WEST VIRGINIA LEGISLATIVE AUDITOR

PERFORMANCE EVALUATION AND RESEARCH DIVISION

Regulatory Board Evaluation

Board of Osteopathy

The Licensing of Osteopathic Physicians and Physician Assistants Is Needed to Protect the Public

The Board Complies With the General Provisions of Chapter 30 of The West Virginia Code

The Board's Licensing Procedures Could Be Strengthened to Better Protect the Public Interest. In Addition, the Board Did Not Follow State Law In One Instance

October 2005
PE 05-14-357

JOINT COMMITTEE ON GOVERNMENT OPERATIONS

Senate

Edwin J. Bowman
Chair

Billy Wayne Bailey, Jr.
Vice Chair

Walt Helmick

Donna J. Boley

Sarah M. Minear

Citizen Members

Dwight Calhoun

John Canfield

James Willison

W. Joseph McCoy

(Vacancy)

House Of Delegates

J.D. Beane
Chair

Timothy R. Ennis
Vice Chair

Joe Talbott

Craig P. Blair

Otis Leggett

Scott G. Varner, Ex Officio Non-Voting Member

OFFICE OF THE LEGISLATIVE AUDITOR

Aaron Allred
Legislative Auditor

John Sylvia
Director

Russell Kitchen
Research Manager

Donald Robinson
Research Analyst

Performance Evaluation and Research Division
Building 1, Room W-314
State Capitol Complex
Charleston, West Virginia 25305
(304) 347-4890

WEST VIRGINIA LEGISLATURE

Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX

John Sylvia
Director

October 2, 2005

The Honorable Edwin J. Bowman
State Senate
129 West Circle Drive
Weirton, West Virginia 26062

The Honorable J.D. Beane
House of Delegates
Building 1, Room E-213
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting a Regulatory Board Evaluation of the Board of Osteopathy, which will be presented to the Joint Committee on Government Operations on Sunday, October 7, 2005. The issues covered herein are "The Licensing of Osteopathic Physicians and Physician Assistants Is Needed to Protect the Public;" "The Board Complies With the General Provisions of Chapter 30 of The West Virginia Code;" and "The Board's Licensing Procedures Could Be Strengthened to Better Protect the Public Interest. In Addition, the Board Did Not Follow State Law In One Instance."

We transmitted a draft copy of the report to the Board of Osteopathy on September 16, 2005. We held an exit conference via telephone with the Board of Osteopathy on September 21, 2006. We received the agency response on September 23, 2005.

Let me know if you have any questions.

Sincerely,

John Sylvia

JS/wsc

Joint Committee on Government and Finance

Contents

Executive Summary 5

Review Objective, Scope and Methodology.....7

Issue 1: The Licensing of Osteopathic Physicians and Physician Assistants Is Needed to Protect the Public.....9

Issue 2: The Board Complies With the General Provisions of Chapter 30 of the West Virginia Code.....13

Issue 3: The Board's Licensing Procedures Could Be Strengthened to Better Protect the Public Interest. In Addition, the Board Did Not Follow State Law In One Instance.....21

List Of Tables

Table 1: State Licensing Boards for Physicians and Physicians Assistants..... 9
Table 2: Board of Osteopathy Licenses.....9
Table 3: Number of Days to Resolve Complaints.....15
Table 4: Complaints Against Doctors.....16
Table 5: Medical Boards & Complaint Forms As Of August 21, 2005.....17
Table 6: Complaints Against Osteopathic Physicians In States With Independent Osteopathic Boards: FY 2003-2005.....18
Table 7: Board of Osteopathy Expenditures & Revenues.....19

List Of Appendices

Appendix A: Transmittal Letter to Agency.....33

Appendix B: Agency Response.....35

Executive Summary

Issue 1: The Licensing of Osteopathic Physicians and Physician Assistants Is Needed to Protect the Public.

All 50 states and the District of Columbia regulate and license osteopathic doctors and physician assistants.

All 50 states and the District of Columbia regulate and license osteopathic doctors and physician assistants. Fourteen (14) states have separate licensing boards for osteopathic doctors. The other 36 states and the District of Columbia license osteopathic and allopathic (medical) doctors through the same licensing agency. West Virginia is one of the 14 states that have separate licensing boards for allopathic and osteopathic doctors. As of May 18, 2005, the Board licensed 830 osteopathic physicians and 99 physician assistants, who work under the supervision of osteopathic physicians.

Issue 2: The Board Complies With the General Provisions of Chapter 30 of the West Virginia Code.

The Board has complied with all Chapter 30 general requirements, however, the Legislative Auditor has concerns with the complaint process.

The Board has complied with all Chapter 30 general requirements. The Legislative Auditor has concerns with the complaint process. The addition of a printable complaint form should improve public access to the Board. Continuing education hours for physician assistants contradict in the *Code* and Legislative Rules. The *Code* specifies that 20 hours must be completed in the preceding year, while the Legislative Rules state that 20 hours must be completed in the preceding two-years. The Board is financially self-sufficient.

Issue 3: The Board's Licensing Procedures Could Be Strengthened to Better Protect the Public Interest. In Addition, the Board Did Not Follow State Law In One Instance.

The Board of Osteopathy takes several steps to ensure that licensed medical practitioners are competent and ethical. However, there is one incident in which the Board granted a restricted license to a doctor whose license was revoked in Texas.

The Legislative Auditor reviewed the Board's licensing process to determine if the Board was providing adequate protection to the citizens of the State. The licensing process involves licensing new applicants or denying licenses to new applicants, renewing or denying the renewal of existing licenses, and suspending or revoking licenses. The Board of Osteopathy takes several steps to ensure that licensed medical practitioners are competent and ethical. However, there is one incident in which the Board granted a restricted license to a doctor whose license was revoked in Texas. By Rule, the Board was not allowed to issue a license to someone whose license was revoked in another state until the

doctor is eligible for licensure in the state where the revocation took place.

Recommendations

1. *The Legislative Auditor recommends that the Legislature continue the Board of Osteopathy.*

2. *The Legislative Auditor recommends that the Legislature consider amending either the Code or the Board's Legislative Rules to clarify legislative intent for the number of required continuing education hours for physician assistants.*

3. *The Legislative Auditor recommends that the Legislature consider amending the West Virginia Code to enable the Board of Osteopathy to conduct criminal background checks through the Federal Bureau of Investigation on all applicants for new osteopathic licenses and existing licensees at a frequency determined by the Board.*

4. *The Legislative Auditor recommends that the Board consider requiring new in-state applicants for a license to submit to a State Police criminal history background check and existing in-state licensees submit to a State Police criminal history background check at a frequency determined by the Board.*

5. The Legislative Auditor recommends that the Board consider requiring that criminal background checks be performed through the State Police in the state where the licensee resides for all out-of-state applicants for new osteopathic licenses and existing licensees at a frequency determined by the Board.

