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NEW HAMPSHIRE DEPARTMENT OF JUSTICE REVIEW

OF BOARD OF MEDICINE - PUBLIC SUMMARY

The New Hampshire Department of Justice ("DOJ") has undertaken a review of the practices and procedures of the New Hampshire Board of Medicine ("BOM") during the two-plus decade period from approximately 1994 through 2019 (the "Review Period") after the Governor and Attorney General agreed that such a review was necessary. Some of the content of that review cannot be made public pursuant to statutory requirements that prohibit the disclosure of complaints and of investigatory actions that do not result in a public hearing or licensure sanctions. What follows is a public summation of the conclusions from that review.

Background

In September of 2022, the *Boston Globe* published a series of articles about a now-retired cardiac surgeon who practiced at Catholic Medical Center in Manchester ("CMC"), from approximately 1994 to 2019, Dr. Yvon Baribeau. The *Globe* concluded that Dr. Baribeau "has one of the worst surgical malpractice records among all physicians in the United States." According to the *Globe*, Dr. Baribeau "has settled 21 malpractice claims . . . including 14 in which he is accused of contributing to a patient's death." The *Globe* asserted that this is "the largest cluster of malpractice settlements from surgery-related deaths involving a single physician in recent US history." For its part, CMC explained in its response to the *Globe's* inquiries that the number of complaints/lawsuits resulted from the fact that Dr. Baribeau—as a highly skilled cardio-thoracic surgeon—was often tasked with the most severe and difficult cases and that those cases are simply more likely to have negative outcomes (and hence, result in claims/complaints) even if the surgeon performs appropriately.

Apart from the specific assertions about Dr. Baribeau's unfitness as a surgeon, the *Globe* "Spotlight" series also stated that "New Hampshire's medical licensing agency is one of the least transparent [in the country]." The *Globe* reported that "[s]tate officials said they don't see it as their role to inform the public about all aspects of a doctor's troubled history and also want to protect physicians' privacy."[1] The *Globe* also and claimed the New Hampshire disciplinary system is too lenient, citing a national study that found New Hampshire to be "the weakest among the 50 states in disciplining troubled doctors."

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[1] The *Globe* articles do not provide the identity of the state officials who allegedly made these comments.

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The Board of Medicine is established in RSA Chapter 329 with the "primary responsibility and obligation" to "protect the public from the unprofessional, improper, incompetent, unlawful, fraudulent, and deceptive practice of medicine." RSA 329:1-aa. The Board fulfills this obligation, in relevant part, by taking disciplinary action against a physician's license to practice when the individual has engaged in misconduct as set forth in RSA 329:17. The Board is also empowered to issue "nondisciplinary confidential letters of concern" to address a physician's practices or activities. RSA 329:17, VII-a. Misconduct complaints made to the Board and investigations of those complaints are confidential. RSA 329:18. When the Board determines disciplinary action is appropriate for a particular misconduct complaint, the hearing on such action and any resulting decision is public. RSA 329:18-a. With regard to Dr. Baribeau, there was no public disciplinary action taken by the Board of Medicine during the period of his licensure.[2]

Scope of Review

DOJ reviewed a selection of the relevant investigatory files in its Administrative Prosecution Unit's and the Office of Professional Licensure and Certification's ("OPLC's") possession regarding BOM proceedings from the Review Period. The purpose of the review was to determine whether the BOM followed the processes set forth by New Hampshire statutes and administrative rules when receiving and processing complaints in light of the assertions raised by the *Globe* articles about Dr. Baribeau.[3] The DOJ did not undertake a formal comparison to other jurisdictions' licensing regimes nor did it conduct any statistical analysis of the disciplinary "rate" of New Hampshire physicians. As set forth more fully below, DOJ has determined that BOM's processing and assessing of complaints was consistent with the applicable statutes and rules.[4]

In the interest of further promoting public safety, the review also notes areas where policymakers should consider reforms such as greater transparency in the disciplinary process and changes in other areas where the review found potential deficiencies with the current process.

I. Board of Medicine Procedures

The Board of Medicine's ("BOM's") current structure and practice is governed by RSA 329 (Physicians and Surgeons) and Admin. Rules Med 100 through 600.

Potential disciplinary matters typically come to the BOM in one of four ways: Individual complaints (from patients or members of the public), *see* RSA 329:17, I and I-a, settlements of legal claims (these are typically received from insurance carriers, who are obligated to provide copies of settlements involving license-holders to OPLC), *see* RSA 329:17, III, hospital reports (hospitals are statutorily obligated to report certain things to OPLC, such as employee discipline

[2] The BOM process is detailed more fully in Section I.

[3] The purpose of this review was *not* to determine whether Dr. Baribeau violated the appropriate standard of care in any specific instance.

