MAINE BOARD OF LICENSURE IN MEDICINE
BOARD OF OSTEOPATHIC LICENSURE

Joint Report to the Business and Economic Development Committee
Of the 119th Legislature, First General Session

Regarding the Implementation of
Consumer Assistant, and Alternate Dispute Resolution
December 30, 1999

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HISTORY

Based on the recommendations of a committee appointed study group, the 118th Legislature, Second Session, passed Public Law 680 (LD 1580). This law called for the creation of a Consumer Assistant position to assist consumer complainants at both boards, enhancements to the non disciplinary documentation process of regulatory boards, and adjustments to laws regarding the Board of Osteopathic Licensure (BOL) complaint management process. The law also asked for a report regarding the implementation of Alternate Dispute Resolution by the licensing boards.

In July 1998, when Public Law 680 became effective, the Boards moved forward to affect the provisions of the law by accomplishing the following:

- CONSUMER ASSISTANT: The position was openly recruited and a candidate was hired in January 1999. The position is of confirmed benefit to consumers who file complaints against physician licensees.
- ADR: Protocols for the use of Alternate Dispute Resolution (ADR) within the consumer complaint process were developed and implemented, within the limits of statutory public disclosure requirements. The conflict of Administrative Procedures Act public disclosure requirements and confidentiality demands of ADR have marginalized the potential value of the process to respond to consumer concerns.
- LETTERS OF GUIDANCE: Both boards began using this new capability to communicate board concerns to licensees who were not otherwise candidates for board discipline. The public disclosure requirements of the letters, in conflict with patient confidentiality requirements, have seriously limited the value of the letters to clearly communicate board concerns.
- REDUCE MEDICAL BOARD MEMBERSHIP BY ONE LICENSED MEMBER. This change became effective July 1, 1999. Current board members have noted the increased workload created by the reduction.
- STATUTORY CHANGES include the ability of the Board of Osteopathic Licensure to allow complainants a higher level of participation in the complaint process. A number of additional administrative actions have been implemented by both boards to enhance the customer awareness and service levels of each board.

REPORT OF EFFECTIVENESS

1. ALTERNATE DISPUTE RESOLUTION (ADR) CANNOT BE SUCCESSFUL WITHOUT A STATUTORY CHANGE.

Alternate Dispute Resolution relies on confidentiality as a part of its success. The Administrative Procedures Act requires that if a regulatory board orders ADR the process and the result must be public. Anyone can attend the negotiation session, and the final agreement must be public.

This dichotomy between theory and practice can only be remedied by allowing the regulatory boards to order a licensee to ADR, while keeping the process confidential. Failed ADR can be returned to the regulatory body for public determination of discipline. A recommended change to Title 10 can be provided at the committee's request.

2. THE CONSUMER ASSISTANT POSITION APPEARS TO BE A SUCCESS.

- The primary job functions of the position include: 1) helping the complainant accurately articulate the complaint; 2) explaining, interpreting, and assisting in navigating the process with the consumer complainant; 3) maintaining regular contact, to report investigative/hearing status. The CA job description is included at attachment 1.
- This position assisted in the resolution of 151 Board of Medicine complaints and 32 osteopathic board complaints in 1999. Detailed reports regarding disposition will be available as required by statute in March 2000.
- The CA position demands a fine balance of empathy and an understanding of the responsibilities of the Boards as perceived by consumers. The skills required to succeed in the position are a challenge to find, compensate adequately, and retain. The position requires stability of the incumbent to be truly successful. Long term retention may always an issue, due to salary and opportunity pressures. The first Consumer Assistant hired has recently left for another position in Maine State government. The boards are currently recruiting.
- The CA reports many personal expressions of appreciation for the additional attention provided to consumer complainants. A quote from one complainant taken immediately after an Adjudicatory Hearing in early 1999 is indicative. (Note that the complaint did not rise to a level requiring discipline.)

  "May I just make one comment. I am very pleased at the way that I have been treated; the speed with which you people have responded. I thank you for the opportunity to be here. Uh, the people that you have that work back here are very nice people, very available. Umm, they have made the process, which I said originally was very difficult, much less difficult. I thank Dr. XX for being here, and like I say, my greatest concern and my greatest wish, is that she becomes the physician to her patients that she wants to be, and that they need. Thank you."
- The CA position has become a valuable addition to the overall staffing. The position assists board members in clear and efficient preparation of case analysis reporting, and helps assure focus on the complainants concerns.
- The position is shared on an 80% / 20% basis by the Board of Medicine and the osteopathic Board. This appears to allow the CA to satisfactorily manage contacts with all complainants.
- The single ongoing difficulty expressed by the CA is that a significant majority of complainant dissatisfaction results from the **distinction between negligence and incompetence**. Clearly communicating the difference seems simple but is very difficult: simple negligence is an error;

incompetence is the inability to practice with adequate skill or knowledge. Negligence is determined by the civil justice system. Regulatory boards are charged to deal with incompetence and unprofessional conduct. Many consumer complaints relate solely to issues of medical negligence.

