Progress In Reforming Professionals'

By Marc K. Cohen
and M. Natalie McSherry

Three years ago, the *Maryland Bar Journal* published an article entitled "Calls for Reform in the Discipline of Health Care Professionals." At that time, the status quo was not widely embraced. There were strident demands for more efficiency and accountability in the discipline of health care professionals. Equally loud calls were made for the establishment of procedures that were more predictable and fair, hopefully with more rational outcomes in the disciplinary process. Paramount to health care professionals was the right to practice their profession, and to the public - the obligation to practice it honestly and competently. The tension in disciplinary reform was often seen as between the opposing goals of efficiency and fairness. However, there was a reasonable expectation that both goals could be advanced by reform legislation.

The Health Care Disciplinary Process

Background

The establishment of the State Board of Medical Examiners in 1957 was among the earliest efforts in Maryland of state licensure for healthcare providers. This board was comprised entirely of members selected by the Medical and Chirurgical Faculty, a voluntary professional society, and functioned with little state oversight.

Over time, the march toward uniform standards of care and the establishment of accepted levels of professional and ethical patient services brought health occupation boards under increasing pressure to function less like collegial professional societies and more like law enforcement agencies. Boards were encouraged or mandated to have more consumer members, have more detailed professional and ethical rules, increase investigations and prosecutions, limit non-public discipline in favor of publicly reported discipline, increase fines and penalties, and be far more efficient and swift in these efforts. Boards were given more staff and authority to investigate complaints by a member of the public or by the board itself. Ultimately, boards were given the responsibility to issue charges, fashion settlement terms, and decide the facts of the matter. The penalties that could be imposed, as long as they were within board authority, were devoid of any statutory guidelines or restrictions and in many instances even the fines and monetary penalties imposed by a board could be retained and spent by that very board.

Review and oversight of board discipline by the courts was increasingly limited. Judicial review offered no relief to licensees who found not a "straw to grasp" in attempting to protect their licenses against perceived arbitrariness or illegality in a board disciplinary decision. The courts clearly indicated their constraint to interfering with the legislative grant of powers to boards. No blending of investigative, prosecutorial, judging or penalizing functions was found to be constitutionally prohibited. *See, e.g., State Board of Physicians v. Bernstein*, 167 Md. App. 714, 894 A.2d 621 (2006); *Rosov v. State Board of Dental Examiners*, 163 Md. App. 98 877 A.2d 1111 (2005); both citing *Withrow v. Larkin*, 421 U. S. 35, 95 S. Ct. 1456,

Gradually, concern grew within the legislature and health care professional societies that there were aspects of the disciplinary process that had gone too far in neglecting the rights of professionals and appeared to be manifestly unfair, even if the disciplinary process itself was not unconstitutional. Courts also suggested that, while the judicial branch had limited authority to alter board decisions or procedures, relief should be sought through legislative change. See Judge Deborah Eyler opinion in *State Board of Physicians v. Bernstein*, 167 Md. App. 714, 767, 894 A.2d 621, 652 (2006).

Legislative efforts to provide a greater degree of "due process" began to be seriously considered as far back as 1999. Legislation introduced that year proposed: to require boards to separate the hearing and investigatory functions and comply with the Public Information Act as part of a licensee's right of discovery; a statute of limitations on prosecutions; and to guarantee the right to counsel at every stage of the disciplinary process. Md. HB 1217. Except for memorializing the issues for resolution, little progress came out of this legislative effort.

Over the succeeding decade, other legislative attempts at reform legislation were considered and either rejected or held for further study and consideration. Finally, House Bill 811, enacted as Chapter 212, Acts of 2008 established a Task Force on Discipline of HealthCare Professionals and Improved Patient Care (the "Task Force") to develop recommendations for health care discipline reform.

Enactment of the Task Force Recommendations

The Task Force issued its final report and recommendations to the Governor and the Maryland General Assembly on January 30, 2009. http://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/011000/011234/unrestricted/20090123e.pdf The legislature accepted the Task Force report and, with few changes, adopted nearly all recommendations, and introduced enacting legislation. This legislation was first introduced in the 2009 Legislative Session as House Bill 1275 (Nathan-Pulliam, Benson, Montgomery, Oaks, Pena-Melnyk, Tarrant and V. Turner) and Senate Bill 956 (Conway). These bills, with few amendments, made substantial progress toward passage, but neither passed both houses. The following year, House Bill 1275 was reintroduced as HB 114 and became Chapter 534, Acts of 2010.

