

August 1, 2020

Legal Brief

SOUTH DAKOTA
STATE MEDICAL ASSOCIATION
Values. Ethics. Advocacy.

*Providing General Legal Guidance and Regulatory Compliance Information
to SDSMA Members*

WWW.SDSMA.ORG

MEDICAL BOARD MONITORING PROGRAM

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 August 1, 2020; readers should consult the most recent versions of referenced statutes, regulations, and cases to ensure there have been no material changes.

This Legal Brief is the result of a collaborative effort between SDSMA and staff of the South Dakota Board of Medical and Osteopathic Examiners.

Overview

The South Dakota Board of Medical and Osteopathic Examiners (“SDBMOE”) developed the Medical Board Monitoring Program (“MBMP”), which is designed to protect the public by providing monitoring services for professionals whose health conditions may impact their ability to practice medicine safely. South Dakota law requires professionals to self-report to the SDBMOE any such impairment within thirty (30) days. Professionals are also required by law to report any impairment of another licensed professional that may impact the other professional’s ability to practice medicine safely.

Discussion

The Medical Board Monitoring Program

The MBMP is a confidential monitoring program designed to protect the public by supporting and providing monitoring services for physicians whose health conditions may affect their ability to practice medicine safely. Referrals to the MBMP consist of a report of concerns surrounding the professional’s ability to practice safely, and can be made by self-referral, third-party referral, or by formal Complaint. The grounds for referrals and self-reports are varied. They may include the use of mood-altering substances while in the workplace or outside use that affects the workplace, related arrests, and disruptive behavior. Unmanaged physical or behavioral conditions that affect the physician’s ability to practice safely, with or without mood-altering substances, may also lead to reports.

Any such report received by the SDBMOE is confidential and not open to the public. The complaint or referral is reviewed by SDBMOE staff, which will then determine what sort of initial evaluation may be required. There is no board member involved in this initial screening. All reports to the board concerning past, potential, and current participants in the MBMP are de-identified such that only numbers within categories such as gender, physician, and nonphysician are provided to the board. Such reports do not provide information regarding specialties within the profession, nor location of the professional.

If not already completed within the past six months, the monitoring team will require the licensed individual to have an appropriate assessment, such as a chemical dependency evaluation. The assessment must be conducted by a person who is certified and in good standing, such as an alcohol and other drug abuse counselor. This information is necessary to know the participant's current treatment needs, if any. Other evaluations or treatment may be considered prior to being monitored by the MBMP, including inpatient or intensive outpatient treatment programs, fitness to practice, competency, and neuropsychological evaluations. Depending upon the circumstances, one of the mentioned evaluations must have taken place or will need to take place again in order to know the participant's current treatment needs. If an evaluation includes a recommendation for monitoring, or the professional has ever been subject to drug and/or alcohol monitoring (disciplinary or non-disciplinary) in this state or any other state, then this recommendation will result in an automatic referral to the MBMP.

A professional may be deemed ineligible for participation in the MBMP if they cannot practice medicine safely even with appropriate treatment and monitoring.

If the professional is deemed eligible for participation in the MBMP, a confidential "monitoring agreement" will be established between SDBMOE and the professional whereby the professional's medical and support team is identified and expectations for the professional's involvement and compliance are established. The medical and support team may include the professional's primary care physician or other healthcare provider; a therapist, psychologist, or counselor; a work-site monitor; and an after-care monitor. Participation in the monitoring program is completely confidential, and the professional's information is de-identified before being provided to SDBMOE members. Further, participation in the monitoring program will not be disclosed to the public.

If the professional remains in compliance with the MBMP monitoring agreement and does not pose a risk to patient health or safety, no disciplinary action will be initiated on account of the professional's impairment. However, failure to maintain compliance with the monitoring agreement or other acts or omissions which render the professional no longer eligible for the MBMP may result in a referral to the full SDBMOE for disciplinary action.

MBMP participation depends on multiple factors including whether the professional is so impaired it affects their ability to perform their job essential functions, and whether they are a danger to the public. A professional may be deemed ineligible if the professional is a risk to public health or safety even with monitoring, if there are pending criminal charges related to the impairment, if there are claims of sexual harassment, or if there is public action being undertaken in another state; in these cases, the professional may be referred for the commencement of formal disciplinary proceedings.