[4] The review included many of the factual circumstances alluded to in the *Globe* articles.

of licensees), *see* RSA 329:17, IV, and court filings,[5] *see* RSA 329:17, II (collectively "complaints").[6] Any complaint received by OPLC[7] via these four routes is treated as confidential, and is not made public, nor subject to disclosure under RSA 91-A, unless and until public discipline is sought by the BOM through an adjudicative hearing or issued pursuant to an agreement between the BOM and the licensee. *See* RSA 329:18 (information gathered by the BOM "shall be exempt from the public disclosure provisions of RSA 91-A except to the extent such information may later become the subject of a public disciplinary hearing").

Once a complaint is received OPLC provides it to the BOM for its review.[8] Complaints are typically reviewed by the BOM's current investigator, although they are sometimes reviewed initially by OPLC staff or a BOM member, typically the chair. The reviewer then makes a recommendation to the BOM to either take no further action ("NFA") on the complaint or to investigate it. The BOM votes on the investigator's/reviewer's recommendation. If the BOM decides there should be no further action, a letter is sent to the licensee indicating NFA and the matter is closed, without an investigation. In the event of an NFA determination, the complaint and any supporting documentation remain confidential and are not subject to disclosure under RSA 91-A. *See id.*

If instead the BOM concludes that the complaint merits investigation, the matter is forwarded to another body, the Medical Review Sub-Committee ("MRSC"). *See* RSA 329:18, I ("The board, through the medical review subcommittee, may investigate possible misconduct by licensees . . ."). Despite what its name suggests, the MRSC is not a true "subcommittee" of the BOM and instead is a statutorily-created body with separate membership from the BOM, and all its activities are "confidential and privileged." *See* RSA 329:17, V-a ("A medical review subcommittee of 13 members shall be nominated by the board of medicine and appointed by the governor and council. . .") and RSA 329:29 ("All proceedings, records, findings and deliberations of the medical review subcommittee related to the investigations of individual licensees are confidential and privileged and shall not be used or available for use or subject to process in any other proceeding....").

Upon receipt of a complaint from the BOM, the MRSC undertakes an investigation. The MRSC typically contracts with a "board investigator" to lead the investigation. *See* RSA 329:17,

[5] While the BOM is statutorily required to treat all complaints as confidential, court filings are typically public documents that could therefore be available to the public through other means. In the Board's possession, however, a court filing is a confidential complaint.

[6] There are a few other ways complaints might reach the BOM as set forth in RSA 329:17 I through V, and the BOM also has the authority to undertake disciplinary action on its own initiative, but the four mechanisms listed are the primary ways that proceedings with the BOM are initiated.

[7] Complaints addressed to the BOM now come to OPLC, which provides administrative support for BOM. Prior to 2021 such complaints would have gone directly to a Board administrator. During the Review Period the prior model was in place. The flow and structure—and the role of the BOM—were functionally the same under both that arrangement and the current arrangement. As the purpose of this review is to suggest policy changes, the current statutory structure is described here. The confidentiality provisions relating to complaint and investigative materials were not changed when the current OPLC structure was put in place.

[8] In cases where immediate action is necessary to prevent serious ongoing harm, the BOM has the statutory authority to impose immediate, temporary suspensions. This review focuses on the standard process.

V-a ("The state of New Hampshire, by the board and the office of professional licensure and certification, and with the approval of governor and council, shall contract with a qualified physician to serve as a medical review subcommittee investigator") and Admin. Rule Med 201.02(c).[9] Depending on the circumstances and the nature of the complaint the investigation might consist of interviews with the licensee, other witness interviews, and a review of documentation. Following the investigation, the MRSC creates a report of investigation ("ROI") which typically includes a professional medical opinion from the board investigator on whether the appropriate standard of care was followed and makes a recommendation to the BOM to either take no further action or to seek to impose discipline. All of the investigation materials remain confidential and are not subject to disclosure pursuant to RSA 91-A, unless and until there is a disciplinary proceeding. *See* RSA 329:18 (". . . investigations and the information gathered in such investigations, including information provided to the [BOM] . . . shall be exempt from the public disclosure provisions of RSA 91-A except to the extent such information may later become the subject of a public disciplinary hearing.").

The BOM is not bound by the ROI recommendation. Upon receipt of the ROI from the MRSC, the BOM may choose to issue an NFA letter, to issue a non-disciplinary Letter of Concern ("LOC") to the licensee, or to pursue formal discipline against the licensee.

The Statute establishing LOCs, RSA 329:17, VII-a, states that "[t]he board may issue a nondisciplinary confidential letter of concern to a licensee advising that while there is insufficient evidence to support disciplinary action, the board believes the physician or physician assistant should modify or eliminate certain practices . . ." As the LOC is "nondisciplinary" all materials related to the complaint and investigation remain confidential just as if the BOM had made an NFA determination. *See* RSA 329:17, VII-a ("This letter shall not be released to the public ...").

