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Division of Policy Development
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Tony Evers, Governor
Dan Hereth, Secretary

VIRTUAL/TELECONFERENCE
MEDICAL EXAMINING BOARD
Virtual, 4822 Madison Yards Way, Madison
Contact: Tom Ryan (608) 266-2112
October 18, 2023

The following agenda describes the issues that the Board plans to consider at the meeting. At the time of the meeting, items may be removed from the agenda. Please consult the meeting minutes for a record of the actions of the Board.

AGENDA

8:00 A.M.

OPEN SESSION – CALL TO ORDER – ROLL CALL

A. Adoption of Agenda (1-5)

B. Approval of Minutes of September 20, 2023 (6-11)

C. Introductions, Announcements and Recognition

D. Reminders: Conflicts of Interest, Scheduling Concerns

E. Administrative Matters – Discussion and Consideration

1) Department, Staff and Board Updates
2) 2024 Meeting Dates
3) Election of Officers, Appointment of Liaisons and Alternates
4) Board Members – Term Expiration Dates
   a. Bond, Jr., Milton – 7/1/2027
   b. Chou, Clarence P. – 7/1/2027
   c. Clarke, Callisia N. – 7/1/2024
   d. Ferguson, Kris – 7/1/2025
   e. Gerlach, Diane M. – 7/1/2024
   f. Goel, Sumeet K. – 7/1/2027
   g. Hilton, Stephanie – 7/1/2024
   h. Lerma, Carmen – 7/1/2024
   i. Majeed-Haqqi, Lubna – 7/1/2027
   j. Schmeling, Gregory J. – 7/1/2025
   k. Siebert, Derrick R. – 7/1/2025
   l. Wasserman, Sheldon A. – 7/1/2027
   m. Yu, Emily S. – 7/1/2024
5) **Wis. Stat. § 15.085 (3)(b) – Affiliated Credentialing Boards' Biannual Meeting with the Medical Examining Board to Consider Matters of Joint Interest**
   a. Physician Assistant Affiliated Credentialing Board – Jennifer Jarrett, Chairperson

F. Legislative and Policy Matters – Discussion and Consideration (12)

1) Legislative Proposal – Expanding the Professional Assistance Procedure to Include Mental Health

G. Administrative Rule Matters – Discussion and Consideration (13)

1) Scope Statement: Med 24, Relating to Telemedicine and Telehealth **(14-17)**
2) Pending or Possible Rulemaking Projects **(18)**

H. Continuing Education (CE) Broker for Audit of 2023 Renewal (19)

I. Wisconsin Medical Examining Board Historical Research – Board Review (20-57)

J. Newsletter Matters – Discussion and Consideration

K. Federation of State Medical Boards (FSMB) Matters – Discussion and Consideration

L. Controlled Substances Board Report – Discussion and Consideration

M. Interstate Medical Licensure Compact Commission (IMLCC) – Report from Wisconsin's Commissioners – Discussion and Consideration

N. Screening Panel Report

O. Future Agenda Items

P. Discussion and Consideration of Items Added After Preparation of Agenda:

1) Introductions, Announcements and Recognition
2) Elections, Appointments, Reappointments, Confirmations, and Committee, Panel and Liaison Appointments
3) Administrative Matters
4) Election of Officers
5) Appointment of Liaisons and Alternates
6) Delegation of Authorities
7) Education and Examination Matters
8) Credentialing Matters
9) Practice Matters
10) Public Health Emergencies
11) Legislative and Policy Matters
12) Administrative Rule Matters
13) Liaison Reports
14) Board Liaison Training and Appointment of Mentors
15) Informational Items
16) Division of Legal Services and Compliance (DLSC) Matters
17) Presentations of Petitions for Summary Suspension
18) Petitions for Designation of Hearing Examiner
19) Presentation of Stipulations, Final Decisions and Orders
20) Presentation of Proposed Final Decisions and Orders
21) Presentation of Interim Orders
22) Petitions for Re-Hearing
23) Petitions for Assessments
24) Petitions to Vacate Orders
25) Requests for Disciplinary Proceeding Presentations
26) Motions

27) Petitions
28) Appearances from Requests Received or Renewed
29) Speaking Engagements, Travel, or Public Relation Requests, and Reports

Q. Public Comments

CONVENE TO CLOSED SESSION to deliberate on cases following hearing (s. 19.85(1)(a), Stats.); to consider licensure or certification of individuals (s. 19.85(1)(b), Stats.); to consider closing disciplinary investigations with administrative warnings (ss. 19.85(1)(b), and 448.02(8), Stats.); to consider individual histories or disciplinary data (s. 19.85(1)(f), Stats.); and to confer with legal counsel (s. 19.85(1)(g), Stats.).