6. The Legislative Auditor recommends that the Board consider requiring licensees to report any malpractice action(s), in which they are involved, as soon as the licensee becomes aware of it.

Review Objective, Scope and Methodology

Objective

This regulatory board evaluation of the Board of Osteopathy was conducted in accordance with the West Virginia Sunset Law, Chapter 4, Article 10 of the West Virginia *Code*. As stated in *Code*, a regulatory board evaluation is to determine whether a Board 1) complies with the general policies and provisions of Chapter 30, Article 1 of the West Virginia Code and other applicable laws and rules, 2) follows disciplinary procedures which observe due process rights and protect the public interest, and 3) whether public health and safety require that the Board be continued.

Scope

This regulatory board evaluation covers the period from fiscal year 2003 through fiscal year 2005. This audit examined the Board's complaint and licensing procedures.

Methodology

Information compiled in this evaluation was acquired from the West Virginia *Code*, interviews with the Board's staff, examinations of the annual reports, meeting minutes, expenditure schedules, complaint files, survey information from other states' licensing boards and web sites, license applications and renewal files, and continuing education files. This evaluation complied with Generally Accepted Government Auditing Standards.

Issue 1

The Licensing of Osteopathic Physicians and Physician Assistants Is Needed to Protect the Public.

All 50 states and the District of Columbia regulate and license osteopathic doctors and physician assistants.

Issue Summary

All 50 states and the District of Columbia regulate and license osteopathic doctors and physician assistants. Fourteen (14) states have separate licensing boards for osteopathic doctors. The other 36 states and the District of Columbia license osteopathic and allopathic (medical) doctors through the same licensing agency. West Virginia is one of the 14 states that have separate licensing boards for allopathic and osteopathic doctors.

Table 1
State Licensing Boards for Physicians and Physician Assistants

Medical Professional	States With Separate Licensing Boards	States With One Licensing Board
Physicians	14	36
Physician Assistants	6	44

Data Source: American Academy of Physician Assistants & information gathered from licensing board web sites

As of the Board of Osteopathy's May 18, 2005 meeting, the Board licensed 830 osteopathic physicians and 99 physician assistants, who work under the supervision of osteopathic physicians. The total number of physicians and physician assistants for the last three fiscal years can be seen in Table 2.

Table 2
Board of Osteopathy Licensees

Fiscal Year	In-State Physicians	Out-of-State Physicians	Total Physicians	Physician Assistants
2003	530	350	880	91
2004	547	304	851	89
2005	581	249	830	99

Data Source: West Virginia Board of Osteopathy meeting minutes

The Licensing of Osteopathic Physicians

The Occupational Outlook Handbook indicates that Doctors of Osteopathy place special emphasis on the body's musculoskeletal system, preventive medicine, and holistic patient care. Holistic patient care treats both the mind and body. According to the Handbook, an osteopathic physician's responsibilities include:

- Examining patients;
- Obtaining medical histories;
- Prescribing medications;
- Performing surgeries;
- Ordering, performing, and interpreting diagnostic tests; and
- Counseling on diet, hygiene, and preventive healthcare.

Incompetent medical practitioners can endanger members of the public by performing unneeded or improper procedures on patients.

In determining if there is a need for licensure and regulation of osteopathic physicians, a primary consideration is if the unregulated practice of the profession would clearly endanger the health and safety of the public. Incompetent medical practitioners can endanger members of the public by performing unneeded or improper procedures on patients. Possible harm from an incompetent practitioner or an unqualified physician could lead to:

- Improper diagnosis;
- Paralysis;
- Increased risk of infection;
- Complications due to improperly prescribed medications; and
- Death.

The Legislative Auditor finds that the licensing of osteopathic physicians is necessary to protect the citizens of West Virginia.

The Licensing of Physician Assistants

The Board also licenses and regulates physician assistants (PAs), who are responsible for providing healthcare services under the supervision of osteopathic physicians. PAs are formally trained to provide diagnostic, therapeutic, and preventive healthcare services, as delegated by the physician. Work tasks may include:

- Taking medical histories;
- Examining and treat patients;

- Ordering and interpreting laboratory tests and x-rays;
- Making diagnoses; and
- Prescribing medications.

As with determining the need for the licensure of osteopathic physicians, the unregulated practice of physician assistants would clearly endanger the health and safety of the public. PAs are directly involved with the public. They perform tasks with the direction of the physician that unsupervised could cause harm and endanger lives. Licensure ensures a minimal degree of competence relating to the tasks of a PA. Misdiagnosis or improperly prescribed medications could be harmful or fatal to patients. **There is a need for the licensure of the physician assistants to prevent irresponsible and unqualified individuals from engaging in this profession.**

There is a need for the licensure of the physician assistants to prevent irresponsible and unqualified individuals from engaging in this profession.

Conclusion

Osteopathic physicians and PAs are responsible for functions which are potentially harmful to the public if competency is not regulated. The licensure of osteopathic physicians and PAs is important to protect the citizens of West Virginia because it ensures that the licensee must have a level of education and competence sufficient to perform medical procedures. **It is the opinion of the Legislative Auditor that it is necessary to continue licensing these professions to provide for the protection of public health and safety.**

Recommendation

1. *The Legislative Auditor recommends that the Legislature continue the Board of Osteopathy.*

Issue 2:

The Board Complies With the General Provisions of Chapter 30 of the West Virginia Code.

The Board has complied with all Chapter 30 general requirements.

Issue Summary

The Board has complied with all Chapter 30 general requirements. The Legislative Auditor has concerns with the complaint process. The addition of a printable complaint form should improve public access to the Board. Continuing education hours for physician assistants contradict in the *Code* and Legislative Rules. The *Code* specifies that 20 hours must be completed in the preceding year, while the Legislative Rules state that 20 hours must be completed in the preceding two-years. The Board is financially self-sufficient.

The Board Complies With All Chapter 30 Requirements

The Board has satisfactorily complied with all Chapter 30 provisions. These requirements are important in the effective operation of a licensing agency. The Board has complied with the following requirements:

- A Board representative attended one orientation session provided by the State Auditor's Office in the required two-year time frame (§30-1-2(a));
- An official seal has been adopted (§30-1-4);
- The Board meets at least once annually (§30-1-5(a));
- Complaints are investigated and resolved with due process (§30-1-5(b)); (§30-1-8);
- Rules have been promulgated specifying the investigation and resolution procedure of all complaints (§30-1-8(h));
- The Board is financially self-sufficient in carrying out its responsibilities (§30-1-6(c));
- The Board has developed continuing education criteria, that includes course content, course approval, hours required, and reporting periods (§30-1-7a);
- The Board has a register of all applicants, showing for each the date of his or her application, his or her name, age, educational and other qualifications, place of residence, whether an examination was required, whether the applicant was rejected or a license granted, the date of this action, the license number, all renewals of the license, and any suspension or revocation thereof (§30-1-12(a));

- The Board has submitted annual reports to the Governor and Legislature describing transactions for the preceding two years and budget data (§30-1-12(b));
- The Board has complied with public access requirements as specified by (§30-1-12(c)); and
- The Board maintains a complete roster of the names and office addresses of all persons licensed and practicing in this state, arranged alphabetically by name and also by the counties in which their offices are located (§30-1-13).

