OLA
OFFICE OF THE LEGISLATIVE AUDITOR
STATE OF MINNESOTA

PRELIMINARY ASSESSMENT

Board of Medical Practice: Complaint Resolution Process

October 23, 2012

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OFFICE OF THE LEGISLATIVE AUDITOR
State of Minnesota • James Nobles, Legislative Auditor

October 23, 2012

Members of the Legislative Audit Commission

Members of the Sunset Advisory Commission

Members of the Board of Medical Practice

This report is in response to a request from the Sunset Advisory Commission for the Office of the Legislative Auditor to conduct a "special investigation" of the Board of Medical Practice.

The Board of Medical Practice cooperated fully with our review.

Sincerely,

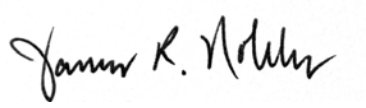

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Table of Contents

Background

During the 2012 legislative session, the Board of Medical Practice was one of many organizations under review by the Sunset Advisory Commission. In addition to conducting a sunset review, the commission also held hearings in response to a newspaper article about the board.[1] The article raised concerns about Minnesota's medical practice law, the availability of data on actions taken against medical practitioners, and how the Board of Medical Practice has responded to complaints against the practitioners it licenses. At the conclusion of the commission's hearings, the chair and vice chair of the Sunset Advisory Commission requested that the Office of the Legislative Auditor (OLA) conduct an evaluation of the Board of Medical Practice.[2]

The request for an OLA evaluation was presented to the Legislative Audit Commission on March 19, 2012, but it was not approved.[3] Members of the Legislative Audit Commission decided that OLA's Program Evaluation Division had a full schedule of work based on evaluation topics that had been reviewed and recommended by the commission's Topic Selection Subcommittee. The chair and vice chair of the Sunset Advisory Commission then sought other ways to obtain an OLA review of the Board of Medical Practice, which resulted in a request in law for OLA to conduct a "special investigation" of the board.[4] Given the history of the request, we understood that we were being asked to investigate the board's complaint resolution process.

Objective, Scope, and Methods

When OLA receives a request to conduct an investigation, we first conduct a preliminary assessment to determine whether an OLA investigation is needed or

[1] Glenn Howatt and Richard Meryhew, "Doctors who err escape penalties," *StarTribune*, February 5, 2012.

[2] Representative Mary Kiffmeyer, Chair, and Senator Terri Bonoff, Vice Chair, Sunset Advisory Commission, letter to Representative Mike Beard, Chair, and Senator Roger Reinert, Vice Chair, Legislative Audit Commission, March 19, 2012.

[3] *Minnesota Statutes* 2011, 3.97, subd. 3a, provides that "The [legislative audit] commission shall periodically select topics for the legislative auditor to evaluate…. Legislators and legislative committees may suggest topics for evaluation, but the legislative auditor shall only conduct evaluations approved by the commission."

[4] *Laws of Minnesota* 2012, Regular Session, chapter 278, art. 2, sec. 34. Section 33 of the law required the Minnesota Commissioner of Health to convene a working group to "evaluate the state's Medical Practice Act to ensure that it effectively protects the safety and well-being of the citizens of the state and allows transparency." The law specifically directed the working group to compare Minnesota's Medical Practice Act to those in other states, "including conduct that may result in disciplinary action."

whether a different response would be more appropriate.[5] OLA will move forward with an investigation if the preliminary assessment finds indications of improper activity that needs to be promptly disclosed. With respect to the request to conduct a special investigation of the Board of Medical Practice, our primary objective was to determine if there are indications that the board's complaint resolution process has significant deficiencies that need to be promptly examined and disclosed through an OLA investigation. Our secondary objective was to determine what other actions might help resolve concerns about the board's complaint review process if we determined that an immediate investigation by OLA was not going to occur.

The scope of our preliminary assessment included the board's process for receiving and resolving complaints against medical practitioners. The board's other key regulatory function—licensing physicians—as well as its other ancillary functions were not within our scope.

To conduct our preliminary assessment, we did the following:

- Observed the complaint resolution process by attending meetings of Complaint Review Committees and the full board (meetings which were not open to the public);
- Reviewed a sample of complaint files (independently selected by OLA);
- Interviewed board staff about their roles in the complaint review process;
- Reviewed board meeting minutes and reports; and
- Reviewed the laws, rules, and policies that govern the board's complaint process.

While the objectives, scope, and methods of our preliminary assessment were limited, our access to information, people, and events was not. OLA has statutory authority to access all information related to the operation of state government, including all information classified as "not public." In addition, by law, all public agencies—including the Board of Medical Practice—must cooperate fully with an OLA review. As a result, we had access to information in board files and from various proceedings that is not available to the Sunset Advisory Commission, media personnel, or the general public.

