

RECEIVED

OCT 31 2023

NEVADA STATE BOARD OF
MEDICAL EXAMINERS

1 LEWIS BRISBOIS BISGAARD & SMITH LLP
 MELANIE L. THOMAS
 2 Nevada Bar No. 12576
 6385 S. Rainbow Boulevard, Suite 600
 3 Las Vegas, Nevada 89118
 Telephone: 702.893.3383
 4 Facsimile: 702.893.3789
Melanie.Thomas@lewisbrisbois.com
 5 *Attorneys for Licensee Sassan Kaveh, M.D.*

6

7

PETITION FOR ADVISORY OPINION FROM

8

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF NEVADA

9

PURSUANT TO NAC 630.450

10

11 SASSAN KAVEH, M.D. ("Dr. Kaveh"), by and through his counsel LEWIS BRISBOIS
 12 BISGAARD & SMITH, LLP hereby submits this Petition pursuant to NRS 630.450, for
 13 consideration at the upcoming regularly scheduled Board meeting on December 1, 2023.

14 DATED: October 31, 2023

Respectfully submitted,

15

MELANIE L. THOMAS
 LEWIS BRISBOIS BISGAARD & SMITH LLP

16

17

/s/ Melanie L. Thomas

18

By: 
 Attorneys for Licensee Sassan Kaveh, M.D.

19

20 /s/ Sassan Kaveh, M.D.
 Frontline Medical Group
 21 3150 N. Tenaya Way, Suite 400
 Las Vegas, NV 89128
 22 Telephone: (702) 233-6661

23

24 ///

25 ///

26 ///

27 ///

28 ///

1 PETITION FOR ADVISORY OPINION OF NRS AND NAC 630

2 I. INTRODUCTION

3 This Petition for Declaratory Order or Advisory Opinions seeks guidance on the
4 power and authority of the Board of Medical Examiners to initiate disciplinary proceedings
5 against a licensee in the absence of a complaint and a report of malpractice, specifically.

6 “The Board of Medical Examiners of the State of Nevada was established in 1899
7 by the Nevada State Legislature to perform two essential tasks: 1) To license qualified and
8 competent physicians for the practice of medicine in Nevada; and 2) To discipline
9 physicians guilty of misconduct.” See Nev. S.B. 64 Legislative History at 000031,
10 *Testimony Before the Nevada State Senate Commerce and Labor Committee*, “Exhibit C.”
11 (Mar. 20, 1985). The Medical Board provides publicly available procedures on its website
12 related to “The Investigative Complaint Process.” See The Complaint Process (**Exhibit**
13 **A**);¹ see also NRS 630.144(3)(b) (“The Board shall place on its Internet website: [...] (b) A
14 list of questions that are frequently asked concerning the processes of the Board and the
15 answers to those questions.”); see also “**Exhibits B-C.**”² “The [Medical] Board responds
16 with expediency to complaints against our licensees by conducting fair, complete
17 investigations that result in appropriate action.”³

18 The Governor’s Office previously recognized the reality that often times Board
19 members do not understand the Nevada Revised Statutes they are expected to enforce:

20 MARYBEL BATJER, CHIEF OF STAFF, OFFICE OF THE GOVERNOR:
21 From the Governor’s direction, training already has been initiated for all
22 members of our advisory boards and commissions; fully understanding that
23 people volunteer for these tasks. Oftentimes they do not understand the
Nevada Revised Statutes (NRS) for which they have volunteered to either

24 ¹ available at:
25 <https://medboard.nv.gov/uploadedFiles/mednvgov/content/Patients/InvestigativeComplaintProcesses.pdf>) [last accessed Oct. 30, 2023].

26 ² Nev. S.B. 64 Legislative History at 000046, *Testimony Before the Nevada State Senate*
27 *Commerce and Labor Committee*, at “Chart 5” and “Chart 7” (outlining the then-applicable
28 procedures followed by the Board in the investigation of complaints and in disciplinary actions
against its licensees and the proposed procedures) (Mar. 20, 1985)

³ See Mission Statement (available at <https://medboard.nv.gov/About/About/>) [last accessed Sept. 5, 2023] [emphasis added].

1 regulate, or oversee, or act in an oversight manner with a board. With the
2 assistance of the attorney general's office, we have initiated training
3 sessions for the current members. I think your conversation with Mr. Hillerby
4 is correct. We are going to continue to train all appointed board members,
both volunteer and full-time. We are fully supportive in ensuring our
members are trained to the law and the regulatory environment they are
asked to oversee and initiate.

5 See Legislative History of Nev. S.B. 250, at Senate Committee on Commerce and Labor,
6 16 (Apr. 11, 2003). "The State Board of Medical Examiners is part of the Executive Branch
7 and as such, [] execute[s] whatever public policy [the Legislature] make[s]. Obviously, the
8 licensing standards in Chapter 630 of NRS are the public policy [the Legislature] have
9 made." See Legislative History of Nev. S.B. 250, at Assembly Committee on Health and
10 Human Services, 10 (Apr. 30, 2003).

11
12 **II. QUESTION PRESENTED**

13 **A. WHETHER FORMAL DISCIPLINARY PROCEEDINGS MAY BE**
14 **INSTITUTED AGAINST A LICENSEE IN THE ABSENCE OF A CITIZEN**
15 **COMPLAINT AND IN THE ABSENCE OF A REPORT OF MALPRACTICE.**

16 This request is for clarification of the following statutes, regulations, or orders to
17 confirm and place licensees on notice of the authority of the Board to institute formal
18 disciplinary proceedings. The plain language of these statutes suggests that a citizen
19 complaint and/or a report of malpractice is required before the Board can initiate formal
20 discipline against a licensee:

21 **General Powers and Duties**

22 **NRS 630.130 Enforcement of chapter; establishment of standards**
23 **for licensure; administration of examinations; investigation of**
24 **applicants and issuance of licenses; institution of court proceedings;**
submission of biennial report; regulations.