R. Deliberation on DLSC Matters

1) Proposed Stipulations, Final Decisions and Orders
- a. 22 MED 245 – Joann C. Litkey, M.D. **(58-65)**
- b. 22 MED 452 – Richard W. Clasen, M.D. **(66-75)**

2) Complaints
- a. 21 MED 525 – V.C. **(76-78)**
- b. 22 MED 260 – B.S.G. **(79-82)**
- c. 22 MED 452 – R.W.C. **(83-86)**
- d. 23 MED 123 – R.M.G. **(87-89)**

3) Administrative Warnings
- a. 22 MED 466 – C.B.S. **(90-92)**
- b. 23 MED 153 – D.J.B. **(93-94)**

4) Case Closings
- a. 21 MED 158 – H.A.K. **(95-106)**
- b. 22 MED 501 – H.M. **(107-112)**
- c. 23 MED 320 – J.A.L. **(113-116)**

S. Credentialing Matters

1) Waiver of 24 Months of ACGME/AOA Accredited Post-Graduate Training
- a. Dirk Van Leeuwen, M.D. **(117-159)**

2) Application Review
- a. Carlos Sierra-Rodriguez – Medicine and Surgery Applicant **(160-203)**
- b. Victor Garrido, M.D. – Visiting Physician Applicant **(204-245)**

T. Medical Military Personnel Application Review (246-255)

U. Deliberation of Items Added After Preparation of the Agenda
1) Education and Examination Matters
2) Credentialing Matters
3) DLSC Matters
4) Monitoring Matters
5) Professional Assistance Procedure (PAP) Matters
6) Petitions for Summary Suspensions
7) Petitions for Designation of Hearing Examiner
8) Proposed Stipulations, Final Decisions and Order
9) Proposed Interim Orders
10) Administrative Warnings
11) Review of Administrative Warnings
12) Proposed Final Decisions and Orders
13) Matters Relating to Costs/Orders Fixing Costs

14) Complaints
15) Case Closings
16) Board Liaison Training
17) Petitions for Extension of Time
18) Petitions for Assessments and Evaluations
19) Petitions to Vacate Orders
20) Remedial Education Cases
21) Motions
22) Petitions for Re-Hearing
23) Appearances from Requests Received or Renewed

V. Open Cases

W. Consulting with Legal Counsel

RECONVENE TO OPEN SESSION IMMEDIATELY FOLLOWING CLOSED SESSION

X. Vote on Items Considered or Deliberated Upon in Closed Session if Voting is Appropriate

Y. Open Session Items Noticed Above Not Completed in the Initial Open Session

Z. Delegation of Ratification of Examination Results and Ratification of Licenses and Certificates

ADJOURNMENT

VIRTUAL/TELECONFERENCE
MEDICAL EXAMINING BOARD
Virtual, 4822 Madison Yards Way, Madison
Contact: Tom Ryan (608) 266-2112
October 18, 2023

MEDICAL EXAMINING BOARD

2023 WISCONSIN ETHICS AND PUBLIC RECORDS LAW FACILITATED TRAINING

8:30 A.M. OR IMMEDIATELY FOLLOWING THE FULL BOARD MEETING

A quorum of the Medical Examining Board may be present; however, no Board business will be conducted.

ORAL INTERVIEWS OF CANDIDATES FOR LICENSURE

VIRTUAL/TELECONFERENCE

10:00 A.M. OR IMMEDIATELY FOLLOWING THE FULL BOARD TRAINING

CLOSED SESSION – Reviewing Applications and Conducting Oral Interview(s) of **two (2)** (at time of agenda publication) Candidate(s) for Licensure – **Dr. Wasserman** and **Dr. Siebert**

NEXT MEETING: NOVEMBER 15, 2023

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MEETINGS AND HEARINGS ARE OPEN TO THE PUBLIC, AND MAY BE CANCELLED WITHOUT NOTICE.

