to
24 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.

1 Certain other parties, such as hospitals and insurers, are also required to report
2 occurrences to the Board. See, e.g., NRS §630.3067 and 630.307. Other
3 times, a report of an occurrence can be made directly to the Board by any
4 member of the public. See NRS §630.309.

5 NRS §630.336(4) states that “... a complaint filed with the Board
6 pursuant to NRS 630.307, all documents and other information filed with the
7 complaint and all documents and other information compiled as a result of an
8 investigation conducted to determine whether to initiate disciplinary action
9 are confidential.” The Board has interpreted this statute to mean that all
10 materials related to the matter are considered confidential, to the point that the
11 subject physician about who the complaint was made, is NOT entitled to see
12 the actual complaint made (or a verbatim copy). The Petition underlying this
13 case challenges, in part, this practice. Fundamental principles of due process
14 require that a physician who is subject to a complaint should be entitled to see
15 the contents of the complaint, at the same time that the physician is ordered to
16 respond to the allegations contained therein.

17 As a result, this is a case of statutory interpretation. “Statutory
18 interpretation is a question of law subject to de novo review.” State v. Catanio,
19 120 Nev. 1030 1033, 102 P.3d 588, 590 (2004). “We must attribute the plain
20 meaning to a statute that is not ambiguous.” Id. “An ambiguity arises where
21 the statutory language lends itself to two or more reasonable interpretations.”
22 Id.

23 This case shows how NRS §630.336(4) can lead to two reasonable
24 interpretations. The Board believes that every document related to a

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

9 While confidentiality of Board investigations has not been discussed by
10 the Nevada Supreme Court, the confidentiality of judicial discipline
11 proceedings has. See Whitehead v. Nevada Com’n on Judicial Discipline, 893
12 P.2d 866, 111 Nev. 70 (Nev., 1995). In that case, the Nevada Supreme Court,
13 building upon case law from throughout the land, recognized that “[t]he State
14 of Nevada has a compelling interest, enthroned in its constitution, to assure
15 the confidentiality of judicial discipline proceedings until there has been a
16 decision to discipline.” Id. (citations omitted). However, in that case and all
17 of the cited cases, the proceedings were not designed to exclude the target,
18 but, rather, to keep the public out from the proceeding. In this case, the same
19 applies – the confidentiality should not to exclude the subject physician, but,
20 rather, the public in an attempt to protect the licensee from the fallout that
21 comes with such accusations.

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

1 confidentiality component to investigations, specifically, was codified. In
2 1989, only subsection 3 of NRS §630.336 was amended. The amendment was
3 more technical, than anything.

4 It was in 2003 when the major revision to this law occurred. In that
5 change, NRS §630.336 was amended to elaborate on the confidential nature
6 of investigations. When reviewing the legislative history, however, it is clear
7 that the concern was the frivolous complaints that are made public would be
8 harmful to physicians in the State. See excerpt of legislative history of SB
9 250 (2003), a true and correct copy of which is attached hereto as **Exhibit**
10 **“H”** at page 172 of April 16, 2003 hearing. There is no discussion how the
11 Board sought confidentiality to preclude the subject physician from seeing the
12 complaint.

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

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

22
23 **3. The Board’s Investigation Process Violates Physicians’ Due**
24 **Process Rights**

1 Basic constitutional due process rights also requires that the subject
2 physician be entitled to see the actual complaint before being required to
3 respond. See, e.g., U.S. Const. XIV; Bd. of Regents of State Colls. v. Roth,
4 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Before being
5 deprived of a protected interest, a person must be afforded some kind of
6 hearing, “except for extraordinary situations where some valid government
7 interest is at stake that justifies postponing the hearing until after the event.”
8 Boddie v. Connecticut, 401 U.S. 371, 378-79, 91 S.Ct. 780, 28 L.Ed.2d 113
9 (1971).

10 In evaluating procedural due process claims, this Court must engage in
11 a two-step inquiry: (1) the Court must ask whether the state has interfered with
12 a protected liberty or property interest; and (2) the Court must determine
13 whether the procedures “attendant upon that deprivation were constitutionally
14 sufficient.” Humphries v. County of Los Angeles, 554 F.3d 1170, 1184-85
15 (9th Cir.2009) (*quoting* Ky. Dep’t of Corr. v. Thompson, 490 U.S. 454, 460,
16 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989)).

