

Legal Brief

Complaint Investigations and Hearings of the S.D. Board of Medical & Osteopathic Examiners

This Legal Brief was drafted for general informational purposes only. It is not meant to be a comprehensive guide, nor should it be construed as legal advice. The information in this brief is current as of May 1, 2013; readers should consult the most recent versions of referenced statutes, regulations, and cases to ensure there have been no material changes.

Summary

Physicians practicing medicine or osteopathy in South Dakota are subject to supervision and discipline by the South Dakota Board of Medical and Osteopathic Examiners (“SDBMOE”). In order to carry out its oversight and enforcement responsibilities, SDBMOE and its officers, agents, and employees are authorized, during regular business hours, to enter and inspect any place where medicine or osteopathy are practiced.

SDBMOE may cancel, revoke, suspend, or limit the license, certificate, or permit of any physician, surgeon, or osteopathic physician or surgeon issued upon proof of professional incompetence, unprofessional or dishonorable conduct, or any other violation of state law regulating physicians and surgeons.

Persons subject to disciplinary proceedings initiated by SDBMOE or its staff are entitled to certain due process protections, including notice, a hearing, and an opportunity to respond and present evidence.

SDBMOE is required by law to report certain disciplinary proceedings, civil or criminal proceedings, and settlements to the national data bank and all other entities deemed necessary by the Board in compliance with state and federal law. The practitioner should immediately engage experienced legal counsel, and should take steps to become fully aware of those reporting requirements and the ramifications of those reports as soon as possible after becoming aware of actual or threatened proceedings by SDBMOE.

Discussion

SDBMOE Oversight and Disciplinary Powers

South Dakota law grants broad licensing, oversight, and disciplinary powers to the Board of Medical and Osteopathic Examiners (“SDBMOE” or the “Board”). The Board consists of nine (9) members, all appointed by the Governor. The membership must consist of six (6) doctors of medicine, one (1) doctor of osteopathy, and two (2) lay members. The Board may employ support staff, legal counsel, and such other consultants as it deems necessary. The chief executive officer of the Board is the Executive Secretary. The Executive Secretary is appointed and employed by the Board.

The Board has the power to grant licenses to practice to physicians and doctors of osteopathy, as well as various other health care professionals, and to establish the standards for obtaining a license. The Board also has the power to cancel, revoke, suspend, or limit the license of a practitioner previously licensed by the Board.

Complaints and Investigations

Disciplinary proceedings, including those that may lead to the revocation or suspension of a license, generally are commenced by the filing of a complaint with the Board. Anyone can file a complaint against a physician; however, typically a complaint is filed by a patient, a patient's family, a member of the physician's staff, or another physician. Complaints must be submitted in writing to the Executive Secretary of the SDBMOE. A further description of the complaint process and the forms used to submit a complaint are available at:

<http://www.sdbmoe.gov/?q=content/complaints>.

The Executive Secretary may initiate an investigation based on a written complaint or, with or without a complaint, based upon reasonable suspicion of a violation. The complaint itself is not a public record. The Executive Secretary must dismiss any complaint that concerns matters over which the Board does not have jurisdiction, and must notify the complaining party of that action.

If the Executive Secretary concludes that the complaint concerns matters within the Board's jurisdiction, such as compliance with licensing standards and requirements, and is not frivolous, the Executive Secretary must proceed to investigate the complaint. The Executive Secretary must give the subject of the investigation written notice, which notice must include a statement that the licensure or licensee is entitled to due process rights, including the right to notice, and an opportunity to be heard and to be represented by counsel. The law authorizes the Executive Secretary to appoint a member of the Board to assist in the investigation.

The Executive Secretary may at any point in the investigation appoint one (1) or two (2) Board members to assist with the investigation and act as a review panel. The review panel may make a determination that the investigation should continue, or to close the investigation, provide a written warning or commence disciplinary proceedings.

Upon completion of an investigation, the Executive Secretary is authorized by law to take the following actions:

1. Dismiss the complaint as unsubstantiated or requiring no further action. Dismissal of a complaint is not a public record;
2. Issue a letter of concern, which shall be placed in the licensee's permanent records. A letter of concern is not a public record;
3. Recommend the Board issue a public reprimand to the licensee;
4. Recommend the Board re-open and modify the license to include compliance with specified terms and conditions; or
5. Recommend the Board suspend or revoke the license.

If the Executive Secretary recommends issuance of a public reprimand, or re-opening and modification of a license, or suspension or revocation of a license, the Executive Secretary must notify the licensee of the right to contest the recommendation.