Times listed for meeting items are approximate and depend on the length of discussion and voting. All meetings are held virtually unless otherwise indicated. In-person meetings are typically conducted at 4822 Madison Yards Way, Madison, Wisconsin, unless an alternative location is listed on the meeting notice. In order to confirm a meeting or to request a complete copy of the board's agenda, please visit the Department website at https:\\dsps.wi.gov. The board may also consider materials or items filed after the transmission of this notice. Times listed for the commencement of disciplinary hearings may be changed by the examiner for the convenience of the parties. Requests for interpreters for the hard of hearing, or other accommodations, are considered upon request by contacting the Affirmative Action Officer, or reach the Meeting Staff by calling 608-267-7213.

VIRTUAL/TELECONFERENCE
MEDICAL EXAMINING BOARD
MEETING MINUTES
SEPTEMBER 20, 2023

PRESENT: Milton Bond, Jr. *(arrived at 8:23 a.m.)*; Clarence Chou, M.D.; Callisia Clarke, M.D.; Kris Ferguson *(arrived at 8:01 a.m.)*, M.D.; Diane Gerlach, D.O.; Sumeet Goel, D.O. *(arrived at 8:01 a.m.)*; Stephanie Hilton; Carmen Lerma; Lubna Majeed-Haqqi, M.D.; Gregory Schmeling, M.D.; Derrick Siebert, M.D. *(excused at 8:16 a.m.) (arrived at 8:36 a.m.)*; Sheldon Wasserman, M.D.; Emily Yu, M.D.

STAFF: Tom Ryan, Executive Director; Jameson Whitney, Legal Counsel; Nilajah Hardin, Administrative Rules Coordinator; Dialah Azam, Board Administrative Specialist; and other Department staff

CALL TO ORDER

Sheldon Wasserman, Chairperson, called the meeting to order at 8:00 a.m. A quorum was confirmed with nine (9) members present.

ADOPTION OF AGENDA

MOTION: Diane Gerlach moved, seconded by Gregory Schmeling, to adopt the Agenda as published. Motion carried unanimously.

(Sumeet Goel arrived at 8:01 a.m.)

(Kris Ferguson arrived at 8:01 a.m.)

APPROVAL OF MINUTES OF AUGUST 16, 2023

MOTION: Clarence Chou moved, seconded by Emily Yu, to approve the Minutes of August 16, 2023 as published. Motion carried unanimously.

LEGISLATIVE AND POLICY MATTERS

Legislative Proposals

MOTION: Diane Gerlach moved, seconded by Gregory Schmeling, to reaffirm the following motions:

- MOTION: Gregory Schmeling moved, seconded by Diane Gerlach, that the Medical Examining Board requests that its legal name be changed to "Wisconsin Medical Board," and that the Board supports the passage of legislation to that effect. Motion carried unanimously.
- MOTION: Diane Gerlach moved, seconded by Clarence Chou, to support a clarification to the Wisconsin statutes regarding the membership of the Medical Examining Board to include a minimum of one doctor of osteopathy among the ten professional members of the Board. Motion carried unanimously.

Motion carried unanimously.

(Derrick Siebert excused at 8:16 a.m.)

ADMINISTRATIVE RULE MATTERS

Preliminary Rule Draft: Gen Couns 1 to 5, Relating to Genetic Counselors

MOTION: Diane Gerlach moved, seconded by Carmen Lerma, to affirm the Board has reviewed the proposed rule creating Wisconsin Administrative Code Chapters Gen Couns 1 to 5, relating to Genetic Counselors. Motion carried unanimously.

(Milton Bond Jr. arrived 8:23 a.m.)

(Derrick Siebert arrived 8:36 a.m.)

ADDRESSING THE ISSUE OF OPIOID ABUSE – BOARD GOAL SETTING FOR 2024

MOTION: Sumeet Goel moved, seconded by Gregory Schmeling, to adopt the goals for 2024 to address the issue of opioid abuse as presented at today's meeting. Motion carried unanimously.