- 25 [...] 2. On or before February 15 of each odd-numbered year, the Board
shall submit to the Governor and to the Director of the Legislative Counsel
Bureau for transmittal to the next regular session of the Legislature a written
report compiling:
26 (a) Disciplinary action taken by the Board during the previous biennium
27 against any licensee for **malpractice or negligence**;
28 (b) Information reported to the Board during the previous biennium
pursuant to NRS 630.3067, 630.3068, subsections 3 and 6 of NRS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

630.307 and NRS 690B.250; and

(c) Information reported to the Board during the previous biennium pursuant to NRS 630.30665, including, without limitation, the number and types of surgeries performed by each holder of a license to practice medicine and the occurrence of sentinel events arising from such surgeries, if any.

È The report must include only aggregate information for statistical purposes and exclude any identifying information related to a particular person.

NRS 630.160 License required to practice medicine; qualifications of applicant; issuance after verification; action by Board if Board receives information concerning applicant that differs from information previously received by Board.⁴

[...]

4. Notwithstanding any provision of this chapter to the contrary, if, after issuing a license to practice medicine, the Board obtains information from a primary or other source of information and that information differs from the information provided by the applicant or otherwise received by the Board, **the Board may:**

- (a) Temporarily suspend the license;
- (b) Promptly review the differing information with the Board as a whole or in a committee appointed by the Board;
- (c) Declare the license void if the Board or a committee appointed by the Board determines that the information submitted by the applicant was false, fraudulent or intended to deceive the Board;
- (d) Refer the applicant to the Attorney General for possible criminal prosecution pursuant to NRS 630.400; or
- (e) If the Board temporarily suspends the license, allow the license to return to active status subject to any terms and conditions specified by the Board, including:
 - (1) Placing the licensee on probation for a specified period with specified conditions;
 - (2) Administering a public reprimand;
 - (3) Limiting the practice of the licensee;
 - (4) Suspending the license for a specified period or until further order of the Board;
 - (5) Requiring the licensee to participate in a program to correct an alcohol or other substance use disorder;
 - (6) Requiring supervision of the practice of the licensee;
 - (7) Imposing an administrative fine not to exceed \$5,000;
 - (8) Requiring the licensee to perform community service without compensation;
 - (9) Requiring the licensee to take a physical or mental examination or an examination testing his or her competence to practice medicine;
 - (10) Requiring the licensee to complete any training or educational requirements specified by the Board; and
 - (11) Requiring the licensee to submit a corrected application, including the payment of all appropriate fees and costs incident to submitting an application.

///

⁴ Discipline for errors in application for licensure.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NRS 630.254 Active licensees: Notice of change of mailing address; notice of change of location or close of office located in State; location of records; maintenance of electronic mail address with Board if performing certain acts outside State.

1. Each licensee shall maintain a permanent mailing address with the Board to which all communications from the Board to the licensee must be sent. A licensee who changes his or her permanent mailing address shall notify the Board in writing of the new permanent mailing address within 30 days after the change. If a licensee fails to notify the Board in writing of a change in his or her permanent mailing address within 30 days after the change, the Board:

- (a) May impose upon the licensee a fine not to exceed \$250; and
- (b) **May initiate disciplinary action** against the licensee as provided pursuant to paragraph (j) of subsection 1 of NRS 630.306.⁵

NRS 630.299 Authority of Board or investigative committee to issue letter of warning, letter of concern or nonpunitive admonishment.

1. If the Board has reason to believe that a person has violated or is violating any provision of this chapter, the Board or any investigative committee of the Board may issue to the person a letter of warning, a letter of concern or a nonpunitive admonishment at any time before the Board has initiated any disciplinary proceedings against the person.

- 2. The issuance of such a letter or admonishment:
 - (a) Does not preclude the Board from initiating any disciplinary proceedings against the person or taking any disciplinary action against the person based on any conduct alleged or described in the letter or admonishment or any other conduct; and
 - (b) Does not constitute a final decision of the Board and is not subject to judicial review.

Reports, Complaints, Investigations and Preliminary Proceedings

NRS 630.30665 Physician required to report certain information concerning surgeries and sentinel events; disciplinary action or fine for failure to report or false report; duties of Board; confidentiality of report; applicability; regulations.

[...]
3. The Board shall:

- (a) Collect and maintain reports received pursuant to subsections 1 and 2; and
- (b) Ensure that the reports, and any additional documents created from the reports, are protected adequately from fire, theft, loss, destruction and other hazards, and from unauthorized access.

[...]

6. In addition to any other remedy or penalty, if a holder of a license to practice medicine fails to submit a report or knowingly or willfully files false information in a report submitted pursuant to this section, the Board may, after providing the holder of a license to practice medicine with notice and opportunity for a hearing, impose against the holder of a license to practice medicine an administrative penalty for each such violation. The Board shall

⁵ Provides basis for Board to initiate discipline with a specific reference to such power (the phrase "initiate disciplinary action" appears only three times in NRS 630, the remaining references are in NRS 630.336).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

establish by regulation a sliding scale based on the severity of the violation to determine the amount of the administrative penalty to be imposed against the holder of the license pursuant to this subsection. The regulations must include standards for determining the severity of the violation and may provide for a more severe penalty for multiple violations.