If contested, the Executive Secretary must issue a petition for hearing that sets out the recommendation and the reasons for the recommendation. The act of issuing the petition for hearing initiates the contested case process, including the process for an evidentiary hearing. A copy of the petition for hearing must be sent to the licensee.

Short of having a hearing, if the parties can agree on the terms, the Executive Secretary and licensee may enter into a settlement agreement concerning the recommendation to be made to the Board. The subject of the investigation may also choose not to renew the license, permit, or certificate after a complaint investigation has been initiated by the Executive Secretary. A failure to renew after investigation has been initiated shall be reported as "withdrawn under investigation" in the Board's permanent license files and to any national databases to which the Board is required to report licensure action.

If the matter cannot otherwise be resolved, a hearing is held. The hearing process is described below in more detail.

The practitioner is advised to engage legal counsel, preferable counsel with experience dealing with licensure proceedings before an administrative agency, as soon as possible upon learning of a pending or threatened investigation or complaint.

Summary Suspension

If the Board makes a finding that protection of the public health, safety, or welfare imperatively requires emergency action, or if the Board has cause to believe a license has been improperly granted (such as in the case of the applicant providing false information to the Board), the Board may summarily suspend a practitioner's license. Summary suspension may happen very quickly, but the Board is required to give as much advance notice to the practitioner and opportunity to respond as is reasonable given the circumstances. Once a summary suspension has occurred, unless the suspension order provides otherwise, the practitioner must cease his or her practice under the suspended license. The Board must promptly initiate the full hearing process, including giving the licensee notice and an opportunity to present evidence. After the hearing process is completed, the Board may unconditionally reinstate the license, reinstate it with conditions, revoke the license, or take other appropriate action.

Acts Considered Unprofessional Conduct – Professional Incompetence

In addition to investigations resulting from a written complaint, the Executive Secretary may also initiate an investigation upon reasonable suspicion that a licensee is in violation of a standard for professional conduct. A "reasonable suspicion" can be something less than the more demanding "probable cause" standard, and is generally defined as information sufficient to lead a reasonably prudent person to believe that unlawful activity may have been committed or is about to be committed.

South Dakota law sets out the following specific conduct which is deemed unprofessional or dishonorable conduct:

1. Producing or aiding or abetting a criminal abortion;
2. Employing what is known as cappers or steerers;
3. Obtaining any fee on the assurance that a manifestly incurable disease can be permanently cured;
4. Willfully betraying a professional confidence;
5. All advertising of medical business in which untruthful or improbable statements are made or which are calculated to mislead or deceive the public;
6. Conviction of any criminal offense of the grade of felony, any conviction of a criminal offense arising out of the practice of medicine or osteopathy, or one in connection with any criminal offense involving moral turpitude;
7. Habits of intemperance or drug addiction, calculated in the opinion of the SDBOME to affect the licensee's practice of the profession;
8. Refusal or neglect to report the existence of a diseased or unsanitary condition to the proper health authorities, as prescribed by the regulations of the board;
9. Prescribing intoxicants, narcotics, barbiturates, or other habit-forming drugs to any person in quantities and under circumstances making it apparent to the Board that the prescription was not made for legitimate medicinal purposes or prescribing in a manner or in amounts calculated in the opinion of the Board to endanger the well-being of an individual patient or the public in general;
10. Splitting fees or giving to any person furnishing a patient any portion of the fees received from the patient or paying or giving to any person consideration of any kind for furnishing a patient;
11. Failure to disclose one's school of practice or one's professional academic degree when using a professional title or designation;
12. Sustaining any physical or mental disability which renders the further practice of a licensee's profession dangerous;
13. Failure to comply with state or federal laws on keeping records regarding possessing and dispensing of narcotics, barbiturates, and habit-forming drugs;

14. Falsifying the medical records of a patient or any official record regarding possession and dispensing of narcotics, barbiturates, and habit-forming drugs or regarding any phase of medical treatment of a patient;
15. Presenting to the Board any license, certificate, or diploma which was obtained by fraud or deception practiced in passing a required examination or which was obtained by the giving of false statements or information on applying for the license;
16. Illegally, fraudulently, or wrongfully obtaining a license required by this chapter by the use of any means, devices, deceptions, or helps in passing any examination or by making false statements or misrepresentations in any applications or information presented;
17. Conviction of a violation of the abortion informed consent requirements of SDCL 34-23A-10.1;
18. Performing medical services which have been declared, by declaratory ruling of the Board, to be of no medical value;
19. The exercise of influence within the physician-patient relationship for the purposes of engaging a patient in sexual activity. For the purposes of this subdivision, the patient is presumed incapable of giving free, full, and informed consent to sexual activity with the physician;
20. Engaging in gross or immoral sexual harassment or sexual contact;
21. Consistently providing or prescribing medical services or treatments which are inappropriate or unnecessary;
22. Any practice or conduct which tends to constitute a danger to the health, welfare, or safety of the public or patients or engaging in conduct which is unbecoming a person licensed to practice medicine;
23. Failure to fulfill a valid obligation to a federal or state student loan or scholarship program for medical school education designed to provide medical services to underserved geographical areas; and
24. Discipline by another state, territorial, or provincial licensing board or the licensing board of the District of Columbia.