CLOSED SESSION

MOTION: Diane Gerlach moved, seconded by Callisia Clarke, to convene to Closed Session to deliberate on cases following hearing (§ 19.85(1)(a), Stats.); to consider licensure or certification of individuals (§ 19.85(1)(b), Stats.); to consider closing disciplinary investigations with administrative warnings (§ 19.85(1)(b), Stats. and § 448.02(8), Stats.); to consider individual histories or disciplinary data (§ 19.85(1)(f), Stats.); and to confer with legal counsel (§ 19.85(1)(g), Stats.). Sheldon Wasserman, Chairperson, read the language of the motion aloud for the record. The vote of each member was ascertained by voice vote. Roll Call Vote: Milton Bond, Jr.-yes; Clarence Chou-yes; Callisia Clarke-yes; Kris Ferguson-yes; Diane Gerlach-yes; Sumeet Goel-yes; Stephanie Hilton-yes; Carmen Lerma-yes; Lubna Majeed-Haqqi-yes; Gregory Schmeling-yes; Sheldon Wasserman-yes; and Emily Yu-yes. Motion carried unanimously.

The Board convened into Closed Session at 9:07 a.m.

DELIBERATION ON DIVISION OF LEGAL SERVICES AND COMPLIANCE (DLSC) MATTERS

Proposed Stipulations, Final Decisions and Orders

21 MED 191 – Francis F. Joseph, M.D.

MOTION: Lubna Majeed-Haqqi moved, seconded by Callisia Clarke, to adopt the Findings of Fact, Conclusions of Law and Order in the matter of disciplinary proceedings against Francis F. Joseph, M.D., DLSC Case Number 21 MED 191. Motion carried unanimously.

21 MED 363 – Daniel R. Canchola, M.D.

MOTION: Clarence Chou moved, seconded by Diane Gerlach, to adopt the Findings of Fact, Conclusions of Law and Order in the matter of disciplinary proceedings against Daniel R. Canchola, M.D., DLSC Case Number 21 MED 363. Motion carried unanimously.

21 MED 500 – James V. Lynott, M.D.

MOTION: Sumeet Goel moved, seconded by Clarence Chou, to adopt the Findings of Fact, Conclusions of Law and Order in the matter of disciplinary proceedings against James V. Lynott, M.D., DLSC Case Number 21 MED 500. Motion carried unanimously.

22 MED 171 – Nebojsa Stevanovic, M.D.

MOTION: Lubna Majeed-Haqqi moved, seconded by Carmen Lerma, to adopt the Findings of Fact, Conclusions of Law and Order in the matter of disciplinary proceedings against Nebojsa Stevanovic, M.D., DLSC Case Number 22 MED 171. Motion carried unanimously.

22 MED 245 – Joann C. Litkey, M.D.

MOTION: Sumeet Goel moved, seconded by Clarence Chou, to reject the Findings of Fact, Conclusions of Law and Order in the matter of disciplinary proceedings against Joann C. Litkey, M.D., DLSC Case Number 22 MED 245. Motion carried unanimously.

22 MED 345 – Paul N. Greenlaw, M.D.

MOTION: Emily Yu moved, seconded by Gregory Schmeling, to adopt the Findings of Fact, Conclusions of Law and Order in the matter of disciplinary proceedings against Paul N. Greenlaw, M.D., DLSC Case Number 22 MED 345. Motion carried unanimously.

23 MED 008 – Jeffrey L. Dunham, M.D.

MOTION: Sumeet Goel moved, seconded by Clarence Chou, to adopt the Findings of Fact, Conclusions of Law and Order in the matter of disciplinary proceedings against Jeffrey L. Dunham, M.D., DLSC Case Number 23 MED 008. Motion carried unanimously.

23 MED 031 – Craig D. Ramsdell, M.D.

MOTION: Lubna Majeed-Haqqi moved, seconded by Diane Gerlach, to adopt the Findings of Fact, Conclusions of Law and Order in the matter of

disciplinary proceedings against Craig D. Ramsdell, M.D., DLSC Case Number 23 MED 031. Motion carried unanimously.