The 2010 Reforms

Board Structure and Membership

The Task Force identified a potential concern of perceived bias in that the membership of some licensing boards

appeared unbalanced in terms of race, gender or geographic area. Race and gender bias have long been proscribed and were usually given fair consideration in appointments. Nevertheless, the composition of some boards may have reflected the diversity within the licensed profession, but not the diversity in the state, or geographic differences. To remedy, or avoid the concerns of such bias or lack of diversity, Section 1-214 was added to the Maryland Code Annotated, Health Occupation Article, expressly mandating that boards "reasonably reflect the geographic, racial, ethnic, and cultural, and gender diversity of the State." (All references to Section are to Sections of the Md. Code Ann., Health Occ. (____)

Section 1-216 now provides that notice of vacancies must be provided to all licensees. Boards are meeting this requirement by posting board vacancies on their websites and including this information in their newsletters. Next, Section 1-216 requires that boards provide training and materials to board members that include training in cultural diversity. This provision is intended to make certain that board members comprehend the laws they are administering and the applicable procedures to be followed, along with an understanding of the differences that culture can make in the health care decisions of both the health care professional and the patient.

New Section 1-218 requires health occupation boards to collect racial and ethnic information about their licensees. This information will allow an assessment of whether there is any imbalance in discipline with regard to race or ethnicity.

Finally, Section 1-217 gives the

Secretary of Maryland's Department of Health & Mental Hygiene ("DHMH") the authority to "confirm" the appointment of each administrator or executive director for each health care board. This section was intended to provide more coordination, where possible and appropriate, among the boards. The goals of this section are substantial and supported by only a modest change in organizational management. It is unclear how much influence the Secretary will derive by obtaining only the right to "confirm," without the right to "appoint." Nevertheless, this change will offer a focal point to help resolve inter-board turf battles, a possibility of more efficiency in board administration, and greater rationality and symmetry, where appropriate, among the licensing boards.

Improved Public Information and Communication in the Disciplinary Process

The Task Force was also concerned that the process and outcome of disciplinary matters was inscrutable to the public. To modernize and assure access to board disciplinary matters, new Section 1-607 requires that each board have a website on which they post all public disciplinary orders. This provision will ensure that patients, potential patients, public health care facilities and the public in general have an easily accessible way of obtaining information about licensed health care providers.

Secondly, licensees had never understood or felt comfortable with a single unit of the Attorney General's office prosecuting the case against them while also advising the board that was making the decisions on evidence, motions and ultimate disposition. Section 1-609, therefore, required each board to collaborate with the Office of the Attorney General to develop written guidelines explaining to the public: the separate roles for (1) Assistant Attorneys General functioning as counsel to the board and (2) the Assistant Attorneys General functioning as the administrative prosecutor. The Office of the Attorney General has administratively reorganized the provision of legal services to the health occupation boards so that administrative prosecutors now constitute a separate unit known as the Health Occupation Prosecutions and Litigation Division (HOPL). The published notices make clear that administrative prosecutors and board counsel have separate roles, and they not coordinate in any way in the prosecution of board cases.

Equality and Rational Basis in Board Sanctions

For a substantial period of time, the legislature had expressed concern that there appeared to be unevenness and unpredictability in the discipline of health care professionals. Without an easily accessible data base of past decisions or set of sanctioning guidelines, consistency and fairness in sanctioning was difficult to assess. Section 1-607 of the Health Occupations Article discussed above mandated that each board have on its website an accessible data base on which sanctioning decisions are posted. Further, Section 1-606 requires each board to adopt specific sanctioning guidelines which are to be used as a guide in sanctioning decisions. A board may depart from these guidelines, but if it does, it must state its reason for doing so. Mere departure from the guidelines is not grounds for an appeal. However, if there are other grounds for appeal a court may be willing to consider reviewing the sanction in relation to the guidelines. Most boards have now adopted or proposed regulations creating sanctioning guidelines. The guidelines, for some licensees, will be more problematic than helpful.