Continuing Education Requirements Still Contradict for Physician Assistants

The Board has established criteria for the continuing education of its licensees. The Board requires doctors and physician assistants to send certificates of attendance for verification of continuing education. The 2002 Regulatory Board Evaluation of the Board of Osteopathy stated that there was a contradiction in the required number of continuing education hours for physician assistants. This contradiction still exists. CSR§24-2-14.1 states that osteopathic physician assistants are required to participate in and successfully complete a minimum of 20 hours of continuing education in the previous **two-year period**. WVC §30-14A-1(l) states that as a condition for renewal of an osteopathic physician assistant certification, each osteopathic physician assistant shall provide written documentation satisfactory to the board of participation in and successful completion during the preceding **one-year period** of a minimum of 20 hours of continuing education. In practice, the Board uses CSR§24-2-14.1, which requires participation and completion of 20 hours of continuing education in the previous two-year period, as the continuing education requirement for PAs. The Legislative Auditor recommends that the Legislature consider amending either the Legislative Rules or the *Code* to clarify legislative intent for the continuing education requirement for physician assistants.

The Legislative Auditor recommends that the Legislature consider amending either the Legislative Rules or the Code to clarify legislative intent for the continuing education requirement for physician assistants.

It should be noted that the Legislative Auditor made a recommendation for the elimination of the contradiction between the *Code* and the Legislative Rules in continuing education hours for PAs in the 2002 report. CSR§11-1B-15.1 specifies Board of Medicine licensed PAs must complete 50 hours of continuing education classified as Category I and 50 hours of continuing education classified as Category II for a total of 100 hours of continuing education in the previous two-year period as a requirement for renewal of license.

The Legislative Auditor Has Concerns With the Complaint Process

The Legislative Auditor has concerns with some of the older pending complaints.

The Legislative Auditor's staff reviewed all complaints from FY 2003 through FY 2005. The complaint process starts with the submission of a complaint or the initiation of a complaint by the Board. The doctor, who the complaint is against, has 20 days to respond to the allegations. The Board delegates the complaint and all of the accompanying evidence. The member reviews and investigates all of the information and then makes a recommendation to the full Board at its next meeting. The Board can either choose to accept the recommendation, reject the recommendation, or request more information from the involved parties. If the members are unavailable or the complaint is too complex, the Board hires an investigator to investigate the complaint.

The Legislative Auditor has concerns with some of the older pending complaints. Three complaints have been unresolved since late calendar year 2002. Two of the three complaints have had hearings rescheduled. These complaints have been turned over to the Attorney General's Office. The other complaint is awaiting the conclusion of a federal investigation.

Table 3 shows the distribution of the number of days complaints required to be resolved. From FY 2003 through FY 2005, the Board averaged 22 complaints per year, with a low of 18 in FY 2003 and a high of 27 in FY 2005.

Table 3
Number of Days To Resolve Complaints

Fiscal Year	Total Number of Days					
	1-30	31-60	61-180	181+	Pending	Total
2003	0	3	7	6	5	21
2004	1	5	7	4	1	18
2005	1	2	11	2	11	27

Data Source: West Virginia Board of Osteopathy Complaint Files from Fiscal Years 2003 to 2005

The Board took 20 reportable actions against doctors' licenses from FY 2003 through FY 2005. A reportable action is defined as any action taken against a doctor's license that is reported to the Federation of State Medical Boards and/or the National Practitioner Data Bank/Healthcare Integrity and Protection Data Bank. Adverse or prejudicial actions include denying new and renewal license applications, granting restricted licenses, consent agreements, probations and licenses being surrendered. Non-prejudicial actions include granting unrestricted licenses after a license had been previously restricted and reductions or extensions of previous actions.

Table 4 shows the median length of time the Board needed to resolve complaints for FY 2003 through 2005. During FY 2003, the Board received 21 complaints. Of the 21 complaints, the Board dismissed 14 cases, 2 renewals were refused, and 5 cases are still pending. In FY 2004, the Board received 18 complaints. Seventeen of the complaints were dismissed, and one complaint is still pending. The Board received 27 complaints during FY 2005 and dismissed 16. The remaining 11 complaints are pending, as of August 31, 2005.

Table 4
Complaints Against Doctors

Fiscal Year	Number of Complaints	Median Number of Days To Resolve Complaints	Pending Cases	Median Number of Days Pending Complaints Were Unresolved As of 8/31/05 *
2003	21	125	5	1014
2004	18	87	1	729
2005	27	107	11	203

** Median includes 21 pending cases based on the number of days the complaint was unresolved as of August 31, 2005.*

Data Source: West Virginia Board of Osteopathy's Complaint Files from FY 2003 to FY 2005

Until Recently the Board Did Not Have Printable Complaint Forms On Its Website

Many states' osteopathic and medical boards have printable online complaint forms. Table 5 lists medical boards and osteopathic medical boards that have online and email options for filing complaints. Thirty-four medical boards and 11 osteopathic boards have printable online complaint forms. Three medical boards have webpages that allow online submission of complaints. A link on the Board's website should either have a printable version of a complaint form or guidelines for which items to include in their written statement to expedite the complaint process. The Board accepts handwritten complaints that are not on an official complaint form.

On August 22, 2005, the Board added a printable complaint form to its website.

On August 22, 2005, the Board added a printable complaint form to its website. The Legislative Auditor commends this effort to improve public access. There is reason to believe that the Board's number of complaints are relatively low compared to other states because of limited public access to the complaint process. Table 5 lists state medical boards and ways for the public to access the complaint process via the internet. Now that the Board has online printable complaint form, it is likely the number of complaints will increase as public access increases.

Table 5
Medical Boards & Complaint Forms As Of August 21, 2005

Type of Medical Board (Number of Boards)	Printable Online Complaint Form	Submit Complaint Form Online	Accepts Complaints Via Email
Osteopathic (14)	12	0	0
Allopathic (50)	34	3	6

** Includes West Virginia's Board of Osteopathy, which created an on-line complaint form on this date.*

Data Source: Information gathered from medical & osteopathic licensing board websites

Table 6 lists the number of complaints in states with an independent osteopathic medical board during the period from FY 2003 to 2005. Nine (9) of the 14 states with independent osteopathic licensing boards responded to a survey conducted by the Legislative Auditor's staff.