Public discipline can only be imposed by the BOM following a public hearing, as required by RSA 329:17 at which the BOM determines that the licensee:

> (a) Has knowingly provided false information during any application for professional licensure or hospital privileges, whether by making any affirmative statement which was false at the time it was made or by failing to disclose any fact material to the application.
>
> (b) Is a habitual user of drugs or intoxicants.
>
> (c) Has displayed medical practice which is incompatible with the basic knowledge and competence expected of persons licensed to practice medicine or any particular aspect or specialty thereof.
>
> (d) Has engaged in dishonest or unprofessional conduct or has been grossly or repeatedly negligent in practicing medicine or in performing activities ancillary to the practice of

[9] OPLC Enforcement typically assists with BOM investigations. At points early in the Review Period, before the OPLC reorganization, APU provided such assistance.

medicine or any particular aspect or specialty thereof, or has intentionally injured a patient while practicing medicine or performing such ancillary activities.

(e) Has employed or allowed an unlicensed person to practice in the licensee's office.

(f) Has failed to provide adequate safeguards in regard to aseptic techniques or radiation techniques.

(g) Has included in advertising any statement of a character tending to deceive or mislead the public or any statement claiming professional superiority.

(h) Has advertised the use of any drug or medicine of an unknown formula or any system of anesthetic that is unnamed, misnamed, misrepresented, or not in reality used.

(i) Has willfully or repeatedly violated any provision of this chapter or any substantive rule of the board.

(j) Has been convicted of a felony under the laws of the United States or any state.

(k) Has failed to maintain adequate medical record documentation on diagnostic and therapeutic treatment provided or has unreasonably delayed medical record transfer, or violated RSA 332-I.

(l) Has knowingly obtained, attempted to obtain or assisted a person in obtaining or attempting to obtain a prescription for a controlled substance without having formed a valid physician-patient relationship pursuant to RSA 329:1-c.

RSA 329:17, VI. Upon making such a finding, the BOM has available to it the following disciplinary actions, which it may utilize individually or in combination:

> The [BOM], upon making an affirmative finding under paragraph VI, may take disciplinary action in any one or more of the following ways:
>
> (a) By reprimand.
>
> (b) By suspension, limitation, or restriction of a license or probation for a period of time as determined reasonable by the board.
>
> (c) By revocation of license.
>
> (d) By requiring the person to submit to the care, treatment, or observation of a physician, counseling service, health care facility, professional assistance program, or any combination thereof which is acceptable to the board.
>
> (e) By requiring the person to participate in a program of continuing medical education in the area or areas in which the person has been found deficient.
>
> (f) By requiring the person to practice under the direction of a physician in a public institution, public or private health care program, or private practice for a period of time specified by the board.

> (g) By assessing administrative fines in amounts established by the board which shall not exceed $3,000 per offense, or, in the case of continuing offenses, $300 for each day that the violation continues, whichever is greater.

RSA 329:17, VII.

If an adjudicatory hearing is initiated, it is done in public, so the allegations against the licensee would become public at that time. Discipline can, and often is, imposed by agreement in lieu of a public hearing. In either case—whether imposed by agreement or after a contested adjudicatory hearing—the resulting discipline is made public and is posted on the BOM website.

Recent BOM Disciplinary Statistics

In 2022 there were 147 complaints filed with the BOM. OPLC posts any public discipline against licensees on its website, at https://www.oplc.nh.gov/board-medicine-board-actions . There were 17 licensure actions by the BOM in 2022.[10] Again, LOCs are not "disciplinary actions" and are therefore not public, and OPLC does not track the number of LOCs that are issued by the BOM each year.[11]

In 2021, the BOM received more than 215 complaints[12] and concluded 9 disciplinary actions.[13]

II. BOM review and processing of complaints

Complaints Received After Retirement

The *Boston Globe's* spotlight series reported that Dr. Baribeau had settled 21 lawsuits, which the *Globe* asserted was among the most in the country and the most in New Hampshire: "There is no US physician with more settlement involving surgical deaths in the last two decades, and no physician in New Hampshire with more settlements of any kind, than [Dr.] Baribeau . . ." This fact raises the question of whether the BOM was appropriately fulfilling its public protection obligations with regard to Dr. Baribeau's practice. It is important to note, however, that 17 of the 21 settlements were settled *after* Dr. Baribeau had retired from the practice of medicine and no longer had an active license regulated by the BOM. The BOM does not, as a

[10] Notably, disciplinary actions taken in a given year aren't necessarily—and, indeed, typically are not—issued in response to complaints filed in the same calendar year.

[11] An email from OPLC in response to a DOJ request for the number of LOCs issued in 2022 stated: "[OPLC] Enforcement does not keep track of those cases for which respondents receive LOCs. From their perspective, they bring the case forward and the board decides how to move forward. [OPLC] Enforcement would only be involved if there was adjudication or settlement."