The statutory inability of the regulatory boards to take action on errors of negligence is a confusing and often emotionally troublesome issue. This issue becomes especially difficult and confusing to the patient who has experienced a medical mishap and no one will clearly determine the responsible party. However the determination of **NEGLIGENCE** and making the patient "whole" for such errors are the **PURVIEW OF THE CIVIL JUSTICE SYSTEM,** and should appropriately remain in that arena. **Regulatory boards** can only respond to demonstrated failure to practice within **acceptable minimum standards.** Often the friction between the two systems can hamper the board's investigative efforts. Both sides can be and sometimes are unwilling to share full information, based on the advice of their attorneys, making a clear finding very difficult.

The whole area of negligence (the right to be made whole through $$) and incompetence is complex. To truly understand the critical nature of this subject requires a clear understanding of the independent but perceived interrelated nature of the concepts. The consideration of these issues is so large in breadth and so complex that it seems inappropriate to attempt to address them within the mandate of this report. If the committee wishes, the board is willing to meet with the committee to further discuss the issues.

3. THE CONSUMER RE-SURVEY WAS NOT CONCLUSIVE, BUT DOES SHOW IMPROVEMENTS IN SIGNIFICANT AREAS

- The survey process used by the study committee in 1997 to survey complainants who had been through the process was duplicated in the fall of 1999. However in this survey of 30 complainants only 8 responded. This is too small a sample to draw definitive conclusions when the two results are compared, but it appears some trends can be approximated.
    - The number of respondents who felt that "the process was fully explained" increased by 10% to 75% in 1999.
    - All respondents but one were satisfied with the "level of assistance received in filing the complaint", reversing a 2-1 score unsatisfied in 1997.
    - All respondents but one felt "the complaint accurately conveyed their concern", reversing a 2-1 score of inaccuracy in 1997.
    - Personal contact responses increased from 39 % to 88 %.
    - Personal contact satisfaction changed 5 fold to 86% from 1997.
    - Responses to "Did you have enough input" increased almost 20 %; however the total score still showed a desire for additional input into the process.
    - To the question "Was dismissal timely", 50% said YES, up from 33% in 1997.
    - In 1999 50 % are satisfied or very satisfied with the overall process. In 1997 the number was zero.
- These results, if transferred onto the universe of complainants, suggest that the Consumer Assistant is in fact contributing to the consumer's successful experience with the regulatory board, even if the final decision of the board may still be unsatisfactory. No questions focused on satisfaction with the end result or board decision, since the 1997 survey did not do so.

4. THE "LETTER OF GUIDANCE " COMMUNICATIONS TOOL HAS SIGNIFICANT LIMITATIONS

The letter of guidance, which allows a regulatory board to express concern regarding a licensee's behavior or performance without the weight of a formal discipline, has been used over 30 times by the two boards since authorization. Two significant negative, albeit unintended, consequences have limited the value of these letters. This non-confidential letter communicating board concerns was established in response to a state Supreme judicial court ruling that disallowed such letters, even if done confidentially.

The intent of the "letter of guidance" was to respond to concerns about physician behavior that did not rise to a level of discipline (and therefore could be simple negligence) but did catch the attention of the Board. The letters were intended to often serve as the bridge between negligence and incompetence. The board uses the letter to identify its concerns and expectations of appropriate remedy. A great deal of effort is expended attempting to make the public letter as explanatory as possible, within the guidelines of appropriate consumer confidentiality. However, the potential benefit to direct the licensee's attention to a deficit is often lost because the board must protect the confidentiality of the patient in this public letter. This requires exclusion of the very details that used to go into these letters and are needed to explain the concern.

Further, while the boards clearly do not exist to protect the professional lives of licensees, the letters were intended to improve practice. Despite clear legislative intent, employers and insurance companies who treat these non-disciplinary communications as indicators of potential or impending future discipline do a great disservice to the consumers who expressed their concerns. Physicians often spend their time explaining away the letter of guidance to credentialers instead of understanding and acting on the expressed concern.

In replacing the "frank" private letter from the board with a public letter, the board has lost a good deal of the impact of expressing specific concerns to crafted language that attempts to worm its way around confidentiality and law suit "discovery", and anticipate incorrect interpretations of accusations of serious wrong doing. The ability to speak frankly, knowing there is some opportunity to affect licensees behavior seems to be lost in the public forum. The boards feel forced to increasingly use the informal conference to have these frank discussions. This process is much less efficient and is beginning to place serious workload demands on the whole complaint process.

If the committee wishes to discuss this issue further then board members would be more than happy to do so.

5. REDUCTION OF MEDICAL BOARD MEMBERSHIP

The Board of Licensure in Medicine was required by the statute to reduce membership by one licensed member to a total 9, with 3 being public members. This was accomplished as of July 1, 1999. The public member representation on the medical and osteopathic boards – 3 on each board – is the highest public representation on any regulatory boards in the state. In the six months now passed since the loss of the 10th board member, the current members of the board of medicine have already noticed a significant impact on their workload. This will certainly require the use of outside consultants from time to time to provide initial analysis of consumer complaints.

- Initiated talks with University of New England, Colleg steopathic Medicine regarding training of osteopathic medical students in areas that the I inds problematic.
- The board verifies licensure renewals with national dis ry database to ensure that any disciplinary actions recently taken are detected.
- The board notifies other states in which a Maine licens ensed of disciplinary action(s) taken by this Board to ensure that consumers in other st also protected (in case FSMB Summary Report is not yet available for the given month)

We hope this report has been of some value in understanding ult of public Law 680, and the additional support it has afforded Maine citizens as they use t gulatory agencies. The boards will be happy to answer any questions at your convenience.