As an example, the sanctioning guidelines recently proposed for the Board of Physicians simply list, for each violation, the statutory minimum and maximum for each as the range of possible sanctions. There is no indication of mitigating or aggravating factors to be considered in deciding where along the continuum of possible sanctions a particular offense might land. The only discussion of mitigating and aggravating factors is in connection with sanctions outside of the statutory range.

Fairness and Due Process Concerns

One concern of the Task Force was that there was no statute of limitations applicable to disciplinary cases. This lack of any limitation on bringing charges certainly did not encourage the prompt resolution of complaints by any party involved in the matter. It also caused manifest unfairness to the licensee who had to develop an explanation or defense to the complaint hindered by lost or destroyed evidence, missing witnesses, and uncertain recollection. Section 1-603 now provides that a board may not bring charges against a licensee based "on events contained in a complaint that was made more than six years after an incident occurred or could have been discovered." This section makes sev-

eral exceptions to the application of this time bar to board charges. For instance, it does not apply to board charges based on criminal convictions, sexual misconduct, ongoing substance abuse, fraud or acts related to minor patients.

Section 1-604 provides one of the most important new rights afforded to health care licensees. It applies only in cases where a board uses peer review to evaluate whether the standard of care had been met. Peer reviews are rendered on the bare record that is provided by the board. It is not improbable that a peer reviewer may not have all the documents that relate to the patient's care, or that information outside the record may be material. Prior to these changes, if a board acted to charge a licensee, based solely on this peer review, there was virtually no chance to provide any such information and possibly avoid being charged. Now under Section 1-604 a licensee has the chance to review the peer review and to provide the board with a written response or explanation to any criticisms or any errors found in the peer review; and the board, if persuaded, has the opportunity to decline or alter any charges under consideration.

Speedy Resolution of Cases

The Task Force and the legislature believed that one of most important goals of reform had to be timely resolution of complaints and reducing the backlog of cases. Section 1-605 establishes one method for efficient resolution and remediation for "a single standard of care violation." Under this section, as an alternative to issuing charges, a board may offer a licensee the opportunity to receive additional training or mentoring. The offer of action under this section is discretionary, but boards, even when acting in their disciplinary capacity, appreciate that remediation and atonement is preferable to simple punishment. In sum, a licensee, in a matter in which the standard of care may have been breached, should give serious consideration to requesting the "help" provided by this section.

What Remains to Be Considered

One Set of Rules

Another issue of serious concern for the Task Force was the thicket of procedural rules each licensing board had created to govern their disciplinary process. The promulgation of uniform rules was intended to address the concern that board rules of procedure had, over time, become riddled with quirks and landmines for licensees. Many of the problems with the boards' rules were related to their conflicts and discrepancies with Maryland's Office of Administrative Hearing ("OAH") Uniform Rules. The Task Force concluded that because board procedural rules were created by regulation with guidance and constructive effort, a coherent and reasonable set of uniform rules could be developed without the need for specific statutory direction. Accordingly the Task Force indicated that, "The Secretary shall convene a working group including representatives from the Attorney General's Office, the health occupations boards and other relevant stakeholders to develop a set of uniform procedures for contested cases for adoption by all boards." This has not yet happened. In fact, some boards have recently proposed additional, unique and challenging rules for licensees to follow in proceeding with any attempt to defend against a board allegation. With little inclination by boards to focus on developing a uniform and balanced set of procedural rules, the simple concept of following OAH rules, unless otherwise required by state statute remains a rational, fair and expedient resolution of this issue.

To encourage the boards in an effort to separate their investigatory and adjudicatory functions, Section 2 of Chapter 534 of the 2010 legislation required that each licensing board report to the legislature "ways in which separation of the board's disciplinary functions can be further achieved." To date few, if any, boards have offered such suggestions.

Expungement

The Task Force, in its final report, discussed giving boards the express authority to expunge certain disciplinary records after an appropriate period of time. The rationale behind this proposal was that old disciplinary actions, especially regarding relatively minor infractions, may be irrelevant to a practitioner's current fitness to practice.