Table 6
Complaints Against Osteopathic Physicians
In States With Independent Osteopathic Boards: FY 2003-2005

State	Fiscal Year	Number of Licensees	Number of Complaints	Complaints Per 100 Licensees
California **	2003	3,798	223	5.9
	2004	3,976	187	4.7
	2005	4,226	215	5.1
Florida **	2003	4,223	407	9.6
	2004	4,102	420	10.2
	2005	4,442	N/A	N/A
Nevada	2003	703	37	5.3
	2004	773	86	11.1
	2005	N/A	N/A	N/A
Pennsylvania **	2003	5,836	436	7.5
	2004	6,288	528	8.4
	2005	6,104	643	10.5
Michigan **	2003	6,770	123	1.8
	2004	6,260	133	2.1
	2005	6,247	N/A	N/A
New Mexico **	2003	N/A	26	N/A
	2004	N/A	20	N/A
	2005	441	25	5.7
Arizona **	2003	1,733	125	7.2
	2004	1,778	211	11.9
	2005	1,935	154	8.0
Utah	2003	218	30	13.8
	2004	244	27	11.1
	2005	N/A	23	N/A
Washington **	2003	729	65	8.9
	2004	761	75	9.9
	2005 *	807	68	8.4

West Virginia**	2003	880	21	2.4
	2004	851	18	2.1
	2005	830	27	3.3

** Indicates that fiscal year had not concluded.*

***States with printable on-line complaint form. West Virginia did not have an on-line complaint form until August 22, 2005.*

Data Source: Survey data from the West Virginia Board of Osteopathy and other states' osteopathic licensing boards

The Board Is Financially Self-Sufficient

The Board of Osteopathy had a cash balance of $614,603 in its account with the Treasurer's Office, as of August 8, 2005. Based on this information, the Board is financially self-sufficient. Table 7 shows the Board's revenues, expenditures, revenues minus expenditures, and end-of-year cash balance for fiscal years 2003-2005.

The large jump in expenditures in FY 2004 was the result of legislative action. The Legislature created a physicians' mutual insurance company and on July 1, 2003 imposed a special one-time assessment fee of $1,000 on every physician licensed by the Board of Medicine or the Board of Osteopathy. The Board collected the fee and was required to forward the fee to the new physicians mutual insurance company.

Table 7
Board of Osteopathy Expenditures & Revenues

Fiscal Year	Revenues	Expenditures	Revenues Minus Expenditures	End Of Fiscal Year Cash Balance
2003	$320,800	$92,505	$228,295	$620,457
2004	$399,758	$511,998	($112,240)	$508,216
2005	$234,682	$169,125	$64,957	$573,172

Data Source: West Virginia Board of Osteopathy annual reports

Conclusion

The Board is in compliance with all of the general provisions of Chapter 30. A contradiction remains in the number of hours of continuing education that physician assistants must attend. **The Legislative Auditor recommends that the Legislature consider amending either the Code or the Board's Legislative Rules to clarify legislative intent.** The Legislative Auditor has concerns with the complaint process regarding the length of time complaints are unresolved. Public access to the Board was improved on August 22, 2005 when a link to printable complaint forms was added from the Board's website. With over $600,000 in the account with the Treasurer's Office, the Board is financially self-sufficient.

Recommendations

2. *The Legislative Auditor recommends that the Legislature consider amending either the Code or the Board's Legislative Rules to clarify legislative intent for the number of required continuing education hours for physician assistants.*

Issue 3

The Board's Licensing Procedures Could Be Strengthened to Better Protect the Public Interest. In Addition, the Board Did Not Follow State Law In One Instance.

Issue Summary

The Legislative Auditor reviewed the Board's licensing process to determine if the Board was providing adequate protection to the citizens of the State. The licensing process involves licensing new applicants or denying licenses to new applicants, renewing or denying the renewal of existing licenses, and the process of suspending or revoking licenses. The Board of Osteopathy takes several steps to ensure that medical practitioners who are licensed are competent and ethical. However, there is one incident in which the Board granted a restricted license to a doctor whose license was revoked in Texas. By Rule, the Board was not allowed to issue a license to someone whose license was revoked in another state until the doctor is eligible for licensure in the state where the revocation took place.

Many Osteopathic Doctors Hold Licenses in Multiple States

It is important for the Board to obtain appropriate information through several sources regarding licensees practicing out of state in order that the Board does not grant or renew a license to incompetent doctors.

It is not uncommon for an individual to hold a license in West Virginia and many other states. As of the Board's May 18, 2005 meeting, the Board licensed 830 doctors. Of the 830 doctors licensed by the Board, 581 physicians practice medicine within the borders of West Virginia. For this reason, it is important for the Board to obtain appropriate information through several sources regarding licensees practicing out of state in order that the Board does not grant or renew a license to incompetent doctors.

Two of the Board's Licensees Have Recently Undergone Media Scrutiny

Two recent Board licensees have received recurring media coverage recently. The first resulted from a surgeon who came to West Virginia from Florida. The doctor was fired from a Florida hospital for removing patient records from the hospital in 1999. The doctor entered into a pre-trial intervention order and subsequently the charges were dropped. The Florida Board of Osteopathic Medicine did not discipline the doctor for this action. At the time

of this incident, the doctor was also licensed in West Virginia. He later came to practice in West Virginia. However, the doctor had his surgical privileges revoked at a West Virginia hospital after seven months. The doctor surrendered his West Virginia license in 2003.

In reviewing the licensing process, the Legislative Auditor reviewed the Board's file on this doctor. The Legislative Auditor found that the Board had on file all relevant materials on the doctor's educational credentials and medical past, including the incident in Florida and a medical malpractice suit that was settled for $550,000. Based on the information on file, the Board decided that there was nothing to warrant the Board to not renew this doctor's license.

The Legislative Auditor will continue to investigate this doctor. Public information concerning this doctor suggests a breakdown in the nationwide medical licensing system occurred, in which the Board had no knowledge of events in the doctor's past. The Legislative Auditor will try to determine where and how the breakdown of the medical licensing system occurred in regards to this doctor. The Legislative Auditor finds no fault with the Board and its procedures in this case, since, information regarding alleged instances of malpractice and misconduct in other states were not available to the Board. The Legislative Auditor may issue a future report on this subject.

The other doctor came to West Virginia after a well publicized surgery where a patient died in Texas in 2002. His license was revoked in Texas on June 4, 2004. The doctor applied for a West Virginia license in 2004. The Board was going to deny the doctor's license application, citing CSR§24-1-16.1., which states that a doctor who has had his/her license revoked or surrendered in another state shall not receive a license in this state until the doctor is eligible for a license in the state where the action was taken. After receiving information from the state of Texas, additional information supplied by the doctor, and upon the report and recommendation of the Chairman of the Neurosurgery Department at the WVU Medical School, he was given a restricted license on September 1, 2004.