23 MED 086 – Kimberly J. Marlowe, M.D.

MOTION: Diane Gerlach moved, seconded by Gregory Schmeling, to adopt the Findings of Fact, Conclusions of Law and Order in the matter of disciplinary proceedings against Kimberly J. Marlowe, M.D., DLSC Case Number 23 MED 086. Motion carried unanimously.

23 MED 144 – Dana J. Onifer, M.D.

MOTION: Lubna Majeed-Haqqi moved, seconded by Gregory Schmeling, to adopt the Findings of Fact, Conclusions of Law and Order in the matter of disciplinary proceedings against Dana J. Onifer, M.D., DLSC Case Number 23 MED 144. Motion carried unanimously.

Administrative Warnings

21 MED 554 – P.C.H.

MOTION: Stephanie Hilton moved, seconded by Clarence Chou, to issue an Administrative Warning in the matter of P.C.H., DLSC Case Number 21 MED 554. Motion carried unanimously.

Case Closings

MOTION: Carmen Lerma moved, seconded by Emily Yu, to close the following DLSC Cases for the reasons outlined below:

1. 22 MED 045 – L.S. – Prosecutorial Discretion (P2)
2. 22 MED 132 – L.M.L. – No Violation
3. 22 MED 476 – T.D. – No Violation
4. 22 MED 554 – P.R.H. – No Violation
5. 22 MED 562 – K.D.S. – No Violation
6. 23 MED 100 – K.M. – Prosecutorial Discretion (P5)
7. 23 MED 128 – M.M. – No Violation
8. 23 MED 186 – A.D.L. – Insufficient Evidence
9. 23 MED 315 – T.A.P. – Prosecutorial Discretion (P1)

Motion carried unanimously.

23 MED 210 – B.P.T.

MOTION: Gregory Schmeling moved, seconded by Emily Yu, to close DLSC Case Number 23 MED 210, against B.P.T., for No Violation. Motion carried unanimously.

(Sheldon Wasserman recused themself and left the room for deliberation and voting in the matter concerning B.P.T., DLSC Case Number 23 MED 210.)

CREDENTIALING MATTERS

Waiver of 24 Months of ACGME/AOA Accredited Post-Graduate Training

Samuel Pennella, M.D.

MOTION: Gregory Schmeling moved, seconded by Clarence Chou, to deny the waiver of 24 Months of ACGME/AOA Accredited Post-Graduate Training application of Samuel Pennella, M.D. **Reason for Denial**: Med 1.02 3(c) the Board finds the documented education and training is not substantially equivalent to the required training and experience. Motion carried unanimously.

Abdulrahman Rageh, M.D.

MOTION: Gregory Schmeling moved, seconded by Sumeet Goel, to request Abdulrahman Rageh, M.D. submit additional information regarding his departure from the University of North Carolina program, and to arrange for an oral interview with the Board pursuant to Med 1.02 3(c). Motion carried unanimously.

Adeloye Soyege, M.D.

MOTION: Diane Gerlach moved, seconded by Sumeet Goel, to approve the waiver of 24 Months of ACGME/AOA Accredited Post-Graduate Training application of Adeloye Soyege, M.D., once all requirements are met. Motion carried.

Application Review

Victor Garrido – Visiting Physician, Medicine and Surgery

MOTION: Gregory Schmeling moved, seconded by Sumeet Goel, to request the required information be provided to support the Visiting Physician application of Victor Garrido. Motion carried unanimously.

Thomas Meuser – Visiting Physician, Medicine and Surgery

MOTION: Gregory Schmeling moved, seconded by Diane Gerlach, to approve the Visiting Physician application of Thomas Meuser, once all requirements are met. Motion carried unanimously.

Carlos Sierra-Rodriguez – Medicine and Surgery Applicant

MOTION: Gregory Schmeling moved, seconded by Callisia Clarke, to table the Medicine and Surgery application of Carlos Sierra-Rodriguez, and designate Sheldon Wasserman and Gregory Schmeling to research the equivalence of the SPEX exam. Motion carried unanimously.

RECONVENE TO OPEN SESSION

MOTION: Lubna Majeed-Haqqi moved, seconded by Clarence Chou, to reconvene to Open Session. Motion carried unanimously.

The Board reconvened to Open Session at 10:44 a.m.