NRS 630.3067 Insurer of physician required to report certain information concerning malpractice; administrative fine for failure to report.

1. The insurer of a physician licensed under this chapter shall report to the Board:

(a) Any action for malpractice against the physician not later than 45 days after the physician receives service of a summons and complaint for the action;

(b) Any claim for malpractice against the physician that is submitted to arbitration or mediation not later than 45 days after the claim is submitted to arbitration or mediation; and

(c) Any settlement, award, judgment or other disposition of any action or claim described in paragraph (a) or (b) not later than 45 days after the settlement, award, judgment or other disposition.

2. The Board shall report any failure to comply with subsection 1 by an insurer licensed in this State to the Division of Insurance of the Department of Business and Industry. [...]

NRS 630.3068 Physician required to report certain information concerning malpractice and sanctions imposed against physician; administrative fine for failure to report; reports deemed public records.

1. A physician shall report to the Board:

(a) Any action for malpractice against the physician not later than 45 days after the physician receives service of a summons and complaint for the action;

(b) Any claim for malpractice against the physician that is submitted to arbitration or mediation not later than 45 days after the claim is submitted to arbitration or mediation;

(c) Any settlement, award, judgment or other disposition of any action or claim described in paragraph (a) or (b) not later than 45 days after the settlement, award, judgment or other disposition; and

(d) Any sanctions imposed against the physician that are reportable to the National Practitioner Data Bank not later than 45 days after the sanctions are imposed.

2. If the Board finds that a physician has violated any provision of this section, the Board may impose a fine of not more than \$5,000 against the physician for each violation, in addition to any other fines or penalties permitted by law.

3. All reports made by a physician pursuant to this section are public records.

NRS 630.3069 Board required to conduct investigation after receiving certain reports concerning malpractice. If the Board receives a report pursuant to the provisions of NRS 630.3067, 630.3068 or 690B.250 indicating that a judgment has been rendered or an award has been made against a physician regarding an

1 action or claim for malpractice⁶ or that such an action or claim against the
2 physician has been resolved by settlement, **the Board shall conduct an**
3 **investigation to determine whether to impose disciplinary action**
4 against the physician regarding the action or claim, unless the Board has
5 already commenced or completed such an investigation regarding the
6 action or claim before it receives the report.

7 **NRS 630.307 General requirements for filing complaint; medical**
8 **facilities and societies required to report certain information**
9 **concerning privileges and disciplinary action; administrative fine for**
10 **failure to report; clerk of court required to report certain information**
11 **concerning court actions; retention of complaints by Board.**

12 1. Except as otherwise provided in subsection 2, any person may file
13 with the Board a complaint against a physician, perfusionist, physician
14 assistant or practitioner of respiratory care on a form provided by the Board.⁷
15 The form may be submitted in writing or electronically. If a complaint is
16 submitted anonymously, the Board may accept the complaint but may
17 refuse to consider the complaint if the lack of the identity of the complainant
18 makes processing the complaint impossible or unfair to the person who is
19 the subject of the complaint.

20 2. **Any licensee, medical school or medical facility that becomes**
21 **aware that a person practicing medicine, perfusion or respiratory care in**
22 **this State has, is or is about to become engaged in conduct which**
23 **constitutes grounds for initiating disciplinary action shall file a written**
24 **complaint with the Board within 30 days** after becoming aware of the
25 conduct.

26 3. Except as otherwise provided in subsection 4, **any hospital, clinic**
27 **or other medical facility licensed in this State, or medical society, shall**
28 **report to the Board** any change in the privileges of a physician,
perfusionist, physician assistant or practitioner of respiratory care to practice
while the physician, perfusionist, physician assistant or practitioner of
respiratory care is under investigation and the outcome of any disciplinary
action taken by that facility or society against the physician, perfusionist,
physician assistant or practitioner of respiratory care concerning the care of
a patient or the competency of the physician, perfusionist, physician
assistant or practitioner of respiratory care **within 30 days** after the change
in privileges is made or disciplinary action is taken.

4. **A hospital, clinic or other medical facility** licensed in this State,
or medical society, **shall report to the Board** within 5 days after a change
in the privileges of a physician, perfusionist, physician assistant or
practitioner of respiratory care to practice that is based on:

(a) An investigation of the mental, medical or psychological competency
of the physician, perfusionist, physician assistant or practitioner of
respiratory care; or

⁶ Limiting the Board's authority to investigate to actions or claims for malpractice under NRS 630.3068, by its silence on subsection (d) of the statute.

⁷ Compare NRS 630.309 (The Board or any of its investigative committees may file a written complaint against non-physicians directly. "To institute a disciplinary action against a perfusionist, physician assistant or practitioner of respiratory care, a written complaint, specifying the charges, must be filed with the Board by: 1. The Board or a committee designated by the Board to investigate a complaint; 2. Any member of the Board; or 3. Any other person who is aware of any act or circumstance constituting a ground for disciplinary action set forth in the regulations adopted by the Board.")

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(b) Suspected or alleged substance abuse in any form by the physician, perfusionist, physician assistant or practitioner of respiratory care.

5. **The Board shall report any failure to comply** with subsection 3 or 4 by a hospital, clinic or other medical facility licensed in this State to the Division of Public and Behavioral Health of the Department of Health and Human Services. If, after a hearing, the Division of Public and Behavioral Health determines that any such facility or society failed to comply with the requirements of subsection 3 or 4, the Division may impose an administrative fine of not more than \$10,000 against the facility or society for each such failure to report. If the administrative fine is not paid when due, the fine must be recovered in a civil action brought by the Attorney General on behalf of the Division.