17
18 *a. The Protected Property Interest*

19 It is well-established that a fundamental right may not be impaired
20 without due process of law. Chudacoff v. Univ. Med. Ctr. of S. Nev., 609
21 F.Supp.2d 1163, 1172–73 (D.Nev.2009); Maiola v. State, 120 Nev. 671, 674–
22 75, 99 P.3d 227, 229 (2004). A physician’s interest in practicing medicine is
23 a property right that must be afforded due process. Minton v. Bd. of Med.
24 Exam’rs, 110 Nev. 1060 1082, 881 P.2d 1339, 1354 (1994), *disapproved of*

1 *on other grounds by* Nassiri v. Chiropractic Physicians’ Bd.,130 Nev. Adv.
2 Op. 27, 327 P.3d 487, 489 (2014); *see also*, Molnar v. State ex rel. Bd. of Med.
3 Exam’rs of the State of Nev., 105 Nev. 213, 216, 773 P.2d 726, 727 (1989);
4 Potter v. State Bd. of Med. Exam’rs, 101 Nev. 369, 371, 705 P.2d 132, 134
5 (1985) ; Kassabian v. State Board of Medical Examiners, 68 Nev. 455, 464,
6 235 P.2d 327 331 (1951). The private interest at stake here is the ability to
7 practice medicine within the State of Nevada. The interest extends further,
8 however, in that a licensing action in one jurisdiction could limit a physician’s
9 ability to practice anywhere in the country, as most jurisdictions have
10 reciprocal discipline amongst physicians. To that end, the amount of process
11 must accord sufficient respect for a professional’s life and livelihood

12
13 *b. Whether the Procedures Were Constitutionally Sufficient*

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

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

24 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

1 licensing action would have dramatic consequences for the physician.
2 Additionally, the Board, as an agency that serves to protect the public, only
3 serves as a reliable source of information if it receives accurate reports; an
4 erroneous report reduces the Board's utility. As a result, there are substantial
5 benefits to having procedural safeguards in place to protect both the physician
6 and the Board from erroneous or improper reporting. Both are best served by
7 having the safeguards in place on the front-end of the decision-making
8 process; neither is served by remedial provisions. Once the damage is done, it
9 is hard to undo.

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

21 It is for this reason that notice of actual allegations is a fundamental
22 requisite of due process that is employed as a procedural safeguard in any
23 judicial action. See Browning v. Dixon, 114 Nev. 213, 217, 954 P.2d 741, 743
24 (1998). There is no rational basis for why the complaint or the complainant's

1 identity need be kept confidential from the physician who is the target of the
2 investigation. Because Board investigations center on patient care, the
3 identity of the patient is always known. If the complaint is filed by a
4 whistleblower, the whistleblower would have statutory protection for such
5 activities, making anonymity a non-issue. The only people who are protected
6 by the confidentiality is someone who would file a false complaint, or a
7 competitor who is trying to use the administrative process to harm his or her
8 competition. That is not a compelling government interest over the due
9 process rights that the physician has in this case.

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

20
21 **4. The Board’s Approach Eliminates Any Safeguards the Licensee**
22 **May Have Against Overzealous Prosecution**

23 “[T]he legal process due in an administrative forum ‘is flexible and
24 calls for such procedural protections as the particular situation demands.’”

1 Minton v. Bd. of Med. Examiners, 110 Nev. 1060 1082, 881 P.2d 1201, 1204
2 (1982); see also Dutchess Bus Servs, Inc. v. Bd. of Pharmacy, 124 Nev. 701,
3 713, 191 P.3d 1159, 1167 (2008) (providing that the discovery provisions of
4 the Nevada Rules of Civil Procedure do not apply to administrative agencies).
5 Relying on this standard, this Court in Minton, used the Matthews balancing
6 test to determine whether a given procedure appropriately safeguards an
7 individual's due process guarantees. Id. The Court then stated that "[u]nder
8 the second prong of the due process test, however, the absence of safeguards
9 **must** suggest a risk of erroneous deprivation." Id. (emphasis added).

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

17 This State needs safeguards to protect its physicians (or those who are
18 left and those who were brave enough to come in the first place). The Board
19 is known for abusive practices and unconstitutional laws. See, e.g., Tate v.
20 State Bd. of Medical Examiners, 356 P.3d 506, 131 Nev. Adv. Op. 67 (Nev.,
21 2015)(striking NRS §630.356(2) as being an unconstitutional violation of the
22 separation of powers doctrine). It is not uncommon for the Board to target a
23 physician, usually, they are a solo practitioner or practitioner in a small
24 practice with only one or two partners, as opposed to being in a large group,

1 and make onerous demands from that physician without an understanding as
2 to why the Board is making such a request. These fishing expeditions expose
3 the physician to severe mental anguish, as well as resources expounded to
4 respond to the inquiry. Worse, rare if ever, has the physician been provided
5 with notice of the allegations made against him or her; rather, it is shoot first,
6 respond second. This is nothing more than the Board's abuse of its powers.

7 Petitioner should know – he has been here before. The Board and the
8 Petitioner have a long history. The Board was a serial filer of cases against
9 Dr. Sarfo. They filed investigatory cases in 2010 (Case #10-12353), 2011
10 (Case # 11-13343), 2012 (Case #s 12-13762, 12-14231, and 12-29257-1), and
11 2014 (14-15034). Finally, after exhaustive defense efforts, the Board
12 appeared to have stopped with its frivolous investigations against Dr. Sarfo.
13 Such termination, however, did not make up for the expense and stress of
14 having to continually defend his medical license against the Board.