The Chairman of the Neurosurgery Department at West Virginia University Medical School reviewed the doctor's highly publicized case in Texas. He saw no fault in the doctor's procedures. The Chairman offered the doctor an opportunity for a highly structured educational experience under his supervision at the West Virginia University Hospital. Before the doctor could participate in the refresher course, he had to first secure a Board license. At the recommendation of the Chairman of the Neurosurgery Department and others, the Board granted a restricted license to the doctor to participate in the supervised educational experience. At the conclusion of the refresher course in May 2005,

the doctor was offered a full faculty position at the WVU Medical School Department of Neurosurgery. The doctor was a volunteer (unpaid) appointment as a clinical instructor at WVU from April 1, 2005 to July 31, 2005. Following the refresher course, the doctor left the WVU Medical School. He did not complete all of the stages to become a paid medical staff member at WVU. He was granted an unrestricted license to practice medicine on July 1, 2005, after a recommendation to the Board by the Chairman of the Neurosurgery Department. The doctor is now practicing in West Virginia.

The doctor who surrendered his license had been licensed by the Board since 1985. Disciplinary information was sent to the Federation of State Medical Boards and the National Practitioner Data Bank/Healthcare Integrity and Protection Data Bank about the doctor and the surrender of his license. The doctor, who had his Texas license revoked, was first licensed by the Board in 2004. The Board's licensing procedures, as specified by legislative rules, are adequate. However, the Board did not follow the licensing procedures in its Legislative Rules in the case of the Texas doctor.

The Board Violated the Law by Licensing the Doctor Who Had His License Revoked in Texas

The Board incorrectly used its licensing authority to grant a license to the doctor who had his Texas license revoked. The following WVC and CSR citations describe the correct licensing procedures for the Board. The Texas Board of Medical Examiners Legislative Rule regarding reissuing a license after revocation is also listed, in order to show the procedures the doctor was required to undergo to become eligible for a Texas license. WVC §30-1-6(f) states:

> *Any board may deny the application for licensure or registration of an applicant whose license or registration in any other state, territory, jurisdiction or foreign nation has been revoked by the licensing authority thereof.*

A Board promulgated legislative rule, CSR §24-1-16.1, is more specific and states:

> *If an osteopathic physician has had his or her license revoked or surrendered in another state, the Board shall not issue or reactivate a license until the physician shows that he or she is eligible for licensure in the state where the action was taken.*

The Texas Board of Medical Examiners (TBOME) Legislative Rule 167.1(b) outlines the requirements for reissuing a revoked license:

> *(b) Reissuance of License Following Revocation.*
>
> *(1) An applicant whose license has been revoked must complete in every detail the application for reissuance of license, including payment of the required application fee.*
>
> *(2) The applicant whose license has been revoked must submit a written request to the board's licensure division and appear before a committee of the board to request reissuance of license.*
>
> *(3) A person may not apply for reissuance of a license that was revoked before the first anniversary of the date on which the revocation became effective.*
>
> *(4) An application for reissuance of a license following revocation cannot be considered more often than annually.*
>
> *(5) In addition to any other requirement set out in this chapter for reissuance of a license following revocation, an applicant must also demonstrate compliance with current licensure eligibility requirements.*

A legal opinion from counsel for the Legislative Rule-Making Review Committee on this matter stated:

> *Legislative rules in this state are given the full force and effect in law. Therefore, 24CSR16.1 controls. The only way the Board can grant a license to the doctor would be if the doctor shows that he is eligible for licensure in Texas.*

The state of Texas revoked the doctor's license on June 4, 2004. The West Virginia Board of Osteopathy granted the Texas doctor a restricted license on September 4, 2004. The Board incorrectly assumed that it had discretion to license the doctor. The doctor was not legally eligible for licensure in West Virginia until June 4, 2005, the one-year anniversary of the revocation of his license in Texas. He was then eligible for reinstatement of his Texas Board Of Medical Examiners license.

Current Methods Available to the Board to Screen Applicants

The Board relies on the Federation of State Medical Boards (FSMB) for information on disciplinary actions taken in other states on doctors.

The Board relies on the Federation of State Medical Boards (FSMB) for information on disciplinary actions taken in other states on doctors. The FSMB is very useful because it generates an email that is sent to the all state medical boards immediately after a disciplinary action is reported to the FSMB by a state's medical board. This process saves the Board many hours of researching disciplinary actions of new and current licensees.

The Board also subscribes to the National Practitioner Data Bank (NPDB).

The Board also subscribes to the National Practitioner Data Bank (NPDB). This database was created for the following reasons:

> *The legislation that led to the creation of the NPDB was enacted because the U.S. Congress believed that the increasing occurrence of medical malpractice litigation and the need to improve the quality of medical care had become nationwide problems that warranted greater efforts than any individual State could undertake. The intent is to improve the quality of health care by encouraging State licensing boards, hospitals and other health care entities, and professional societies to identify and discipline those who engage in unprofessional behavior; and to restrict the ability of incompetent physicians, dentists, and other health care practitioners to move from State to State without disclosure or discovery of previous medical malpractice payment and adverse action history. Adverse actions can involve licensure, clinical privileges, professional society membership, and exclusions from Medicare and Medicaid.*

The NPDB is a query service. A doctor's name must be submitted to the database and then queried for results. The Board also checks licensees' names for prior medical problems through the Healthcare Integrity and Protection Data Bank (HIPDB). This data bank is also a query service. The HIPDB was created for the following reasons:

> *The Secretary of the U.S. Department of Health and Human Services, acting through the Office of Inspector General (OIG), was directed by the Health Insurance Portability and Accountability Act of 1996 to create the Healthcare Integrity and Protection Data Bank (HIPDB) to combat fraud and abuse in health insurance and health care delivery. Health care fraud*

burdens the nation with enormous financial costs and threatens the quality of health care and patient safety. Estimates of annual losses due to health care fraud range from 3 to 10 percent of all health care expenditures—between $30 billion and $100 billion based on estimated 1997 expenditures of over $1 trillion.

The HIPDB is primarily a flagging system that may serve to alert users that a comprehensive review of a practitioner's, provider's, or supplier's past actions may be prudent. The HIPDB is intended to augment, not replace, traditional forms of review and investigation, serving as an important supplement to a careful review of a practitioner's, provider's, or supplier's past actions.

The NPDB and the HIPDB are often combined into one search. When used in combination, the FSMB and the NPDB/HIPDB give the Board sufficient evidence to either grant or deny a license to a doctor based on his/her past disciplinary or medical malpractice actions. Information from the NPDB and HIPDB is not available to the general public. All three of these services help to protect the citizens of West Virginia against incompetent doctors.