6. **The clerk of every court shall report to the Board** any finding, judgment or other determination of the court that a physician, perfusionist, physician assistant or practitioner of respiratory care:

- (a) Is mentally ill;
- (b) Is mentally incompetent;
- (c) Has been convicted of a felony or any law governing controlled substances or dangerous drugs;
- (d) Is guilty of abuse or fraud under any state or federal program providing medical assistance; or
- (e) Is liable for damages for malpractice or negligence,

È within 45 days after such a finding, judgment or determination is made.

7. The Board shall retain all complaints filed with the Board pursuant to this section for at least 10 years, including, without limitation, any complaints not acted upon.

NRS 630.311 Review and investigation of complaint by committee designated by Board; formal complaint; proceedings confidential; publication of summary of proceedings and determinations.

1. Except as otherwise provided in NRS 630.323, a committee designated by the Board and consisting of members of **the Board shall review each complaint and conduct an investigation to determine if there is a reasonable basis for the complaint**. The committee must be composed of at least three members of the Board, at least one of whom is not a physician. The committee may issue orders to aid its investigation including, but not limited to, compelling a physician to appear before the committee.

2. If, after conducting an investigation, the committee determines that there is a reasonable basis **for the complaint** and that a violation of any provision of this chapter has occurred, the committee may file a formal complaint with the Board.

3. The proceedings of the committee are confidential and are not subject to the requirements of NRS 241.020. Within 20 days after the conclusion of each meeting of the committee, the Board shall publish a summary setting forth the proceedings and determinations of the committee. The summary must not identify any person involved in the complaint that is the subject of the proceedings.

NRS 630.318 Examination of physician to determine fitness to practice medicine; consent to examination; testimony and examination reports not privileged; effect of failure to submit to examination.

1. If the Board or any investigative committee of the Board has reason to believe that the conduct of any physician has raised a reasonable

1 question as to his or her competence to practice medicine with reasonable
2 skill and safety to patients, or if the Board has received a report pursuant to
3 the provisions of NRS 630.3067, 630.3068 or 690B.250 indicating that a
4 judgment has been rendered or an award has been made against a
5 physician regarding an action or claim for malpractice or that such an action
6 or claim against the physician has been resolved by settlement, **the Board
or committee may order that the physician undergo a mental or
physical examination**, an examination testing his or her competence to
7 practice medicine or any other examination designated by the Board to
8 assist the Board or committee in determining the fitness of the physician to
9 practice medicine. [...]

7 **NRS 630.323 Review and investigation of complaint relating to
8 prescriptions for certain controlled substances; notice to licensee;
9 formal complaint and hearing; referral or postponement of
10 investigation; regulations; explanation or technical advisory bulletin
11 for physicians and physician assistants regarding relevant law.**

10 1. The Executive Director of the Board or his or her designee **shall
11 review and evaluate any complaint or information received** from the
12 Investigation Division of the Department of Public Safety or the State Board
13 of Pharmacy, including, without limitation, information provided pursuant
14 to NRS 453.164, or from a law enforcement agency, professional licensing
15 board or any other source indicating that:

13 (a) A licensee has issued a fraudulent, illegal, unauthorized or
14 otherwise inappropriate prescription for a controlled substance listed in
15 schedule II, III or IV;

14 (b) A pattern of prescriptions issued by a licensee indicates that the
15 licensee has issued prescriptions in the manner described in paragraph (a);
16 or

15 (c) A patient of a licensee has acquired, used or possessed a controlled
16 substance listed in schedule II, III or IV in a fraudulent, illegal, unauthorized
17 or otherwise inappropriate manner.

17 [...]

18 4. If, after a review and evaluation conducted pursuant to subsection
19 1, the Executive Director or his or her designee determines that a licensee
20 may have issued a fraudulent, illegal, unauthorized or otherwise
21 inappropriate prescription for a controlled substance listed in schedule II, III
22 or IV, **the Board must proceed as if a written complaint had been filed
against the licensee**. If, after conducting an investigation and a hearing in
23 accordance with the provisions of this chapter, the Board determines that
24 the licensee issued a fraudulent, illegal, unauthorized or otherwise
25 inappropriate prescription, the Board must impose appropriate disciplinary
26 action.

22 [...]

23 6. The Board shall:

24 (a) Adopt regulations providing for disciplinary action against a licensee
25 for inappropriately prescribing a controlled substance listed in schedule II,
26 III or IV or violating the provisions of NRS 639.2391 to 639.23916, inclusive,
27 and any regulations adopted by the State Board of Pharmacy pursuant
28 thereto. Such disciplinary action must include, without limitation, requiring
the licensee to complete additional continuing education concerning
prescribing controlled substances listed in schedules II, III and IV.

(b) Develop and disseminate to each physician and physician assistant
licensed pursuant to this chapter or make available on the Internet website
of the Board an explanation or a technical advisory bulletin to inform those

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

physicians and physician assistants of the requirements of this section and NRS 630.324, 639.23507 and 639.2391 to 639.23916, inclusive, and any regulations adopted pursuant thereto. The Board shall update the explanation or bulletin as necessary to include any revisions to those provisions of law or regulations. The explanation or bulletin must include, without limitation, an explanation of the requirements that apply to specific controlled substances or categories of controlled substances.

NRS 630.336 Confidentiality of certain proceedings, reports, complaints, investigations, records and other information; exceptions. [...]

4. Except as otherwise provided in subsection 5 and NRS 239.0115, a complaint filed with the Board pursuant to NRS 630.307, all documents and other information filed with the complaint and all documents and other information compiled as a result of an investigation conducted to determine whether to initiate disciplinary action are confidential.