In reviewing individual cases, we did not attempt to judge whether the board made the "right" decision, nor did we attempt to judge whether, over all, the board's use of disciplinary actions to resolve cases was appropriate. As stated previously, we assessed the board's process for responding to complaints to

[5] OLA generally conducts investigations in response to allegations that a particular individual or organization has inappropriately used public money or other public resources (e.g., property). However, OLA sometimes responds to broader concerns with a "special review." Both investigations and special reviews provide OLA with a way to respond to allegations and concerns when it is not possible or appropriate to respond through a financial audit or program evaluation.

determine whether the process contained the elements of "due diligence" needed to achieve factually-supported decision making.

Conclusions

We concluded there is not a need at this time for an OLA investigation of the complaint resolution process at the Board of Medical Practice. Based on the cases we reviewed, the interviews we conducted, and the observations we made, we concluded that the board seeks to render judgments based on relevant facts, expert advice, and objective, professional staff support. We observed open, candid, and respectful discussions by board members about complaints, evidence, and what action(s) would be an appropriate response. In short, we found that the board's complaint resolution process contained the elements of "due diligence" needed to achieve factually-supported and legally-grounded regulatory decision making.[6]

While our review did not identify deficiencies in the board's complaint resolution process, we will again submit the board's complaint resolution process to the Legislative Audit Commission for consideration as a topic for evaluation by OLA's Program Evaluation Division. In an evaluation, OLA would examine more individual files, attend more proceedings, interview more individuals, review relevant court decisions, and compare the board's complaint process and disciplinary experience with other health-related regulatory boards in Minnesota and other states. Given the importance, complexity, and sensitivity of the board's role in regulating medical practitioners, a more comprehensive review by OLA may be justified.

Additional Information

Board of Medical Practice. The board is governed primarily by *Minnesota Statutes* 2011, chapter 147, which is often referred to as Minnesota's "Medical Practice Act." It mandates that the board has 16 members; 10 must hold a doctor of medicine degree and must be licensed to practice medicine in Minnesota, 1 must hold a doctor of osteopathy degree, and 5 must be "public members."[7] All board members are appointed by the Governor to four-year terms and no member

[6] Our conclusion is consistent with the conclusion presented in a 2002 peer review report. Glenn L. Smith, D.O. and Gary R. Clark, Minnesota Board of Medical Practice Peer Review, August 16, 2002. The board contracted with Dr. Smith, a physician practicing in Oklahoma, and Mr. Clark, Executive Director of the Oklahoma Board of Osteopathic Examiners, to conduct the peer review.

[7] A "public member" is defined in *Minnesota Statutes* 2011, 214.02, as follows: "Public member means a person who is not, or never was, a member of the profession or occupation being licensed or regulated or the spouse of any such person, or a person who does not have or has never had, a material financial interest in either the providing of the professional service being licensed or regulated or an activity directly related to the profession or occupation being licensed or regulated." *Minnesota Statutes* 2011, chapter 214, contains various other provisions that define terms and set procedurals requirements for all of Minnesota's licenses and examining boards.

may serve longer than eight consecutive years. Physician members must come from each of Minnesota's eight congressional districts and must, as a whole, reflect the broad mix of expertise of physicians practicing in Minnesota.[8]

According to state law, the "primary responsibility and obligation of the Board of Medical Practice is to protect the public from the unprofessional, improper, incompetent, and unlawful practice of medicine…."[9] The board currently has a staff of 23 full-time employees (supplemented by attorneys from the Minnesota Office of the Attorney General and physicians and other medical experts working on contract).

Grounds for Disciplinary Action. In addition to granting the board authority to license individuals who are qualified to practice medicine in Minnesota, state law defines 27 grounds the board may use to take disciplinary action against a professional under its jurisdiction.[10] They include, for example:

- Inability to practice medicine with reasonable skill and safety to patients.
- Unethical or unprofessional conduct.
- Improper management of medical records.
- False or misleading advertising.
- Unlawfully revealing privileged communications from or about a patient.
- Aiding in a suicide or attempted suicide.
- Sexual conduct or seductive communications with a patient.

According to data the Medical Practice Board submitted to the Sunset Advisory Commission, most of the complaints the board has received over the past ten years alleged some form of unprofessional or unethical conduct. For example, in 2010, the board's data showed that 60 percent of all complaints fell into those categories.

Forms of Disciplinary Action. As it responds to complaints, state law provides the board with seven forms of disciplinary action it may take.[11] They include the following:

- Revoke a license.

[8] The required characteristics of board members are stated in *Minnesota Statutes* 2011, 147.01, subd. 1. While the board's primary jurisdiction is medical doctors, state law also gives the board certain regulatory responsibilities over other professionals from what are often referred to as "allied health professions," including acupuncturists, athletic trainers, naturopathic doctors, physician assistants, and respiratory therapists. Because state law does not mandate the appointment of representatives from these allied health professions to the board, the board has established an advisory council for each of the allied health professions to assist the board on matters related to those professions. Each advisory council is composed of representatives from the professional field on which they advise the board.