The Executive Secretary may also commence an investigation based on a complaint or other reasonable suspicion of professional incompetence or mental incompetence. "Professional incompetence" is defined as a deviation from the statewide standard for the minimum degree of skill and knowledge necessary for the performance of characteristic tasks of a physician or surgeon in at least a reasonably effective way. In the case of mental incompetence, the adjudication of incompetency must be made by a court of competent jurisdiction.

Hearings and Contested Cases

A petition to initiate disciplinary proceedings must be signed by the person commencing the proceedings (most often the SDBMOE Executive Secretary) and contain the following information: the name and address of the licensee, the basis for the request for hearing, recitation of the applicable statutes or regulations under which the petitioner is requesting Board action, and the relief requested by the petitioner. As noted above, the Executive Secretary of the SDBMOE may prepare and file a petition for hearing.

All petitions for hearing must be formally filed with the Executive Secretary. The Executive Secretary is required to maintain an official record of contested case proceedings held before the Board.

Upon receipt of a petition for hearing, the Board president, if asked to do so by staff or the licensee, may appoint a hearing examiner to conduct the contested case hearing, or may schedule the matter to be heard by the Board itself. Depending on timing and availability, the persons appointed as hearing examiners are either lawyers from the South Dakota Office of Hearing Examiners or outside lawyers hired on a contract basis.

Hearings must be conducted in accordance with the South Dakota Administrative Procedures Act. The parties to a hearing are the Executive Secretary and the licensee.

The licensee has the right to appear at the hearing in person or by counsel, or both, to be present during the giving of all evidence, to inspect all documentary evidence, to examine and cross-examine witnesses, to present evidence in support of the licensee's position, and to have subpoenas issued to compel attendance of witnesses and production of evidence in the licensee's behalf.

The rules of evidence for a contested case hearing are similar to those for regular court proceedings (e.g., witnesses generally must have personal knowledge of the subject of their testimony, documents must be authenticated, only relevant evidence may be presented), except that the rules relating to hearsay evidence are relaxed in contested case proceedings.

As with other judicial and quasi-judicial proceedings, members of the SDBMOE are not permitted to communicate with the parties or their legal counsel concerning the substance of the proceedings outside of the hearing process. (Communications outside the hearing process are called “ex parte” communications.) Rather, the SDBMOE is tasked with making a decision based only on the evidence presented at the hearing. If the Executive Secretary appoints a Board member to assist in the investigation, that Board member may not participate in the decision-making process.

Board members are prohibited from participating in ex parte communications to protect the integrity of the adversarial process. Under the American system of justice, the decision-maker (in this case, the SDBMOE) is tasked with making a decision based on the relevant, admissible evidence presented at the hearing, which evidence is subject to being tested under cross-examination. Allowing one side or the other to present its version of the facts to one or more Board members without the benefit of cross-examination or the other protections of the adversarial system undermines the decision-making process and as a result makes it less trustworthy for both sides.

The testimony of a witness or documentary evidence related to a procedure before the Board to cancel, revoke, suspend, or limit a license are not subject to disclosure (whether pre-trial or at the trial) in any other legal or administrative proceedings, and are not admissible as evidence in any action of any kind in any court or arbitration forum.

No person in attendance at any such hearing of the Board may be required to testify as to what transpired at the hearing. These evidentiary limitations may not be used to deny a physician access to the evidence against the physician in the proceedings before the Board, or to deny a physician access to or use of information upon which a decision regarding the physician's staff privileges was based.

SDBMOE hearings regarding physicians are not open to the press or public absent the licensee's consent. See SDCL 36-4-31.5. The hearings concerning other licensees regulated by the SDBMOE are open to the public.

Decisions

If the Board hears the proceeding itself, it deliberates and then issues a written decision. The Board may require the parties to submit proposed findings of fact and conclusions of law for consideration at the Board's next meeting. The findings of fact and conclusions of law adopted by the Board constitute its final, formal decision on the matter.