5. The formal complaint or other document filed by the Board to initiate disciplinary action and all documents and information considered by the Board when determining whether to impose discipline are public records.

Disciplinary Proceedings

NRS 630.339 Contents of formal complaint; answer; case conference; procedure for hearing resulting from report of violations of Industrial Insurance Act; formal hearing.

1. If a committee designated by the Board to conduct an investigation of a complaint decides to proceed with disciplinary action, it shall bring charges against the licensee by filing a formal complaint. The formal complaint must include a written statement setting forth the charges alleged and setting forth in concise and plain language each act or omission of the respondent upon which the charges are based. The formal complaint must be prepared with sufficient clarity to ensure that the respondent is able to prepare a defense. The formal complaint must specify any applicable law or regulation that the respondent is alleged to have violated. The formal complaint may be signed by the chair of the investigative committee or the legal counsel for the Board.

NRS 630.352 Disposition of charges: Adjudication by Board; dismissal of charges or required disciplinary action for violations; private reprimands prohibited; issuance of order imposing discipline; orders imposing discipline deemed public records.

1. Any member of the Board, other than a member of an investigative committee of the Board who participated in any determination regarding a formal complaint in the matter or any member serving on a panel of the Board at the hearing of the matter, may participate in an adjudication to obtain the final order of the Board. **At the adjudication, the Board** shall consider any findings of fact and conclusions of law submitted after the hearing and **shall allow:**

(a) Counsel for the Board to present a disciplinary recommendation and argument in support of the disciplinary recommendation subject to the provisions of NRS 622A.200 and 622A.210;

(b) The respondent or counsel of the respondent to present a disciplinary recommendation and argument in support of the disciplinary recommendation; **and**

(c) **The complainant in the matter** to make a statement to the Board regarding the disciplinary recommendations by the parties and to address

1 the effect of the respondent's conduct upon the complainant or the
2 patient involved, if other than the complainant.

3 È The Board may limit the time within which the parties and the
4 complainant may make their arguments and statements.

5 2. At the conclusion of the presentations of the parties and the
6 complainant, the Board shall deliberate and may by a majority vote impose
7 discipline based upon the findings of fact and conclusions of law and the
8 presentations of the parties and the complainant.

9
10
11 **III. DISCUSSION**

12 It appears the public policy is to act only when there is an initial public complaint
13 made to the Medical Board, or upon the report of certain events related to malpractice
14 that stem from patient care complaints brought in litigation, mediation, arbitration, or were
15 otherwise settled. See NRS 630.3067-NRS 630.3068.

16 Chapter 630 specifies that once the Board receives a complaint about a
17 physician, an investigative committee reviews it to determine whether is
18 has a reasonable basis. See Nev. Rev. Stat. § 630.311. If
19 the investigation substantiates the complaint, the Board may bring formal
20 charges against the physician and set a hearing date. *Id.* § 630.339.

21 *Buckwalter v. Nev. Bd. of Med. Exam'rs*, No. 11-15742, 2012 U.S. App. LEXIS 8461, at *8
22 (9th Cir. Apr. 26, 2012). [emphases added]. NRS 630.307 provides in relevant part as
23 follows:

24 **NRS 630.307 General requirements for filing complaint; medical**
25 **facilities and societies required to report certain information**
26 **concerning privileges and disciplinary action; administrative fine for**
27 **failure to report; clerk of court required to report certain information**
28 **concerning court actions; retention of complaints by Board.**

1. Except as otherwise provided in subsection 2, any person may
file with the Board a complaint against a physician [...] on a form provided
by the Board. The form may be submitted in writing or electronically. If a
complaint is submitted anonymously, the Board may accept the complaint
but may refuse to consider the complaint if the lack of the identity of the
complainant makes processing the complaint impossible or unfair to the
person who is the subject of the complaint.

2. Any licensee, medical school or medical facility that becomes
aware that a person practicing medicine [...] in this State has, is or is about
to become engaged in conduct which constitutes grounds for initiating
disciplinary action shall file a written complaint with the Board within 30
days after becoming aware of the conduct.

3. Except as otherwise provided in subsection 4, any hospital,
clinic or other medical facility licensed in this State, or medical
society, shall report to the Board any change in the privileges of a
physician, [...] to practice while the physician [...] is under investigation
and the outcome of any disciplinary action taken by that facility or society
against the physician [...] concerning the care of a patient or the

1 competency of the physician [...] within 30 days after the change in
2 privileges is made or disciplinary action is taken.

3 4. **A hospital, clinic or other medical facility licensed in this**
4 **State, or medical society**, shall report to the Board within 5 days after a
5 change in the privileges of a physician [...] to practice that is based on:

6 (a) An investigation of the mental, medical or psychological
7 competency of the physician [...]; or

8 (b) Suspected or alleged substance abuse in any form by the
9 physician [...].

10 6. **The clerk of every court** shall report to the Board any finding,
11 judgment or other determination of the court that a physician [...]:

12 (a) Is mentally ill;

13 (b) Is mentally incompetent;

14 (c) Has been convicted of a felony or any law governing controlled
15 substances or dangerous drugs;

16 (d) Is guilty of abuse or fraud under any state or federal program
17 providing medical assistance; or

18 (e) Is liable for damages for malpractice or negligence,

19 É within 45 days after such a finding, judgment or determination is made.

20 7. The Board shall retain all complaints filed with the Board pursuant
21 to this section for at least 10 years, including, without limitation, any
22 complaints not acted upon.