VOTE ON ITEMS CONSIDERED OR DELIBERATED UPON IN CLOSED SESSION

MOTION: Gregory Schmeling moved, seconded by Callisia Clarke, to affirm all motions made and votes taken in Closed Session. Motion carried unanimously.

(Be advised that any recusals or abstentions reflected in the closed session motions stand for the purposes of the affirmation vote.)

DELEGATION OF RATIFICATION OF EXAMINATION RESULTS AND RATIFICATION OF LICENSES AND CERTIFICATES

MOTION: Callisia Clarke moved, seconded by Emily Yu, to delegate ratification of examination results to DSPS staff and to ratify all licenses and certificates as issued. Motion carried unanimously.

ADJOURNMENT

MOTION: Sumeet Goel moved, seconded by Gregory Schmeling, to adjourn the meeting. Motion carried unanimously.

The meeting adjourned at 10:47 a.m.

State of Wisconsin
Department of Safety & Professional Services

AGENDA REQUEST FORM

1) Name and title of person submitting the request: Dr. Gregory Schmeling		**2) Date when request submitted:** 9/27/2023 **Items will be considered late if submitted after 12:00 p.m. on the deadline date which is 8 business days before the meeting**
3) Name of Board, Committee, Council, Sections: Medical Examining Board		
4) Meeting Date: 10/18/2023	**5) Attachments:** ☐ Yes ☒ No	**6) How should the item be titled on the agenda page?** Legislative Proposal – Expanding the Professional Assistance Procedure to Include Mental Health
7) Place Item in: ☒ Open Session ☐ Closed Session	**8) Is an appearance before the Board being scheduled?** *(If yes, please complete Appearance Request for Non-DSPS Staff)* ☐ Yes ☒ No	**9) Name of Case Advisor(s), if applicable:** N/A

10) Describe the issue and action that should be addressed:

The Professional Assistance Procedure (PAP) currently addresses substance abuse. The purpose of the discussion is to create a plan for a legislative proposal to amend the state statutes to include mental health reporting in the Professional Assistance Procedure.

11) Authorization

Signature of person making this request	**Date**
Supervisor (Only required for post agenda deadline items)	**Date**
Executive Director signature (Indicates approval for post agenda deadline items)	**Date**

Directions for including supporting documents:

1. This form should be saved with any other documents submitted to the Agenda Items folders.
2. Post Agenda Deadline items must be authorized by a Supervisor and the Policy Development Executive Director.
3. If necessary, provide original documents needing Board Chairperson signature to the Bureau Assistant prior to the start of a meeting.

State of Wisconsin
Department of Safety & Professional Services

AGENDA REQUEST FORM

1) Name and title of person submitting the request:	2) Date when request submitted:
Nilajah Hardin, Administrative Rules Coordinator	**10/04/23** **Items will be considered late if submitted after 12:00 p.m. on the deadline date which is 8 business days before the meeting**

3) Name of Board, Committee, Council, Sections:

Medical Examining Board

4) Meeting Date:	5) Attachments:	6) How should the item be titled on the agenda page?
10/18/23	☒ Yes ☐ No	**Administrative Rule Matters – Discussion and Consideration** **1. Scope Statement: Med 24, Relating to Telemedicine and Telehealth** **2. Pending or Possible Rulemaking Projects** **a. Rule Projects Chart**

7) Place Item in:	8) Is an appearance before the Board being scheduled? *(If yes, please complete Appearance Request for Non-DSPS Staff)*	9) Name of Case Advisor(s), if required:
☒ Open Session ☐ Closed Session	☐ Yes ☒ No	**N/A**

10) Describe the issue and action that should be addressed:

Attachments:
Scope Statement – Med 24
2021 Wisconsin Act 121
Rule Project Chart

(Board Rule projects can be Viewed Here if Needed: https://dsps.wi.gov/Pages/RulesStatutes/PendingRules.aspx)

11) Authorization

Nilajah D. Hardin — 10/04/23

Signature of person making this request — **Date**

Supervisor (if required) — **Date**

Executive Director signature (indicates approval to add post agenda deadline item to agenda) — **Date**

Directions for including supporting documents:
1. This form should be attached to any documents submitted to the agenda.
2. Post Agenda Deadline items must be authorized by a Supervisor and the Policy Development Executive Director.
3. If necessary, provide original documents needing Board Chairperson signature to the Bureau Assistant prior to the start of a meeting.

