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Short Title: Disciplinary Proceedings/NC Medical Board.

(Public)

Sponsors:

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March 26, 2009

A BILL TO BE ENTITLED

AN ACT AMENDING DISCIPLINARY PROCEEDINGS OF THE NORTH CAROLINA
MEDICAL BOARD.

The General Assembly of North Carolina enacts:

SECTION 1.1. G.S. 90-1.1 is amended by adding the following new subdivision:

"(4a) Modality. – A method of medical treatment."

SECTION 1.2. G.S. 90-14(a)(6) reads as rewritten:

"(6) Unprofessional conduct, including, but not limited to, departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, or the committing of any act contrary to honesty, justice, or good morals, whether the same is committed in the course of the ~~physician's~~licensee's practice or otherwise, and whether committed within or without North Carolina. The Board shall not revoke the license of or deny a license to a ~~person~~person, or discipline a licensee in any manner, solely because of that person's practice of a therapy that is experimental, nontraditional, or that departs from acceptable and prevailing medical practices unless, by competent evidence, the Board can establish that the treatment has a safety risk greater than the prevailing treatment or that the treatment is generally not effective."

SECTION 1.3. G.S. 90-14(g) reads as rewritten:

"(g) Prior to taking action against any licensee ~~who practices integrative medicine~~ for providing care not in accordance with the standards of practice for the procedures or treatments administered, the Board shall whenever practical consult with a ~~licensee who practices integrative medicine.~~licensee who routinely utilizes or is familiar with the same modalities and who has an understanding of the standards of practice for the modality administered. Information obtained as result of the consultation shall be available to the licensee at the informal nonpublic precharge conference."

SECTION 1.4. G.S. 90-14 is amended by adding the following new subsections to read:

"(h) No investigation of a licensee shall be initiated upon the direction of a single member of the Board without another Board member concurring. A Board member shall not serve as an expert in determining the basis for the initiation of an investigation.

(i) At the time of first communication from the Board or agent of the Board to a licensee regarding a complaint or investigation, the Board shall provide notice in writing to the



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1 licensee that informs the licensee: (i) of the existence of any complaint or other information
2 forming the basis for the initiation of an investigation; (ii) that the licensee may retain counsel;
3 (iii) how the Board will communicate with the licensee regarding the investigation or
4 disciplinary proceeding in accordance with subsections (m) and (n) of this section;(iv) that the
5 licensee has a duty to respond to inquiries from the Board concerning any matter affecting the
6 license, and all information supplied to the Board and its staff will be considered by the Board
7 in making a determination with regard to the matter under investigation; (v) that the Board will
8 complete its investigation within six months or provide an explanation as to why it must be
9 extended; and (vi) that if the Board makes a decision to initiate public disciplinary proceedings,
10 the licensee may request in writing an informal nonpublic precharge conference.

11 (j) After the Board has made a nonpublic determination to initiate disciplinary
12 proceedings, but before public charges have been issued, the licensee requesting so in writing,
13 shall be entitled to an informal nonpublic precharge conference. At least five days prior to the
14 informal nonpublic precharge conference, the Board will provide to the licensee the following:
15 (i) all relevant information obtained during an investigation, including exculpatory evidence
16 except for information that would identify an anonymous complainant; (ii) the substance of any
17 written expert opinion that the Board relied upon, not including information that would identify
18 an anonymous complainant or expert reviewer; (iii) notice that the licensee may retain counsel,
19 and if the licensee retains counsel all communications from the Board or agent of the Board
20 regarding the disciplinary proceeding will be made through the licensee's counsel; (iv) notice
21 that if a Board member initiated the investigation then that Board member will not participate
22 in the adjudication of the matter before the Board or hearing committee; (v) notice that the
23 Board may use an administrative law judge or designate hearing officers to conduct hearings as
24 a hearing committee to take evidence; (vi) notice that the hearing shall proceed in the manner
25 prescribed in Article 3A of Chapter 150B of the General Statutes and as otherwise provided in
26 this Article; and (vii) any Board member who serves as a hearing officer in this capacity shall
27 not serve as part of the quorum that determines the final agency decision.

28 (k) Unless the conditions specified in G.S. 150B-3(c) exist, the Board shall not seek to
29 require of a licensee the taking of any action adversely impacting the licensee's medical
30 practice or license without first giving notice of the proposed action, the basis for the proposed
31 action, and information required under subsection (i) of this section.