23 **emphases added**. NRS 630.307; compare language stricken at legislative hearing stage

24 (“[The board or any of its members, any medical review panel of a hospital or medical
25 society which becomes aware that any one or combination of the grounds for initiating
26 disciplinary action may exist as to a person practicing medicine in this state shall, and any
27 other person who is so aware may, file a written complaint specifying the relevant facts
28 with the board or with the medical society of the county in which the person charged has
his office if there is a medical society in the county.]”⁸

29 In *Sarfo v. State*, 134 Nev. 709, 429 P.3d 650 (2018), the Nevada Supreme Court
30 held:

31 In issuing this order, the district court relied on *Hernandez v. Bennett-*
32 *Haron*, 128 Nev. 580, 287 P.3d 305 (2012), to find that the IC’s
33 investigation did not invoke due process protections because the IC “has
34 no authority to adjudicate any legal rights,” since it is only “tasked with
35 gathering facts and investigating **whether there is any merit to a**
36 **complaint filed with the Board** against a physician.”

37 *Sarfo*, 134 Nev. at 710-11, 429 P.3d 650. **emphases added**. The proposition in *Sarfo* is

38 ⁸ Available at <https://www.leg.state.nv.us/Statutes/63rd/Stats198510.html#Stats198510page2239>
[last accessed Oct. 31, 2023].

1 that there is required to be a complaint filed with the Board in order to initiate discipline,
2 unrelated to a report of malpractice. As demonstrated by the plain language of the Nevada
3 Revised Statutes and through its legislative history, it appears that the Medical Board itself
4 cannot be the complainant.

5 There are two types of complaints that come before the Board: a
6 complaint initially generated by a member of the public and a formal
7 complaint generated by the IC following the completion of its
8 investigation. See NRS 630.311. Upon receipt of the initial complaint
9 filed by a member of the public against a physician, the Board must
10 designate an IC to "review each complaint and conduct an investigation to
11 determine if there is a reasonable basis for the complaint." NRS 630.311(1).
12 The IC has no disciplinary powers and can only file a formal complaint
13 with the Board if it concludes that a complaint from a member of the
14 public has a reasonable basis. NRS 630.311(2). Once a formal complaint
15 has been filed, the adjudicative process begins, and the physician is
16 provided with notice and an opportunity to be heard at a formal
17 hearing. See NRS 630.339. Here, Dr. Sarfo is alleging a due process
18 violation stemming from an initial complaint, not a formal complaint.

19 *Sarfo v. State*, 134 Nev. 709, 712, 429 P.3d 650 (2018)[emphases added].

20 The Nevada Constitution requires that "[n]o person shall be deprived of
21 life, liberty, or property, without due process of law." Nev. Const. art. 1, §
22 8(5). The district court, relying on *Hernandez v. Bennett-Haron*, 128 Nev.
23 580, 287 P.3d 305 (2012), found that Dr. Sarfo could not prevail on the
24 merits because due process was not implicated in this matter, as the IC
25 was merely performing investigatory fact-finding with no power to
26 deprive Dr. Sarfo of his liberty interest. In *Hernandez*, we determined
27 that the county coroner's fact-finding investigation of whether police
28 officers used excessive force did not implicate due process rights because
the county coroner was only tasked with fact-finding and not with
adjudicating formal disciplinary proceedings. 128 Nev. at 591-93, 287
P.3d at 313-14. In fact, due process protections "need not be made
available in proceedings that merely involve fact-finding or investigatory
exercises by the government agency." *Id.* at 587, 287 P.3d at 311
(citing *Hannah v. Larche*, 363 U.S. 420, 442, 80 S. Ct. 1502, 4 L. Ed. 2d
1307 (1960)). Here, the IC is tasked with "conduct[ing] an investigation to
determine if there is a reasonable basis for the complaint." NRS
630.311(1).

Dr. Sarfo challenges the district court's application of *Hernandez*,
contending that the IC is distinguishable from a county coroner because
the IC, unlike the county coroner, is able to file a formal complaint with the
Board. However, NRS 630.352(1) mitigates the due process danger of an
entity serving in both an investigatory and adjudicatory role, stating that
[a]ny member of the Board, *other than a member of an investigative
committee of the Board who participated in any determination regarding a
formal complaint in the matter* or any member serving on a panel of the
Board at the hearing of the matter, may participate in an adjudication to
obtain the final order of the Board.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Thus, the IC fact-finders are statutorily prohibited from participating in the adjudication of any subsequent formal complaint.

Sarfo, 134 Nev. at 712-13, 429 P.3d 650. **[emphases added]**. The procedural safeguards relied upon by the Nevada Supreme Court included the filing of a citizen complaint as a pre-requisite to investigation. The IC has no disciplinary powers and can only file a formal complaint with the Board **if it concludes that a complaint from a member of the public** has a reasonable basis. NRS 630.311(2).

IV. LEGISLATIVE HISTORY

The following Legislative History suggests the Board’s authority to “initiate” disciplinary proceedings is limited:

Perhaps the most unique bill passed on the subject of medical malpractice in Nevada in 1975 was S.B. 432. Many states sought to increase the power and flexibility of medical licensing boards as a response to charges that regulation of the medical profession was not all that it might be. Nevada did this as well, giving the Board of Medical Examiners new powers of discipline and new legal protections for its official actions. Access for complaints to the board was clearly opened to any citizen with legal protections for such persons. The unique feature of the Nevada law was the role mandated to the Attorney General designed with two purposes in mind. First, the 58th session was concerned that a strong investigative capability be available to the board. It gave the Attorney General this responsibility. Second, it was concerned that the board not be its own investigator, prosecutor and judge. Under S.B. 432, the Attorney General investigates complaints referred by the board and where the grounds are adequate, recommends that the board take action. The board then has three options. It can dismiss the case, proceed administratively or direct the Attorney General to go into district court for a judicial order to suspend, revoke or modify a license.