The Board asks applicants for new licenses a series of screening questions. These questions cover applicants' civil, criminal, and malpractice histories. They are as follows:

- *Have you ever been the subject of an investigation of any kind by any licensing Board, jurisdiction, or agency?*
- *Has your license to practice Osteopathic Medicine ever been suspended, revoked, or in any way acted against in any licensing jurisdiction?*
- *Have you ever been denied Osteopathic Licensure in any licensing jurisdiction or been granted a license under restrictions of any kind?*
- *Have any proceedings ever been filed or instituted against you-either malpractice, criminal, civil, or professional Board related?*
- *Have you ever been convicted of a violation of or pled No Contest to any Federal, State, or local statute, regulation, or ordinance, or entered into any plea bargain relating to a felony or misdemeanor?*
- *Have you ever had staff privileges denied or suspended, or have you ever voluntarily resigned in lieu of disciplinary action?*

An answer of yes to any of the previous questions requires a written explanation. The questions allow the Board to assess the applicants' civil, criminal, and malpractice histories. The application for a renewal license asks the following similar questions:

- *Has any action been taken by any state board or hospital regarding our license, privileges, or DEA; or any restrictions from Medicare, Medicaid, or Workers' Compensation in the last two years or that has not been previously reported to the board?*
- *Have you been involved in any malpractice action, civil or criminal action in the last two years?*

A response of yes to any of these questions on the renewal application also warrants a written explanation.

The Board has two methods to check the accuracy of the responses to the questions concerning disciplinary actions taken by medical boards....but neither of these two data banks lists criminal background history information.

The Board has two methods to check the accuracy of the responses to the questions concerning disciplinary actions taken by medical boards. The Board can submit the medical professional's name to the NPDB/HIPDB. These searches display disciplinary actions taken by medical boards and malpractice issues. The FSMB information lists disciplinary actions taken by states' medical boards only. Neither of these two data banks lists criminal background history information.

The Board Cannot Utilize the FBI For Criminal History Background Checks of Licensees

Currently, the Board cannot perform criminal history background checks on applicants for licenses, either new or renewed, through the FBI database. Public Law 92-544 states that in order for a state to access FBI criminal background history information, the state must have legislation in place authorizing criminal background checks through the FBI. To comply with Public Law 92-544, state statutes must satisfy the following criteria:

- *A state statute must exist as a result of a legislative enactment;*
- *The state statute must require the fingerprinting of applicants who are to be subjected to a national criminal history background check;*
- *The state statute must expressly ("submit to the FBI") or by implication (submit for a national check"), authorize the use of FBI records for the screening of applicants;*
- *The state statute must identify the specific category(ies) of licensees/ employees falling within its purview, thereby avoiding overbreadth;*

- *The state statute must not be against public policy;*
- *The state statute may not authorize receipt of criminal history information by a private entity.*

The fees for an FBI criminal history background check range from $16 to $22. The Board could pass on this cost to applicants for licenses. The FBI criminal background check lists all felonies and occupation-related misdemeanors within US borders. The FBI criminal background check would ensure the accuracy of the answers that applicants submit to the previously mentioned questions on the license application.

The Board Can Perform Criminal Background History Checks Through the State Police of the State Where the Doctor Resides

The Board could access the State Police criminal history database without statutory authority. This criminal history check shows all violations of the law within the state of West Virginia. The fee for a State Police criminal history check is $20. This background check should be considered by the Board for in-state applicants and licensees at a frequency determined by the Board. For out-of-state licensees, the Board should consider making the applicant or licensee submit his/her fingerprints to a state police background check in the state in which he/she resides at a frequency determined by the Board. The State Police criminal history check in combination with the FBI background check should provide a complete criminal history to allow the Board to evaluate each applicant for an osteopathic license fully.

The Board Could Consider Making Licensees Report Malpractice as Soon as They Become Aware

The Board receives malpractice information concerning licensees from insurance companies. According to CSR§24-6-5.2.8,

> *Every insurer providing professional liability insurance to a licensee in this State shall submit to the Board the following information within thirty (30) days from any judgement, dismissal, or settlement of a civil action involving the insured*: *The date of any judgement, dismissal or settlement; whether any appeal has been taken on the judgement, and if so, by which party; the*

amount of any settlement or judgement against the insured; and such other information within the knowledge of the insurer as the Board requires.

Since malpractice cases can last for an extended period of time, it may be necessary for the Board to become aware of a licensee's professional conduct much sooner. The Legislative Auditor, therefore, recommends that the Board require all licensees to inform the Board of any malpractice litigation against the licensee as soon as he/she becomes aware of it. This will allow the Board to determine whether it will pursue an investigation against the licensee immediately, rather than waiting for a resolution in court and then initiating an investigation.

The Legislative Auditor recommends that the Board require all licensees to inform the Board of any malpractice litigation against the licensee as soon as he/she becomes aware of it.

Conclusion

Many doctors hold licenses to practice osteopathic medicine in multiple states. The Board subscribes to the Federation of State Medical Boards database. The FSMB service sends notification to a state's board every time a disciplinary action is taken against a doctor's license in any state. The FSMB database also lists any malpractice issues concerning each doctor. The Board also receives information on doctors through the National Practitioner Data Bank/Healthcare Integrity and Protection Data Bank. This is a query service, whereby doctors' names are submitted to the data bank and queried for a response. The NPDB/HIPDB does not automatically generate notifications as the FSMB does, when a disciplinary action is taken against a doctor's license.

Two board licensees have received significant media coverage. The first case was an osteopathic surgeon who came to West Virginia after losing his medical privileges at a Florida hospital for removing patient records. No action was taken against the doctor's license by the Florida Board of Osteopathic Medicine. The doctor only practiced in this state for seven months. In that time, his patients filed multiple medical malpractice cases[1] filed against him. He subsequently surrendered his West Virginia Board of Osteopathy license.

The second licensee came to West Virginia from Texas. A patient died under his care. The Texas Board of Medical Examiners revoked his license to practice medicine. The Chairman of the Neurosurgery Department at WVU Medical School reviewed his case and found no faults. The Chairman offered

[1] *The Legislative Auditor's wife is a lawyer in a firm handling multiple law suits against this doctor.*

the doctor a refresher course under the Chairman's supervision. Following the refresher course, WVU offered the doctor a full faculty position at its medical school. The doctor did not meet all of the requirements for employment at WVU. He now practices in West Virginia.

The Board incorrectly granted a restricted license. According to CSR §24-1-16.1, the Board shall not issue a license to a doctor who has had his license revoked in another state until the doctor becomes eligible for licensure in the state where the action was taken.

The doctor was not eligible for a West Virginia Board of Osteopathy license until June 4, 2005. The Texas Board of Medical Examiners Legislative Rule 167.1b(3) states that a doctor who has had his/her license revoked cannot apply for reissuance of a license until after the one year anniversary of the revocation.