Reporting Obligations

A professional licensed with the SDBMOE is required to self-report, within thirty (30) days, if they believe their impairment risks their ability to practice medicine with reasonable skill and safety, and/or if it constitutes knowledge of an act of unprofessional conduct.¹ Examples of circumstances that require reporting include, but are not limited to, being

¹ Pursuant to SDCL 36-4-29, the SDBMOE may cancel, revoke, suspend, or limit a license in cases of "professional incompetence, or unprofessional or dishonorable conduct, or proof of a violation of [SDCL Ch. 36-4]."¹ In addition to these general guidelines, the law sets out twenty-four (24) specific examples of unprofessional conduct, including "habits of intemperance or drug addiction", "sustaining any physical or mental disability which renders the further practice of a licensee's profession dangerous," and "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"

In May of 2015, SDBMOE in effect adopted the 2012 version of the American Medical Association Code of Ethics (the "Code") and required licensees to practice in compliance with it.¹ As an aid to its interpretation of the Code, SDBMOE also promulgated a rule under which it may consider the annotations and opinions interpreting the Code when determining whether a physician "has violated professional ethical standards and conduct"¹

The Code, as adopted by SDBMOE, requires physicians to "report physician deficits in character or competence, or engaging in fraud or deception, to appropriate authorities."¹ The AMA's interpretation of the Code also establishes an obligation on the part of physicians to "take appropriate action when their health or wellness is compromised, including: (i) engaging in honest assessment of their ability to continue practicing safely; (ii) taking measures to mitigate the problem; [and] ... (iv) seeking appropriate help as

addicted to or under the influence of alcohol or any drug that would affect a professional's ability to practice with skill and safety while in the workplace; , a physical or mental illness that affects the professional's ability to practice with skill and safety; any drug or alcohol related arrest, such as an arrest for driving under the influence; or any practice or conduct that presents a danger to health, welfare, or safety of the public or patients; and engaging in conduct that is unbecoming to a professional. This reporting requirement includes both a concern about the physician's ability to provide safe and competent care and a concern which undermines the trust and confidence of fellow providers or patients.

Furthermore, a licensed professional has an ethical and legal obligation to report a colleague to the SDBMOE if they observe behavior that risks the colleague's ability to practice medicine with reasonable skill and safety, and/or any knowledge of an act of unprofessional conduct. The SDBMOE treats reports and complaints as confidential, except that the reporting party may be called as a witness in any subsequent disciplinary action brought against the licensee that is the subject of the report or complaint. Persons making reports or filing complaints with SDBMOE are immune from suit for making the report or filing the complaint.²

Update to Disclosure Questions on Initial and Renewal Applications

The SDBMOE, working together with licensees, professional associations, healthcare organizations, and the academic professional programs produced an important change to South Dakota Administrative Rule 20:47:03. The change took effect as of May, 2020. This change provides clarity and compassion for licensed medical professionals. Previously, the administrative rule was ambiguous about reporting requirements and unfairly focused on mental health diagnoses. The revised rule requires the applicant to

[s]tate whether the applicant is currently suffering from any condition for which the applicant is not being appropriately treated that impairs the applicant's ability to practice medicine in a competent, ethical, and professional manner.

This change will reduce any stigma associated with alcohol and drug use as well as mental health diagnoses by focusing on reporting on only *current impairment* without regard to cause. This wording also eliminates a barrier to seeking treatment due to a concern about needing to report past diagnoses or treatment that are currently resolved or well-treated.

Conclusion

Physicians are ethically and legally obligated to protect the health, safety, and welfare of their patients. Physicians also have an obligation to themselves and their loved ones to address physical and mental health concerns, especially those that involve mood-altering substances. A professional that is referred to the MBMP receives confidential help and if that professional completes the program and does not pose a risk to patient health or safety, they will avoid disciplinary action.



SDSMA gratefully acknowledges the SDSMA Foundation for its support of this publication through funds awarded by The Physicians Foundation.

needed, including help in addressing substance abuse."¹ The failure to report or to acknowledge and address impairment as required by the Code would constitute unethical behavior.

² SDCL 20-11-5(2); Flugge v. Wagner, 532 N.W.2d 419 (S.D. 1995).