15 Naturally, one thing, “where there is smoke...” – right? So, it should
16 be disclosed that one of these investigatory complaints *did* actually
17 matriculate into a formal administrative complaint – case number 12-29257.
18 In that case, despite public allegations that Dr. Sarfo engaged in numerous
19 cases of malpractice and other statutory violations, that case ended with Dr.
20 Sarfo entering a no contest plea for one count of failure to maintain timely,
21 legible, medical records. So, after defending himself in over the course of
22 five years, at the cost of thousands of dollars, the only way that the Board
23 protected the public is through a reprimand about poor documentation –
24 something that Dr. Sarfo was aware of because of administrative issues in his

1 practice converting to electronic medical records. Does that really serve the
2 public interest, or is it more governmental waste and abuse of power simply
3 because a Board investigator dug his heels in?

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

9
10 **B. APPELLANT IS ABOUT TO SUFFER IMMEDIATE AND**
11 **IRREPARABLE INJURY, LOSS, OR DAMAGE**

12 In this instant action, Appellant seeks this Court's intervention to stop
13 enforcement of the Order requiring the production of five (5) patients'
14 complete medical records *and* respond to vague allegations of wrongdoing.
15 If Dr. Sarfo fails to comply with the order, he can be subject to discipline
16 independent of any discipline the Board may seek as a result of the underlying
17 investigation. As such would adversely affect his license to practice medicine,
18 as discussed above, Dr. Sarfo's interests are severe and equal to the ability to
19 practice medicine within the State of Nevada. The interest extends further,
20 however, in that a licensing action in one jurisdiction could limit Dr. Sarfo's
21 ability to practice anywhere in the country, as most jurisdictions have
22 reciprocal discipline amongst physicians. It could also limit Dr. Sarfo's
23 ability to work in hospitals, and participate in payor panels. To that end, the
24

1 interests are tantamount to maintaining Dr. Sarfo’s professional’s life and
2 livelihood.

3
4 **C. PUBLIC INTEREST WEIGHS IN FAVOR OF THE**
5 **PRELIMINARY INJUNCTION**

6 Notwithstanding, public interest weighs in favor of the preliminary
7 injunction. Harm to a community has long been recognized as sufficient harm
8 to warrant an injunction. *See, e.g., Funk Jewelry Co. v. State ex rel. La Prade*,
9 46 Ariz. 348, 357, 50 P.2d 945, 948 (Ariz.1935); Caribbean Marine Services
10 Co., Inc., supra, 844 F.2d at 674 (“Our cases have emphasized, however, that
11 when the public interest is involved, it must be a necessary factor in the district
12 court's consideration of whether to grant preliminary injunctive relief.”). “The
13 decision whether to grant . . . relief turns also on whether or not the balance of
14 irreparable damage favors issuance of a preliminary injunction, and on
15 relevant public interests.” Friends of the Earth, Inc. v. Coleman, 518 F.2d
16 323, 330 (9th Cir. 1975).

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

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

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

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

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

11
12 **D. THE OBJECT OF THE APPEAL WILL BE DEFEATED IF THE**
13 **STAY IS NOT GRANTED**

14 One of the reasons that it is so hard to challenge the Board's
15 investigative procedures is because the deadlines come and go. Without a
16

17 ⁴ The Board was a serial filer of cases against Dr. Sarfo. They filed
18 investigatory cases in 2010 (Case #10-12353), 2011 (Case # 11-13343),
19 2012 (Case #s 12-13762, 12-14231, and 12-29257-1), and 2014 (14-15034).
20 Out of all of these investigations, only one matriculated into a formal
21 administrative complaint – case number 12-29257. And, yet, even still,
22 despite being the subject of a formal complaint where the Board alleged
23 numerous violations of Nevada Revised Statutes (NRS) Chapter 630,
24 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).

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

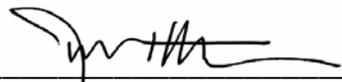
5
6 **IV. CONCLUSION**

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

12 DATED THIS 30TH day of May, 2017.

13 **HAFTERLAW**

14
15 By:



16 JACOB L. HAFTER, ESQ.
17 Nevada Bar Number 9303
18 6851 W. Charleston Boulevard
19 Las Vegas, Nevada 89117
20 *Counsel for Appellant Kofi Sarfo, MD*
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EXHIBITS

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- 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)

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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:

JACOB L. HAFTER, ESQ.
Nevada State Bar No. 9303
HAFTERLAW
6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
Phone: (702) 405-6700
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Counsel for Petitioner

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

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

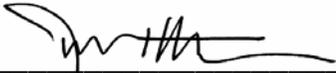
1 issued pending appeal, in conformance with NRAP 8. See Exhibit “F”. The
2 district court denied that request. See Exhibit “G”.

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

5 DATED THIS 30th day of May, 2017.

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HAFTERLAW

By: 

JACOB L. HAFTER, ESQ.
Nevada Bar Number 9303

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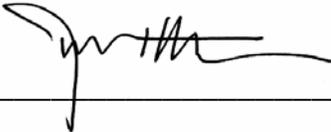
CERTIFICATE OF SERVICE

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:

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Therese Shanks, Esq.
Robison, Belaustegui, Sharp & Low
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*Counsel for Nevada State Board of
Medical Examiners*

HAFTERLAW

By:  _____