32 (l) The Board shall complete any investigation initiated pursuant to this section no later
33 than six months from the date of first communication required under subsection (i) of this
34 section, unless the Board provides to the licensee a written explanation of the circumstances
35 and reasons for extending the investigation.

36 (m) If a licensee retains counsel to represent the licensee in any matter related to a
37 complaint, investigation, or proceeding, the Board shall communicate to the licensee through
38 the licensee's counsel.

39 (n) Notwithstanding subsection (m) of this section, if the licensee has retained counsel
40 and the Board has not made a nonpublic determination to initiate disciplinary proceedings, the
41 Board may serve orders to produce, orders to appear, or provide notice that the Board will not
42 be taking any further action against a licensee to both the licensee and the licensee's counsel."

43 **SECTION 2.** G.S. 90-14.2 reads as rewritten:

44 **"§ 90-14.2. Hearing before disciplinary action.**

45 (a) Before the Board shall take disciplinary action against any license granted by it, the
46 licensee shall be given a written notice indicating the ~~general nature of the charges, accusation,~~
47 ~~or complaint~~ charges made against ~~him,~~ the licensee, which notice may be prepared by a
48 committee or one or more members of the Board designated by the Board, and stating that ~~such~~
49 ~~the~~ licensee will be given an opportunity to be heard concerning ~~such charges or complaint~~ the
50 charges at a time and place stated in ~~such~~ the notice, or at a time and place to be thereafter
51 designated by the Board, and the Board shall hold a public hearing not less than 30 days from

1 the date of the service of ~~such~~ notice upon ~~such~~ the licensee, at which ~~such~~ the licensee may
2 appear personally and through counsel, may cross examine witnesses and present evidence in
3 ~~his~~ the licensee's own behalf. A ~~physician~~ licensee who is mentally incompetent shall be
4 represented at such hearing and shall be served with notice as herein provided by and through a
5 guardian ad litem appointed by the clerk of the court of the county in which the ~~physician~~ has
6 ~~his residence~~ licensee resides. ~~Such~~ The licensee or physician may, if he desires, may file
7 written answers to the charges ~~or complaints preferred against him~~ within 30 days after the
8 service of ~~such~~ the notice, which answer shall become a part of the record but shall not
9 constitute evidence in the case.

10 (b) Once charges have been issued, neither counsel for the Board nor counsel for the
11 respondent shall communicate ex parte, directly or indirectly, pertaining to a matter that is an
12 issue of fact or a question of law with a hearing officer or Board member who is permitted to
13 participate in a final decision in a disciplinary proceeding. In conducting hearings, the Board
14 shall retain independent counsel to provide advice to the Board or any hearing committee
15 constituted under G.S. 90-14.5(a) concerning contested matters of procedure and evidence."

16 **SECTION 3.** G.S. 90-14.5 reads as rewritten:

17 "**§ 90-14.5. Use of hearing committee and depositions; appointment of hearing officers.**

18 (a) ~~The~~ Except as provided in subsection (a1) of this section, the Board, in its discretion,
19 may designate in writing three or more hearing officers to conduct hearings as a hearing
20 committee to take evidence. A majority of hearing officers participating in a hearing committee
21 shall be licensees of the Board. The Board shall make a reasonable effort to include on the
22 panel at least one physician licensed in the same or similar specialty as the licensee against
23 whom the complaint has been filed. If a current or retired judge as described in G.S. 90-1.1(2)
24 who is not a current or past Board member participates as a hearing officer, the Board may
25 elect not to retain independent counsel for the hearing committee.

26 (a1) The Board may use an administrative law judge consistent with Article 3A of
27 Chapter 150B of the General Statutes in lieu of a hearing committee so long as the Board has
28 not alleged that the licensee failed to meet an applicable standard of medical care.

29 (b) Evidence and testimony may be presented at hearings before the Board or a hearing
30 committee in the form of depositions before any person authorized to administer oaths in
31 accordance with the procedure for the taking of depositions in civil actions in the superior
32 court.

33 (c) The hearing committee shall submit a recommended decision that contains findings
34 of fact and conclusions of law to the Board. Before the Board makes a final decision, it shall
35 give each party an opportunity to file written exceptions to the recommended decision made by
36 the hearing committee and to present oral arguments to the Board. A quorum of the Board will
37 issue a final decision. No member of the Board who served as a member of the hearing
38 committee described in subsection (a) of this section may participate as a member of the
39 quorum of the Board that issues a final agency decision.