[9] *Minnesota Statutes* 2011, 147.001.

[10] *Minnesota Statutes* 2011, 147.091.

[11] *Minnesota Statutes* 2011, 147.141.

- Suspend a license.
- Revoke or suspend registration to perform interstate telemedicine.
- Impose limitations or conditions on the scope and use of a license.
- Impose a civil penalty.
- Order the physician to provide unremunerated professional service.
- Censure or reprimand the licensed physician.

State law also provides that, as an alternative to disciplinary action, the board (and other health-regulatory boards) "may attempt to correct improper activities and redress grievances through education, conferences, conciliation and persuasion…."[12] Consistent with this provision, the Board of Medical Practice has communicated its approach to discipline as follows:

> While the Medical [Practice] Board has the authority to suspend or revoke licenses, it is believed that requiring education and putting restrictions on a physician's license can solve many problems so the public is protected while maintaining valuable community resources.[13]

Complaint Resolution Process. Over the past ten years, the Board of Medical Practice has received an average of 840 complaints each year (ranging from a low of 770 in 2008 and a high of 941 in 2004). Most complaints come from patients and patients' family members. State law obligates medical institutions, medical societies, licensed professionals, insurers, and others to report information to the board that might indicate a basis for disciplinary action against a licensed physician, and it obligates physicians to "self report" information about events that they themselves were involved in that could lead to disciplinary action.[14]

In the early 1990s, the board restructured its approach to processing complaints to accommodate an increase in complaints and a growing backlog of unresolved cases.[15] The board's goal was to establish a "triage system" that would allow the board to assess and sort complaints as to their severity and urgency. It is essentially the same system the board currently uses, and it is the one we examined.

In summary, the board's complaint resolution process includes the following steps:

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[12] *Minnesota Statutes* 2011, 214.10, subd. 2.

[13] Contained in a brief information brochure published by the Board of Medical Practice, called "What you need to know about the Minnesota Board of Medical Practice."

[14] *Minnesota Statutes* 2011, 147.111.

[15] For a contemporaneous assessment of the board's restructuring, see Kent G. Harbison, "The Board of Medical Practice Improves Its Complaint Handling System," *Minnesota Medicine*, (January 1995), 43-47.

- Information is received by board staff from mandated reporters, patients, family of patients, etc., which results in a complaint being logged into the board's complaint file management system. The system checks for other complaints against the same physician and adds them to the complaint file.

- Complaint is reviewed by board's Complaint Review Unit supervisor and assigned to a medical regulations analyst, who contacts individuals (including the physician(s) named in the complaint), institutions, and others for additional information and documentation.

- Complaint file is reviewed by a medical coordinator (physician working on contract for the board) who summarizes the medical aspects of a case and makes recommendations or requests additional information. Medical coordinators may also request that the board contract with a medical specialist to review the case. They may also recommend that a physician named in a complaint be brought in for what is referred to as a "medical coordinator conference," which can be a combination of education for the physician on an issue and evaluation of the physician's state of mind or acceptance of the complaint and need for corrective action. Medical coordinators may also request an investigation or legal counsel from an attorney at the Minnesota Office of the Attorney General.

- Complaint file is assigned for review and action by one of the board's two complaint review committees (composed of two board members who are physicians and one public member). Each review committee meets once a month for most of the day. The committees may dismiss a complaint and close the case, request more information, and/or require a physician named in a complaint to meet with the committee at a future date. The committee may also propose a "corrective action agreement" with a physician or recommend disciplinary action against a physician. If a physician agrees to a proposed corrective action agreement, it does not go to the full board for ratification; however, proposed disciplinary actions do require ratification by the board.

- In addition to taking action on proposed disciplinary actions, the full board hears oral arguments after an administrative hearing when a physician does not accept a complaint review committee's proposed corrective action agreement or disciplinary action. If the board and physician cannot agree on a resolution, either the board or the physician may request a "contested case" hearing under the state's Administrative Procedures Act. Contested case hearings are conducted by an administrative law judge from the Office of Administrative Hearings. The position of the complaint review committee is presented by an attorney from the Office of the Attorney General. The physician's position may be presented either by the physician or the physician's legal counsel. The board receives a report and

recommendation(s) from the presiding administrative law judge, but the final decision on how to resolve a complaint remains with the board.

There are additional details about the complaint review process on the board's Web site at:

http://mn.gov/health-licensing-boards/medical-practice/public/complaints/complaint-review.jsp

More detailed data about the nature and disposition of complaints is available in the report the board submitted to the Sunset Advisory Commission as part of the sunset review process. That report is available on the commission's Web site at:

http://www.commissions.leg.state.mn.us/sunset/reports/BoardofMedicalPractice_2012.pdf