See Bulletin 77-1 The Problems of Medical Malpractice Insurance, at 28.⁹

An earlier recommendation reflected the subcommittee’s desire that the Board of Medical Examiners be informed of all claims made or closed against doctors. It was felt that once a claim was closed, the board should look into the specific facts to determine if any board action is warranted. If all closed claims must be investigated, the board is not placed in the position of choosing which cases to investigate. Removal of this discretion should protect the board against charges of favoritism or harassment.

⁹ Available at: <https://www.leg.state.nv.us/Division/Research/Publications/InterimReports/1977/Bulletin77-01.pdf> [last accessed Oct. 31, 2023].

1 See Bulletin 77-1 The Problems of Medical Malpractice Insurance, at 32-33.¹⁰

2 Problems

3 There are problems with the present disciplinary process. First, the
4 Secretary-Treasurer has full responsibility of reviewing and investigating all
5 complaints and making a Judgment as to the reasonable basis of those
6 complaints. The Board, and I agree, that this is too much authority and
7 responsibility vested in one individual and believes that the function of
8 investigating complaints should be done by a committee of the Board.

6 Nev. S.B. 64 Legislative History at 000037, *Testimony Before the Nevada State Senate*
7 *Commerce and Labor Committee*, at "Exhibit C." (Mar. 20, 1985) (implying that discipline
8 initiation requires the receipt of an outside complaint versus self-initiating authority of the
9 Board).

10 "When a complaint has been received and reviewed and there is a reasonable basis
11 for the complaint, the secretary shall order an investigation of the complaint rather than to
12 await the periodic meeting of the Board. This will expedite investigations to the public
13 benefit." Nev. S.B. 53 Legislative History at 10, *Letter from Nevada State Board of Medical*
14 *Examiners*, "Exhibit D." (Jan. 31, 1983) (complaint is pre-requisite to investigation); see
15 also Minutes of the Nevada State Legislature, Assembly Committee on Health and Welfare,
16 at 37 ("a complaint is received by the Board, reviewed by the Secretary of the Board, and
17 the Secretary orders the investigation of that complaint. Fortunately, he said, the Board
18 now has the luxury of an investigator which they haven't had before. Previously, the AG's
19 office handled the investigations, but due to the budget cuts that came in, they no longer
20 are able to provide that service. Now, when a complaint comes to the attention of the Board,
21 and is determined to have a reasonable basis, the Board's Secretary, Dr. Kenneth F.
22 Maclean of Reno reviews that and directs an investigation be made." (Mar. 23, 1983).

23 KEITH L. LEE, LOBBYIST, STATE BOARD OF MEDICAL EXAMINERS
24 (SBME):

25 I will give you a brief perspective of how the State Board of Medical
26 Examiners deals with malpractice claims filed against a physician. When
27 the board learns, from whatever source, there is a potential malpractice,
28 and that source could be the doctor himself or herself, the insurance

27 ¹⁰ Available at:

28 <https://www.leg.state.nv.us/Division/Research/Publications/InterimReports/1977/Bulletin77-01.pdf>
[last accessed Oct. 31, 2023].

1 company, the plaintiff's lawyer, a colleague, or someone else, a file is
2 immediately opened at the staff level. Whatever information is available at
3 that time and can be obtained by the staff is gathered, and an on-staff
4 physician reviews it and makes an overall analysis. Regardless of the
5 physician's analysis, the information and the review goes on to an
6 investigating board made up of three members of the State Board of
7 Medical Examiners, one of whom must be a lay person. That board does
8 their own independent investigation. Depending on the outcome of their
9 investigation, it is then referred to the full board for a disciplinary hearing if
10 that is the investigating board's recommendation. At some point in time that
11 information comes into the public domain. From the board's perspective,
12 that information does not come to the public domain until the investigative
13 staff makes a decision for disciplinary action.

8 See Legislative History of Nev. S.B. 250, at Senate Committee on Commerce and Labor,
9 34, comments by Keith L. Lee, Lobbyist, State Board of Medical Examiners, (Mar. 14,
10 2003).

11 Kevin Powers said:
12 I am going to focus on what the bill does. Section 28 contains some
13 preliminary requirements, which must be met before the board is required to
14 take any action. The board has to receive a report that a licensed physician
15 has a judgment rendered against that licensed physician for a claim of
16 malpractice or negligence. What happens under sections 28 and 32 of the
17 bill is when the board receives a notice of a judgment of malpractice, the
18 board then has to evaluate the competency of the physician. That evaluation
19 of competency is considered at a disciplinary proceeding where the board
20 would decide if it should take disciplinary action because of the judgment of
21 malpractice being levied against the physician. If the doctor were to not
22 achieve compliance with the competency testing, that would be a reason for
23 the board, in addition to the malpractice judgment, to suspend or revoke the
24 license or take other disciplinary action. This provision does not deal with
25 applicants for a license, it only deals with licensed physicians who had a
26 judgment of malpractice levied against them.

20 See Legislative History of Nev. S.B. 250, at Senate Committee on Commerce and Labor,
21 5-6, comments by Kevin Powers (Mar. 28, 2003).

22 **Keith Lee, Legislative Advocate, State Board of Medical Examiners:**
23 [...] I have written in something else that I believe is important, which I will call to
24 your attention by way of some very brief background. There are 9 members
25 on the Board of Medical Examiners. Pursuant to statute and procedure of
26 the Committee, 3 members of the Board are designated as the investigative
27 committee. Whenever a complaint is filed against a physician, for any
28 alleged misconduct or malpractice, the investigative committee reviews that.