40 (d) Hearing officers are entitled to receive per diem compensation and reimbursement
41 for expenses as authorized by the Board. The per diem compensation shall not exceed the
42 amount allowed by G.S. 90-13.3."

43 **SECTION 4.** G.S. 90-14.6 reads as rewritten:

44 "**§ 90-14.6. Evidence admissible.**

45 (a) Except as otherwise provided in proceedings held pursuant to this Article the Board
46 shall admit and hear evidence in the same manner and form as prescribed by law for civil
47 actions. A complete record of such evidence shall be made, together with the other proceedings
48 incident to ~~such~~ the hearing.

49 (b) Subject to the North Carolina Rules of Civil Procedure and Rules of Evidence, in
50 proceedings held pursuant to this Article, the individual under investigation may call witnesses,
51 including medical practitioners licensed in the United States with training and experience in the

1 same field of practice as the individual under investigation and familiar with the standard of
2 care among members of the same health care profession in North Carolina. Witnesses shall not
3 be restricted to experts certified by the American Board of Medical Specialties. A Board
4 member shall not testify as an expert witness.

5 (c) Subject to the North Carolina Rules of Civil Procedure and Rules of Evidence,
6 statements contained in medical or scientific literature shall be competent evidence in
7 proceedings held pursuant to this Article. Documentary evidence may be received in the form
8 of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are
9 available for examination by the parties. Upon timely request, a party shall be given an
10 opportunity to compare the copy with the original if available.

11 (d) When evidence is not reasonably available under the Rules of Civil Procedure and
12 Rules of Evidence to show relevant facts, then the most reliable and substantial evidence
13 available shall be admitted.

14 (e) Any final agency decision of the Board shall be based upon a preponderance of the
15 evidence admitted in the hearing."

16 **SECTION 5.** G.S. 90-14.8 reads as rewritten:

17 "**§ 90-14.8. Appeal from Board's decision taking disciplinary action on a license.**

18 (a) A licensee against whom the Board imposes any public disciplinary sanction, as
19 authorized under G.S. 90-14(a), may appeal such action.

20 (b) ~~A physician whose license is revoked or suspended by the Board~~ A licensee against
21 whom any public disciplinary sanction is imposed by the Board may obtain a review of the
22 decision of the Board in the Superior Court of Wake CountyCounty, or the county in which the
23 licensee resides, upon filing with the secretary of the Board a written notice of appeal within
24 2030 days after the date of the service of the decision of the Board, stating all exceptions taken
25 to the decision of the Board and indicating the court in which the appeal is to be heard. The
26 court shall schedule and hear the case within six months of the filing of the appeal.

27 (c) Within 30 days after the receipt of a notice of appeal as herein provided, the Board
28 shall prepare, certify and file with the clerk of the Superior Court of ~~Wake County~~ in the county
29 where the notice of appeal has been filed the record of the case comprising a copy of the
30 charges, notice of hearing, transcript of testimony, and copies of documents or other written
31 evidence produced at the hearing, decision of the Board, and notice of appeal containing
32 exceptions to the decision of the Board."

33 **SECTION 6.** G.S. 90-16(e1) reads as rewritten:

34 "(e1) When the Board receives a complaint regarding the care of a patient, the Board shall
35 provide the licensee with a copy of the complaint as soon as practical and inform the
36 complainant of the disposition of the Board's inquiry into the complaint and the Board's basis
37 for that disposition. If providing a copy of the complaint identifies an anonymous complainant
38 or compromises the integrity of an investigation, the Board shall provide the licensee with a
39 summary of all substantial elements of the complaint. Upon written request of a patient, the
40 Board may provide the patient a licensee's written response to a complaint filed by the patient
41 with the Board regarding the patient's care. Upon written request of a complainant, who is not
42 the patient but is authorized by State and federal law to receive protected health information
43 about the patient, the Board may provide the complainant a licensee's written response to a
44 complaint filed with the Board regarding the patient's care. Any information furnished to the
45 patient or complainant pursuant to this subsection shall be inadmissible in evidence in any civil
46 proceeding. However, information, documents, or records otherwise available are not immune
47 from discovery or use in a civil action merely because they were included in the Board's review
48 or were the subject of information furnished to the patient or complainant pursuant to this
49 subsection."

50 **SECTION 7.** This act becomes effective October 1, 2009, and applies to
51 investigative or disciplinary actions initiated on or after that date.