STATEMENT OF SCOPE

MEDICAL EXAMINING BOARD

Rule No.: Med 24

Relating to: Telemedicine and Telehealth

Rule Type: Permanent

1. Finding/nature of emergency (Emergency Rule only): N/A

2. Detailed description of the objective of the proposed rule:
The objective of the proposed rule is to implement the statutory changes from 2021 Wisconsin Act 121.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:
The Board intends to update the administrative code to bring it into alignment with 2021 Wisconsin Act 121 by revising the requirements for telehealth and telemedicine practice in Wisconsin. An alternative would be to not revise the administrative code to reflect these new requirements, which would create confusion and a lack of clarity for stakeholders as to what is required regarding telemedicine or telehealth practice in Wisconsin.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):
Section 15.08 (5) (b), Stats. states that "The Board shall promulgate rules for its own guidance and for the guidance of the trade or profession to which it pertains, and define and enforce professional conduct and unethical practices not inconsistent with the law relating to the particular trade or profession."

Section 448.40 (1), Stats., provides that "[t]he board may promulgate rules to carry out the purposes of this subchapter, including rules requiring the completion of continuing education, professional development, and maintenance of certification or performance improvement or continuing medical education programs for renewal of a license to practice medicine and surgery."

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:
Approximately 80 hours

6. List with description of all entities that may be affected by the proposed rule:
Wisconsin licensed physicians and their employers

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule: None.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):
The proposed rule will have minimal to no economic impact on small businesses and the state's economy as a whole.

Contact Person: Nilajah Hardin, Administrative Rules Coordinator, DSPSAdminRules@wisconsin.gov, (608) 267-7139.

Approved for publication:

Authorized Signature

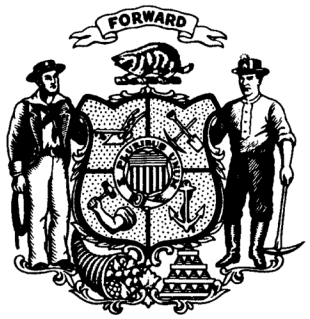
Date Submitted

Approved for implementation:

Authorized Signature

Date Submitted

State of Wisconsin



2021 Senate Bill 309

Date of enactment: **February 4, 2022**
Date of publication*: **February 5, 2022**

2021 WISCONSIN ACT 121

AN ACT ***to renumber and amend*** 250.15 (1); and ***to create*** 250.15 (1) (b), 250.15 (2) (d), 440.01 (1) (ab), (bm), (dg) and (hm) and 440.17 of the statutes; **relating to:** funding for free and charitable clinics and defining telehealth.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 250.15 (1) of the statutes is renumbered 250.15 (1) (intro.) and amended to read:

250.15 **(1)** ~~DEFINITION~~ DEFINITIONS. (intro.) In this section~~, "community~~:

(a) "Community health center" means a health care entity that provides primary health care, health education and social services to low−income individuals.

SECTION 2. 250.15 (1) (b) of the statutes is created to read:

250.15 **(1)** (b) "Free and charitable clinics" means health care organizations that use a volunteer and staff model to provide health services to uninsured, underinsured, underserved, economically and socially disadvantaged, and vulnerable populations and that meet all of the following criteria:

1. The organizations are nonprofit and tax exempt under section 501 (c) (3) of the Internal Revenue Code or are a part of a larger nonprofit, tax−exempt organization.

2. The organizations are located in this state or serve residents in this state.

3. The organizations restrict eligibility to receive services to individuals who are uninsured, underinsured, or have limited or no access to primary, specialty, or prescription care.

4. The organizations provide one or more of the following services:

a. Medical care.

b. Mental health care.

c. Dental care.

d. Prescription medications.

5. The organizations use volunteer health care professionals, nonclinical volunteers, and partnerships with other health care providers to provide the services under subd. 4.

6. The organizations are not federally qualified health centers as defined in 42 USC 1396d (l) (2) and do not receive reimbursement from the federal centers for medicare and medicaid services under a federally qualified health center payment methodology.