The Board has no way to verify licensees' answers to the criminal questions on the applications. The Legislative Auditor, therefore, recommends that the Legislature consider amending the *Code* to allow the Board to access the FBI's criminal history database in order to check its new applicants and existing licensees for any past criminal activity at a frequency determined by the Board. The Legislative Auditor also recommends that the Board conduct a State Police criminal history background check of each new in-state applicant and existing licensees at a frequency determined by the Board. The Board should consider requiring new out-of-state applicants and existing licensees to submit to a criminal history background check performed by the state police in the state in which the licensee resides. The combination of FBI, State Police, FSMB, and NPDB/HIPDB information should help protect the citizens of West Virginia against incompetent, dishonest, felonious, and fraudulent doctors. The Legislative Auditor also recommends that the Board consider making licensees report any malpractice case(s) in which they are involved as soon as they become aware of the actions. This will bring the doctor's conduct to the attention of the Board much sooner than waiting for the resolution of the malpractice case. The Board will also be able to investigate problems against licensees before malpractice litigation concludes.

The Board asks questions concerning civil actions on applications for new and renewed licenses. CSR§24-6-5.2.8 states that all insurers who insure Board licensees must inform the Board within 30 days of any judgement, dismissal, or settlement concerning a civil action involving the insured. The Legislative Auditor recommends that the Board consider making licensees report any malpractice case(s) in which they are involved as soon as they become

aware of the actions. This will bring the doctor's conduct to the attention of the Board much sooner than waiting for the resolution of the malpractice case. The Board will also be able to investigate problems against licensees before malpractice litigation concludes

Recommendations

3. The Legislative Auditor recommends that the Legislature consider amending the West Virginia Code to enable the Board of Osteopathy to conduct criminal background checks through the Federal Bureau of Investigation on all applicants for new osteopathic licenses and existing licensees at a frequency determined by the Board.

4. The Legislative Auditor recommends that the Board consider requiring new in-state applicants for a license to submit to a State Police criminal history background check and existing in-state licensees submit to a State Police criminal history background check at a frequency determined by the Board.

5. The Legislative Auditor recommends that the Board consider requiring that criminal background checks be performed through the State Police in the state where the licensee resides for all out-of-state applicants for new osteopathic licenses and existing licensees at a frequency determined by the Board.

6. *The Legislative Auditor recommends that the Board consider requiring licensees to report any malpractice action(s), in which they are involved, as soon as the licensee becomes aware of it.*

Appendix A: Transmittal Letter

WEST VIRGINIA LEGISLATURE
Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX

John Sylvia
Director

September 16, 2005

Board of Osteopathy
334 Penco Road
Weirton, WV 26062

Dear Ms. Schreiber:

This is to transmit a draft copy of the Regulatory Board Evaluation of the Board of Osteopathy. This report is scheduled to be presented during the October 2, 2005 interim meeting of the Joint Committee on Government Operations. We will inform you of the exact time and location once the information becomes available. It is expected that a representative from your agency be present at the meeting to orally respond to the report and answer any questions the committee may have.

We need to schedule an exit conference via teleconference to discuss any concerns you may have with the report. Please notify us to schedule an exact time. In addition, we need your written response by noon on September 26, 2005 in order for it to be included in the final report. If your agency intends to distribute additional material to committee members at the meeting, please contact the House Government Organization staff at 340-3192 by Thursday, September 29, 2005 to make arrangements.

We request that your personnel not disclose the report to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

John Sylvia

Enclosure

Joint Committee on Government and Finance

Appendix B: Agency Response

STATE OF WEST VIRGINIA
BOARD OF OSTEOPATHY
334 PENCO ROAD
WEIRTON, WV 26062

TELEPHONE
(304) 723-4638
FAX
(304) 723-6723

September 23, 2005

Mr. John Sylvia
West Virginia Legislature
Performance Evaluation and Research Division
Charleston, WV 25305-0610

Dear Mr. Sylvia:

This letter is to transmit the West Virginia Board of Osteopathy Response to the Regulatory Board Evaluation of the Board of Osteopathy. Ernest Miller, DO, President, and Cheryl Schreiber, Executive Secretary, plan to attend the interim meeting of the Joint Committee on Government Operations to be held in Charleston, West Virginia, on Sunday, October 2, 2005.

If you have any questions, you may contact this office at (304) 723-4638.

Sincerely,

Cheryl D. Schreiber
Executive Secretary

Enclosure

WEST VIRGINIA BOARD OF OSTEOPATHY RESPONSE

ISSUE 1: Licensing Osteopathic Physicians and Physician Assistants is Needed to Protect Public.

RECOMMENDATION 1:

The Legislative Auditor recommends that the Legislature continue the Board of Osteopathy.

BOARD RESPONSE 1:

The Board agrees that the Legislature continue the Board of Osteopathy.

ISSUE 2: The Board Complies with the General Provisions of Chapter 30 of the West Virginia Code.

RECOMMENDATION 2:

The Legislative Auditor recommends that the Legislature consider amending either the Code or the Board's Legislative Rules to clarify legislative intent for the number of required continuing education hours for physician assistants.

BOARD RESPONSE 2:

The Board currently has a rule change pending before the Legislative Rule-Making Review Committee, and expects to be able to change the Rules for the number of required continuing education hours for physician assistants to forty (40) hours in the previous two-year period, which would then be consistent with the Code.

ISSUE 3: The Board's Licensing Procedure Could Be Strengthened to Better Protect the Public Interest. In Addition, the Board Did Not Follow State Law in One Instance.

RECOMMENDATION 3:

The Legislative Auditor recommends that the Legislature consider amending the West Virginia Code to enable the Board of Osteopathy to conduct criminal background checks through the Federal Bureau of Investigation on all applicants for new osteopathic licenses and existing licensees at a frequency determined by the Board.

RECOMMENDATION 4:

The Legislative Auditor recommends that the Board consider requiring new in-state applicants for a license to submit to a State Police criminal history background check and existing in-state licensees submit to a State Police criminal history background check at a frequency determined by the Board.

RECOMMENDATION 5:

The Legislative Auditor recommends that the Board consider requiring that criminal background checks be performed through the State Police in the state where the licensee resides for all out-of-state applicants for new osteopathic licenses and existing licensees at a frequency determined by the Board.

RECOMMENDATION 6:

The Legislative Auditor recommends that the Board consider requiring licensees to report any malpractice action(s), in which they are involved, as soon as the licensee becomes aware of it.

BOARD RESPONSE 3, 4, and 5:

Periodic Checks for Criminal Charges Pose Practical, Administrative and Political Problems

The draft report contains three recommendations that all involve requests, on a periodic basis, for the criminal histories and backgrounds of the Board's licensees. Though at first glance, this would appear to be a reasonable and prudent suggestion, there are a number of reasons why such procedures may prove to be so burdensome that they would outweigh their benefit.

