



To: House Committee on Healthcare
From: Jessa Barnard, Vermont Medical Society
Date: February 12, 2020
RE: H. 438, Physician Licensing

The Vermont Medical Society is the State's largest physician membership organization, representing approximately 2,400 physicians, physician assistants and medical students of all practice types and locations. Thank you for the opportunity to testify this afternoon regarding H. 438. **Overall, VMS is comfortable with the changes proposed in the bill. We do have a few areas where we suggest specific changes.** VMS has shared this feedback with the Board of Medical Practice and looks forward to further discussion.

1. Section 1, § 1317, Unprofessional Conduct to be Reported to the Board

VMS and other stakeholders met with the Board of Medical Practice a number of times in 2018 to discuss and refine the language contained in § 1371. VMS is comfortable with the compromise language contained in this section and the balance it strikes between the Board seeking information about circumstances that could impact patient care and the ability of an employer and physician to have an opportunity to engage in mentoring, quality improvement or quality review. It is of particular importance to VMS that referrals to the Vermont Practitioner Health Program - Vermont's monitoring program run by VMS for Board licensees with an impaired ability to practice medicine – are only reported if they are the result of a completed, contested disciplinary process, allowing paths for confidential referrals before that point.

2. Section 1, §§ 1370-1376, Hearing and Discovery Process

VMS has several suggestions for sections 1370-1376 that would clarify or expand upon the rights of licensees to access information and engage in discovery during the disciplinary process.

The comments below focus on several aspects. First, it should be explicitly addressed in statute that a respondent has a right to access to the investigatory file prior to entering into a stipulation and/or participating in an evidentiary hearing. Existing statute that references the licensee's right to access his or her licensing file (26 VSA § 1318 (e)) does not sufficiently address the right to information during the course of an investigation or disciplinary process. In addition, it should be stated the licensee has the ability and adequate timeframes to engage in discovery, including securing expert witness(es) or deposing the State's expert. Finally, in cases where the Executive Director designates a hearing panel, a licensee should have the ability to move to remove a member of a panel for reasons of a conflict of interest. The intent of these changes collectively is to allow a licensee the fair opportunity to participate in the disciplinary process and respond to allegations raised against him or her.

VMS suggests the following language changes:

Insert:

§ 1371. Access to Documents, Discovery (new)

- (a) A licensee notified of a specification of charges shall be entitled to inspect and copy all information in the possession of the Department of Health pertaining to the licensee, except investigatory files which have not resulted in charges of unprofessional conduct and attorney work product, and shall be notified of that fact in accordance with subsection 1372(b) of this chapter.
- (b) A licensee notified of a specification of charges shall be entitled to depose and produce fact-witnesses, expert witnesses, and evidence on his or her own behalf, to cross-examine witnesses testifying against him or her and to engage in other methods of discovery as set out in order by the Executive Director or hearing officer.

§ 1372. HEARING PANEL (renumber)

(a) Composition of hearing panel.

(1) The Executive Director may designate a hearing panel constituting less than a quorum of the Board to conduct hearings that would otherwise be heard by the full Board. A hearing panel shall consist of at least three members, including at least one physician member of the Board and at least one public member of the Board. No member of the hearing panel shall have been a member of the investigative committee that reviewed the matter at the investigative stage. A licensee may move to disqualify a member of a hearing panel for reasons of a conflict of interest.

(2) If there is an insufficient number of members to serve on a hearing panel by reason of disqualification, resignation, vacancy, or necessary absence, the Commissioner of Health may, at the request of the Board, appoint ad hoc members to serve on the hearing panel for that matter only.

(b) Time and notice of hearing.

(1) The Executive Director or a hearing officer shall set a time for the evidentiary hearing as soon as convenient following the determination by the investigative committee that an evidentiary hearing is warranted, and subject to the discovery needs of the parties as established in any prehearing or discovery conference and/or orders regulating discovery and depositions, but no earlier than 30 days after service of the charge upon the individual complained against. A licensee may file motions for extending the time of the hearing for good cause.

(2) The Executive Director shall issue a notice of the evidentiary hearing on the charges, which notice shall specify the time and place of the hearing and shall notify the individual complained against that he or she may file with the Executive Director a written response within 20 days of the date of service. The notice shall also notify the individual complained against that a record of the proceeding will be kept and that he or she will have the opportunity to appear personally and to have counsel present, with the right to produce witnesses and evidence on his or her own behalf, to cross-examine witnesses testifying against him or her, ~~and~~ to examine such documentary evidence as may be produced against him or her, and to inspect and copy all information in the possession of the Department of Health pertaining to the licensee, except investigatory files which have not resulted in charges of unprofessional conduct and attorney work product.

3. Board Operating Procedures Regarding Investigations

VMS and the Board have been in discussion for a number of years regarding additional policies and procedures for investigating unprofessional conduct cases. Issues of priority to VMS discussed with the Board include:

- Standards for Board-initiated and Executive Director-initiated investigations

- Notice to licensees of Board-initiated cases or when notice may be delayed
- Standards for visits to practices
- Standards for when and how reports are made to law enforcement
- Standards for issuing subpoenas and access to patient records.

During the 2017 update to the Board of Medical Practice rules, Board staff assured VMS that while the VDH position was that such issues were not appropriate for rulemaking, they would be incorporated into written Board operating procedures. Further, VMS confirmed with Board staff that VMS would have an opportunity to comment on such a document and that it will be available to licensees after completion, for example, on the Board website. VMS has yet to see such a document. **VMS requests that Board operating procedures be made available by a date certain with an opportunity for licensees to review and comments.**

VMS suggests the following language changes:

Sec 6. INVESTIGATIVE PROCEDURES (new)

The Board shall by July 1, 2020 post to its website and inform licensees that an operations manual covering topics including procedures for initiating investigations, notifying licensees of investigations, visiting practices and interacting with law enforcement, is available for review and comment.

Thank you for your time considering H. 438. I am happy to answer any questions and look forward to further work on this bill. You can reach me at jbarnard@vtmd.org or 802-917-1460.