[12] OPLC was not able to provide a precise number as they have only recently begun taking a precise count of the number of complaints received, but they were able to confirm that there were more than 215 individual complaints.

[13] As noted above, discipline can only be imposed by the BOM in a public adjudicatory hearing. If the licensee voluntarily agrees to the imposition of discipline, however, a hearing can be avoided. As such, these "disciplinary action" counts include both discipline imposed by the BOM through a hearing as well as "settlement agreements" through which a licensee stipulates to specific conduct and sanctions.

matter of course, investigate complaints received about medical professionals that no longer have an active license, both because there is no action the BOM can take against a non-license holder and because there is no meaningful public protection function to be served when the (former) licensee is already no longer practicing. Thus, the fact that 17 settlements were reached following Dr. Baribeau's retirement is not something that the BOM would have been expected to review.

Board Actions Regarding Dr. Baribeau Prior to His Retirement

Due to the statutory confidentiality requirements noted in Section I, the DOJ may not provide any public information regarding any complaints filed against Dr. Baribeau during the period of his practice in New Hampshire, including how many complaints were filed and their resolution, unless such action ended with discipline as described in Section I. Within the bounds of these statutory requirements, the DOJ can confirm that: 1) there was no publicly reportable discipline taken against Dr. Baribeau's license during the period of his practice in New Hampshire, and 2) the DOJ's review of documents from the Review Period did not reveal any instance where the BOM failed to follow extant statutory and administrative rule procedural requirements.

III. Potential Policy Changes

The DOJ makes the following policy observations and recommendations for consideration to further support the BOM's public protection mission:

Transparency

The *Globe* was very critical of what it perceived as a lack of transparency in the BOM process: "Medical consumers – patients in need – are often kept in the dark about the performance history of their physicians, even when that history is grim." Chief among the *Globe*'s concerns seemed to be that New Hampshire does not make publicly available the fact that a complaint has been filed against a licensee, particularly settlements of formal legal claims. Certainly other states (notably Massachusetts) publicly post the fact that there has been a settlement of a claim against a licensee. New Hampshire should seriously consider making one or more categories of complaints public.

It should be noted that there are pros and cons to increasing transparency in this manner. Certainly, greater transparency can further the public protection function of the OPLC/BOM by providing more information to consumers of medical services. On the other hand, knowledge of the mere fact of a settlement (which is often subject to private contractual confidentiality protections) does not afford a consumer or member of the public any context to discern a frivolous claim from a meritorious one.

Policymakers should consider making LOCs public. The fact that the BOM currently has available to it a formal mechanism to express "concern" about an individual's professional conduct in a nonpublic setting might be part of the reason that the BOM appears to act on complaints at such a low rate compared to its peers in other states.

Lastly, Policymakers should consider making the civil lawsuit category of complaints public with the Board of Medicine. While this is already a public document within the court system, this enhances transparency by connecting relevant public documents to licensees and further sheds light on the BOM's activities.

Investigatory Tools

Policymakers should consider increasing the investigatory tools available to the BOM to gather information in an investigation. The BOM already has the authority to issue subpoenas for "witnesses and for documents and things" (from both licensees and third parties alike) pursuant to RSA 329:18, IV(a)-(e). It also retains broad authority to request information from a licensee any time there is a complaint, without a subpoena: "The board may at any time require a licensee or license applicant to provide a detailed, good faith written response to allegations of possible professional misconduct or grounds for non-disciplinary remedial action . . . " *See* RSA 329:18, VII. Still, additional statutory authority might be advisable to support the BOM's public protection mission and to streamline its investigations. For example, policymakers should consider including employment records and files in RSA 329:18, VII, as these are records that are outside the licensee's control.

Policymakers should also consider adding authority for OPLC to assume investigative authority for the BOM (and perhaps other licensing boards similarly situated) on temporary basis if deficiencies in process or resources are identified. While our review has concluded that the BOM followed the correct statutory process during the Review Period, this situation highlights the fact that there could be merit in having some interim backstop in the event that the BOM or another Board either was not following correct process or had insufficient resources to manage current investigations.

Data

Policymakers should consider requiring the BOM to post certain enforcement statistics on its website. As noted, disciplinary enforcement actions and the number of complaints are already posted, but it would be helpful for the public to understand the BOM's activities if it were required to track and post the number of LOCs issued annually to licensees.

Conclusion

Based on the material considered by the DOJ in its review, the BOM followed the correct statutory processes in the matters during the Review Period. Nevertheless, the *Globe* series and the review that it prompted revealed several areas where the public may benefit from policymakers reviewing the current statutory processes. Policymakers should consider reform of the current system to better address the following:

- Greater transparency
- More efficient investigations and dispositions of complaints
- More robust and effective data collection tools for investigators