A. There are long delays between the request for criminal background information and the issuance of the report.

The Board has learned from other attempts to obtain criminal background information and from representatives of the Department of Public Safety that it may take more than sixty days to receive a criminal background report after it is requested.

Because of such delays, a criminal background inquiry could not be incorporated into the process of regular reapplication and renewal of existing licensees.

The Board could require a background check of all new licensees prior to the issuance of a license. The Board might also require such checks of existing licensees on a random, rotating basis if this were separated from the renewal procedures. However, since existing licensees expect, and can make a legal claim for, a quick turnaround on renewal applications, it is likely that holding up the application process to wait for the background check results would cause great disruptions in the delivery of medical care.

B. There will be substantial opposition to the finger-printing requirement that is necessary to request a criminal background check.

In order to request a criminal history report from a law enforcement agency such as the FBI or the State Police, the Board must supply a contemporaneous fingerprint card for the individual whose records are sought. The fingerprints must be taken at a police station by someone with specific experience in printing.

If the Board were to abide by the recommendation in the draft report, then licensees would have to present themselves at a police station, preferably at a State Police detachment, to be fingerprinted every five (or seven or ten) years. In response to such a requirement, the doctors of this state are likely to mount a significant lobbying effort to oppose and block it. The opposition would not be restricted to osteopathic physicians, either, because doctors licensed by the Board of Medicine would probably add their own voices as a preemptive measure to prevent a similar measure from being proposed for them.

C. It will require a change to legislative rules to make criminal background checks a requirement of the Board's licensees.

Although the Board of Osteopathy might amend their procedural rules to provide for periodic criminal background checks of licensees, such provision could not be enforceable unless the requirement were promulgated as a legislative rule. The Board would have to amend its disciplinary rules to include failure to execute a release or failure to submit to fingerprinting as grounds for the denial, revocation or suspension of a license. This is not offered as a reason against the recommendation, but instead, the Legislative Auditor should note that an amended rule could not be promulgated until July 1, 2007.

D. The Legislature has shown great reluctance to any requests for an increase in licensing fees.

The draft report suggests that the fees that would be required for each criminal background report could be recouped by a tack-on to the current licensing fees. While

this would be an appropriate way to pay for the procedure, the additional cost is likely to meet with considerable objection from the licensees and from the Legislature.

Historically the Legislature has been protective of the financial requirements placed upon non-offending licensees. The Legislature tends to be very resistant to the raising of licensing fees or other costs associated with licensing. The regular review of criminal backgrounds may be accomplished through an addition of the corresponding fees to licensees, but the Legislature must be willing to accept and pass on this additional expense.

E. The Recommendations for Criminal Background Checks Do Not Appear to Correspond to Any Problems Identified in the Audit.

The draft report referred to a few cases in which problems were identified with regard to disciplinary actions or misconduct of licensees. The report also identified a problem in the delays in resolution of some cases. The report did not, however, identify any issues in which the Board's licensees had been engaged in criminal activity of which the Board was not aware. Similarly, the report did not identify that there has been a problem with applicants obtaining licenses despite criminal convictions.

In the one case cited in the draft report, criminal charges against the doctor in another state were dropped and so no conviction was recorded. Though the Board was aware that there were allegations against that doctor, the charges were extinguished and thus had no legal effect upon which the Board could lawfully deny a license to this doctor. If a criminal history report had been prepared in this instance, it might have shown the filing of charges and, perhaps, an arrest, but it would also have shown the dismissal of those charges. Though the Board may have had significant concerns about this person's character, the Board could not have legally denied a license to this person short of retrying the case against him that was charged in the other state. This would likely raise problems of collateral estoppel and respect for foreign judgments not to mention the fact that the Board does not have the authority to subpoena witnesses from other states.

The Board has also encountered other situations in which licensees have been able to have criminal charges expunged, including arrest records, so such items would not show up in a formal criminal history. In a few other cases, the Board has been aware of pending criminal charges and patiently awaited the outcome of those investigations in order to proceed appropriately, but the Board was to find that a conclusion was never reached or it came so long afterwards that it was of no benefit to protection of the public.

The Board respectfully suggests that the problem does not arise from lack of knowledge of criminal histories. Rather, there is a much greater problem with the limited effect to which such criminal information may be given. Only felony offenses and a few misdemeanors may be used as a basis for a license suspension or revocation. Dismissals and incomplete prosecutions actually cause a greater difficulty for a disciplinary action

than if there were no criminal action at all. As shown in the case example from the draft report, where one doctor repeatedly ran into trouble in one jurisdiction and moved on before any sanctions were imposed, the Board was faced with what was technically a "clean" record because the person had never been convicted and never had a completed disciplinary action. This situation is much more common than instances where the Board has not even been aware of a licensee's criminal background.

BOARD RESPONSE 6:

There Needs to Be Clarification in the Recommendation for Earlier Reporting of Malpractice Actions.

Recommendation number six in the draft report of the Legislative Audit would require the Board's licensees to report malpractice actions "as soon as the licensee becomes aware of it." If this recommendation is to be considered by the Board, some more specificity and clarification will be necessary.

What type of "malpractice actions" should be considered as reportable? Does the Legislative Auditor suggest that this apply just to the filing of a civil action or should there be other reportable events? Would receipt of a demand letter from an attorney qualify? Should a physician licensee report, as potential malpractice, the administration of remedial treatments or procedures following an untoward result of the original treatment? The board respectfully requests more guidance on this issue.

In addition, it is not clear what is contemplated by "becoming aware of" a malpractice action. Presumably a doctor would become aware of a malpractice action upon being served with a civil complaint, but if some other type of action would be deemed as a reportable event, this could involve difficult questions of proof of the doctor's awareness. Would information available to a doctor's insurer be attributed to the doctor? Some additional explanation of what is contemplated would be helpful to the Board in this regard.

The Board would also like to note that simultaneous investigations often give rise to conflicts and legal complications. Both the licensees and the malpractice claimants may - and have - cited issues of privilege and procedural concerns regarding discovery when the Board attempts to investigate alleged unprofessional behavior at the same time that civil litigation is underway.

By way of example, the draft report refers to the case of a doctor who had multiple malpractice actions against him after a very short period of practice in this state. Although there are more than sixty separate cases pending against this doctor, not one of those plaintiffs has initiated a complaint with the Board. When the Board sought information regarding the nature of those claims from attorneys for some of the plaintiffs, those parties declined to provide any information for tactical and procedural reasons. Thus, even though the Board was aware of pending malpractice claims against this doctor

and the Board sought to investigate those claims prior to their final resolution, the fact that the litigation was pending was a hindrance to the investigation and to the claimants' abilities to cooperate.

These are not necessarily reasons against the recommendation, but the Board wishes to note these actual, practical considerations and consequences of the recommendation.