Chapter 534, Section 3, rather than dictating a particular time frame or circumstances for either requiring or merely authorizing a board to expunge past discipline, directed the boards in collaboration with DHMH to study the length of time and circumstances when it "may

be appropriate to expunge disciplinary proceedings." The boards responded in a report to the legislature dated January 24, 2011. This report acknowledged that some other states' boards had authority to expunge records in appropriate circumstances. Some of this State's boards had previously indicated that expungement was a reasonable action in the right circumstances. However, the report concluded "literal expungement" was effectively impossible and any form of expungement would not be in the public interest. The legislature did not assess or deal with the boards' expungement report during the 2012 session. However, this issue may be the subject of future inquiry.

Related Developments

Board of Physicians—Sunset and legislative concerns

The Maryland Board of Physicians underwent "Sunset Review" under Section 8-401 of the State Government Article, and the report of that review was published in November, 2011. The review made 46 specific recommendations, culminating in a finding that, "although several positive trends were observed, the board faces significant challenges moving forward. . . . Also, based on past performance, DLS has significant concerns about whether the recommendations, especially those contained in legislation, will be complied with by MBP." As a result, the Maryland Board of Physicians authorizing legislation will expire July 2013 unless the legislature is satisfied at the upcoming 2013 session that the Board has sufficiently reformed its disciplinary process and procedures.

The Department of Health and Mental Hygiene requested a one-year extension of its Sunset expiration. http://dhmh.maryland.gov/docs/11-30-11_Physicians_Testimony_Secretary_Dr_Herrera.pdf That one-year extension was granted.

In its efforts to satisfy the legislature, the Board entered into a Memorandum of Understanding with the University of Maryland, Baltimore in April 2012 under which the University, led by Jay Perman, M.D., President, University of Maryland, Baltimore, reviewed relevant laws, regulations and procedures, interviewed some board staff and others, and made recommendations to implement key recommendations of the Sunset Report and legislation, address transparency concerns, and otherwise assist the Board. That effort led to a report delivered in July 2012, with 18 of its own specific recommendations (the "Perman Report"). http://www.mbp.state.md.us/forms/Final_BOP_report.pdf Some of those recommendations addressed concerns discussed above regarding: separation of investigatory, settlement and adjudicatory functions; better utilization of informal case resolution processes; establishing timeframes for actions within the disciplinary process; implementation of sanctioning guidelines; uniformity in gathering information in the investigative phase; use of a single peer reviewer; and specially trained administrative law judges. While the recommendations of the Perman Report deserve serious consideration, it remains to be seen whether the Board will engage in any real discussion with other stakeholders in the process, in a serious attempt to design and implement a system for health professional discipline that is transparent to the public, fair to the licensees, and efficient in its operation.

Before even receiving the Perman Report, the Board issued proposed regulations to revamp its disciplinary hearing process. Based on comments received, the Board withdrew such proposed regulations and reissued new proposed regulations on November 2, 2012. (Md. Reg. Vol. 39, Issue 22, pp 1437-1454, Nov. 2, 2012.) These proposed regulations contain a number of changes in the charging and hearing process, but unfortunately do not include any of the recommendations in the Perman report. Unless the Legislature enacts statutory changes, the re-proposed regulations will become effective January 21, 2013. Md. Register Jan 11, 2013; Vol. 40, Issue 1.

Conclusion

To properly address the issues of transparency and fairness in these proceedings would require a joint effort by the boards, their staff, the defense bar and members of the profession and the public in a work group that had specific goals and objectives. It would take cooperation and compromise, but it could be done. The ongoing process of Sunset Reports by the Department of Legislative Services and the Report by the University of Maryland led by Dr. Perman are helpful in identifying areas of concern, but they do not, by themselves, formulate actual policies and procedures. The only way to do that is for all stakeholders to get together, roll up their sleeves and spend some time focusing on these issues.

Mr. Cohen is a principal at the law firm Ober Kaler. He may be reached at mkcohen@ober.com. Ms. McSherry is a principal at the law firm Kramon & Graham, P.A. She may be reached at nmcsherry@kg-law.com.

Back to Menu