27 See Legislative History of Nev. S.B. 250, at Assembly Committee on Commerce and Labor,
28 5-6, comments by Keith L. Lee, Lobbyist, State Board of Medical Examiners, (June 1,

1 2003).

2 **V. CONCLUSION**

3 Wherefore, licensee requests that the Nevada State Board of Medical Examiners
4 issue an advisory opinion in this matter within thirty (30) days of the December 1, 2023
5 meeting, pursuant to NAC 630.450(2), confirming that a citizen complaint and/or report of
6 malpractice is required for the Board to investigate a licensee for initiation of formal
7 disciplinary proceedings or otherwise providing the instances when the Board may initiate
8 its own investigations and formal disciplinary actions.¹¹

9 October 31, 2023

10

LEWIS BRISBOIS BISGAARD & SMITH LLP

11

12

By /s/ Melanie L. Thomas

13

MELANIE L. THOMAS

14

Nevada Bar No. 12576

15

6385 S. Rainbow Boulevard, Suite 600

16

Las Vegas, Nevada 89118

17

Melanie.Thomas@lewisbrisbois.com

18

Attorneys for Licensee Sassan Kaveh, M.D.

19

20

21

22

23

24

25

26

27

28

¹¹ "[...] Within 30 days thereafter, the Board will issue its declaratory order or advisory opinion."

EXHIBIT A

The Complaint Process



EXHIBIT B

PRESENT DISCIPLINARY PROCEDURES

#5
80000622

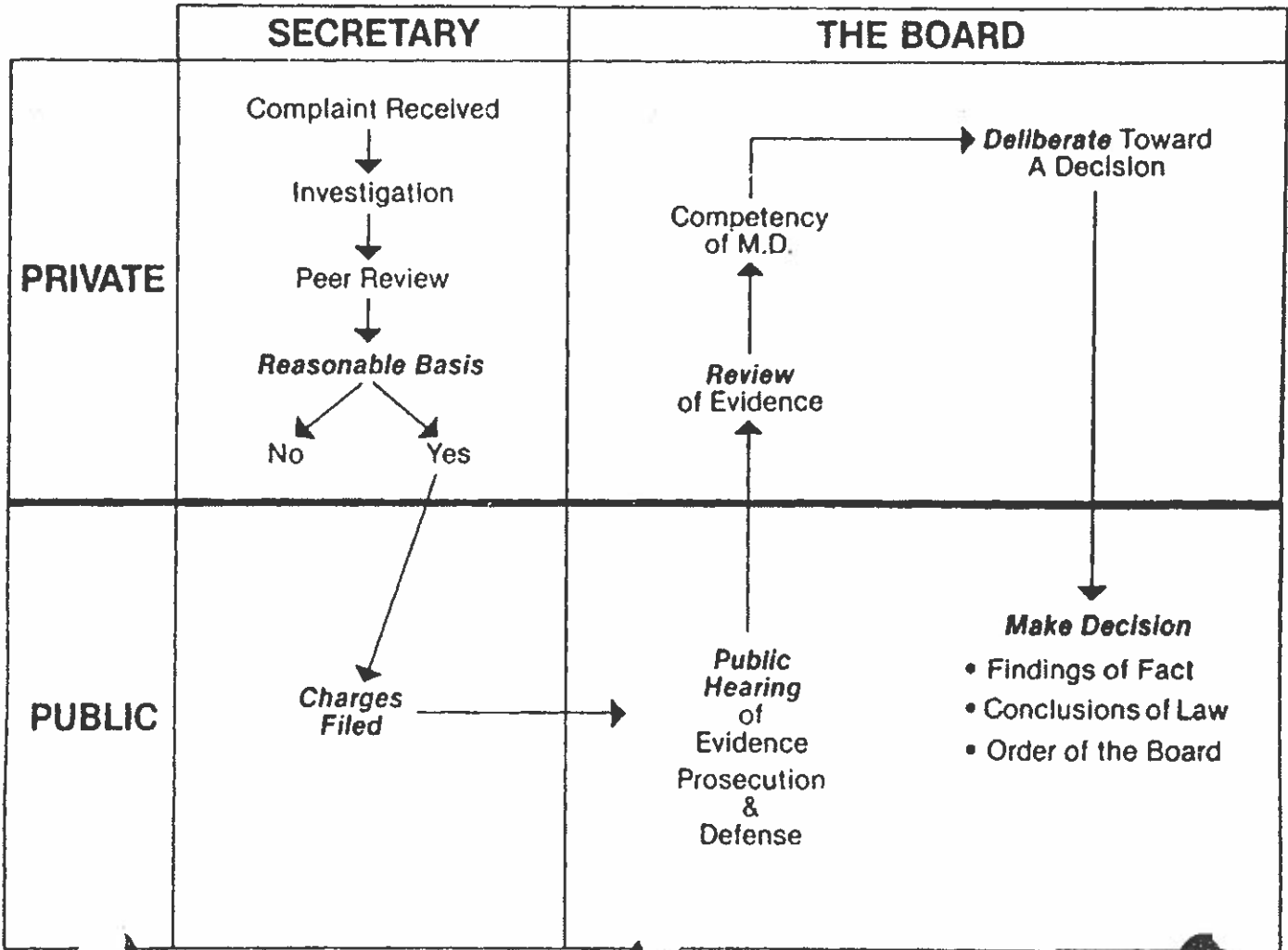


EXHIBIT C

PROPOSED DISCIPLINARY PROCEDURES

#7

00004
TSC