If a hearing examiner hears the proceeding, the examiner must prepare and issue a proposed decision, including findings of fact and conclusions of law. The examiner must serve the proposed decision on the Board and the parties. The Board usually allows the parties to appear before it to present oral argument and objections to the examiner's proposed decision. The Board then issues a final decision that accepts, rejects, or modifies the findings and conclusions of the examiner. If the Board does not agree with the hearing examiner's findings and conclusions, the most likely result is that the Board would modify the examiner's findings and conclusions to conform to the decision of the Board. In any event, the Board's final decision, with accompanying findings of fact and conclusions of law, must be formally presented to the licensee and Executive Secretary, usually by First Class Mail.

Upon motion of the Executive Secretary, the Board may assess its costs associated with the contested case against the licensee, but only if the proceedings resulted in the Board taking disciplinary action against the licensee.

Appeals

The losing party may appeal the Board's decision to the Circuit Court. The Circuit Court's review is limited to the testimony and other evidence presented to the Board. The Circuit Court may affirm the decision of the Board, overturn it, or send the matter back to the Board for further proceedings.

If either party believes the Circuit Court's ruling is not legally sound, that party may appeal the decision to the South Dakota Supreme Court. As with the Circuit Court, the Supreme Court's review is limited to the testimony and evidence presented to the Board, and it also has the option to affirm or overturn the Board's actions, or send the matter back for further proceedings.

Unless the matter involves a question of federal law, there are no further appeals available beyond the South Dakota Supreme Court. If there are questions of federal law involved, a party may petition the United States Supreme Court to hear the case. The U.S. Supreme Court chooses the cases it hears; there is no "right" of an appeal to it. Because the U.S. Supreme Court only hears a few hundred matters a year out of the thousands of requests it receives, the chances of a petition for review being granted are very low. Absent extremely unusual circumstances, counsel is likely to advise not to seek further review from the U.S. Supreme Court.

Other Remedies

If the Board believes a person has violated the provisions of South Dakota law relating to physicians and surgeons or a person has committed unprofessional or dishonorable conduct or is incompetent, the Board, in lieu of or in addition to commencing a contested case proceeding, may apply to the Circuit Court for an injunction to restrain the person from continuing to practice in this state. Under South Dakota law, application by the Board for an injunction is an alternate to criminal proceedings, and the commencement of one type of proceeding by the Board acts to bar the other.

National Data Bank Reporting of Proceedings and Settlements

It is important to keep in mind that the results of disciplinary proceedings and settlements may have ramifications beyond just the practitioner's license to practice in South Dakota. Federal law requires SDBMOE to report certain events, including the terms of some settlement agreements, to the National Practitioner Data Bank ("NPDB"). (Effective May 3, 2013, the Healthcare Integrity and Protection Integrity Data Bank was merged into and became a part of the NPDB.) The NPDB is an information clearinghouse created by Congress in an effort to improve health care quality and reduce health care fraud and abuse in the U.S.

Generally speaking, federal law requires the SDBMOE to report "any negative action or finding by [a licensing board] regarding [a] practitioner" to the NPDB. Because the report is mandatory, SDBMOE is not authorized to negotiate away the obligation for it to make a report. Because the NPDB is in part intended to combat fraud and abuse in health insurance and health care delivery, it also collects information concerning exclusions from participation in federal and state health care programs (including Medicare and Medicaid), healthcare-related criminal convictions and civil judgments (including malpractice awards), and certain other acts or decisions of governmental bodies and other entities.

The NPDB is available for review by eligible member entities, including licensing boards of other states and hospitals. Accordingly, a practitioner should not assume that "settling" a dispute with the SDBMOE will lay the matter to rest; it may well be an issue if the practitioner applies for licensure in another jurisdiction or privileges at a hospital. Because of the possible ramifications of reports to the NPDB, the practitioner should take steps to become fully aware of those reporting requirements and the ramifications as soon as possible after becoming aware of proceedings commenced by SDBMOE.

Posting to SDBMOE Web Site

While hearings involving physician licensees are closed to the public, the SDBMOE is required to make its decisions in open session and the resulting documentation of the decision is a public record. Although not required by statute, the Governor has directed public bodies like SDBMOE to post their actions online as often as possible. It is SDBMOE's policy that the pleadings in a contested case, including the findings of fact, conclusions of law, and orders, are public records and posted on its website.

Conclusion

The South Dakota Board of Medical and Osteopathic Examiners has substantial oversight and regulatory power over physicians, including the power to cancel, suspend, revoke, or limit a physician's license after notice and a hearing. The results of disciplinary proceedings by the Board are often required to be reported to the National Practitioner Data Bank and to other entities as required by state and federal law. Board decisions are also posted to its website.

Practitioners are encourage to engage counsel, preferably counsel with experience dealing with administrative licensing proceedings, as soon as possible upon receiving notice of an threatened or pending proceeding before the Board.



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