SECTION 3. 250.15 (2) (d) of the statutes is created to read:

250.15 **(2)** (d) To free and charitable clinics, $1,500,000.

SECTION 4. 440.01 (1) (ab), (bm), (dg) and (hm) of the statutes are created to read:

440.01 **(1)** (ab) "Asynchronous telehealth service" means telehealth that is used to transmit medical data about a patient to a health care provider when the transmission is not a 2−way, real−time interactive communication.

* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."

(bm) "Interactive telehealth" means telehealth delivered using multimedia communication technology that permits 2−way, real−time, interactive communications between a health care provider at a distant site and the patient or the patient's health care provider.

(dg) "Remote patient monitoring" means telehealth in which a patient's medical data is transmitted to a health care provider for monitoring and response if necessary.

(hm) "Telehealth" means a practice of health care delivery, diagnosis, consultation, treatment, or transfer of medically relevant data by means of audio, video, or data communications that are used either during a patient visit or a consultation or are used to transfer medically relevant data about a patient. "Telehealth" includes asynchronous telehealth services, interactive telehealth, and remote patient monitoring.

SECTION 5. 440.17 of the statutes is created to read:

440.17 Telehealth. If the department, an examining board, or an affiliated credentialing board promulgates rules related to telehealth, the department, the examining board, or the affiliated credentialing board shall define "telehealth" to have the meaning given in s. 440.01 (1) (hm).

Medical Examining Board
Rule Projects (updated 10/04/23)

Clearinghouse Rule Number	Scope #	Scope Expiration	Code Chapter Affected	Relating clause (description)	Current Stage	Next Step
22-063	012-21	08/08/2023	Med 10	Performance of Physical Examinations (Chaperones and Observers during Physical Examinations)	Rule Effective 10/01/23	N/A
22-067	035-22	10/25/2024	Med 13	Continuing Medical Education for Physicians (Controlled Substances Prescribing CME)	Rule Effective 10/01/23	N/A
Not Assigned Yet	Not Assigned Yet	TBD	Med 24	Telemedicine and Telehealth	Scope Statement Reviewed at 10/18/23 Meeting	Submission of Scope Statement to Governor's Office for Approval and for Publication in Administrative Register
23-037 (EmR 2308)	044-22	11/23/2024	Med 26	Military Medical Personnel	Final Rule Draft and Legislative Report Ready for Legislative Review – Waiting for Companion Department Rule (SPS 11) to Also be Ready (Emergency Rule 2308 is effective 6/1/23-12/1/23)	Legislative Review

State of Wisconsin
Department of Safety & Professional Services

AGENDA REQUEST FORM

1) Name and title of person submitting the request:	2) Date when request submitted:
Pete Schramm, Licensing Examination Specialist	10/6/2023
	Items will be considered late if submitted after 12:00 p.m. on the deadline date which is 8 business days before the meeting

3) Name of Board, Committee, Council, Sections:

Medical Examining Board

4) Meeting Date:	5) Attachments:	6) How should the item be titled on the agenda page?
10/18/2023	☐ Yes ☒ No	CE Broker For Audit of 2023 Renewal

7) Place Item in:	8) Is an appearance before the Board being scheduled? *(If yes, please complete **Appearance Request** for Non-DSPS Staff)*	9) Name of Case Advisor(s), if required:
☒ Open Session ☐ Closed Session	☐ Yes ☒ No	

10) Describe the issue and action that should be addressed:

Affirm CE Broker as the compliance tracking tool for the 2023 renewal and ensuing audit of compliance

Motion language: moves to affirm the use of CE Broker as the official tool to track CME and conduct the compliance audit for renewals including the current 2023 renewal.

11) Authorization

Pete Schramm — 10/18/2023

Signature of person making this request — **Date**

Supervisor (if required) — **Date**

Executive Director signature (indicates approval to add post agenda deadline item to agenda) — **Date**

Directions for including supporting documents:
1. This form should be attached to any documents submitted to the agenda.
2. Post Agenda Deadline items must be authorized by a Supervisor and the Policy Development Executive Director.
3. If necessary, provide original documents needing Board Chairperson signature to the Bureau Assistant prior to the start of a meeting.

Revised 07/2019

State of Wisconsin
Department of Safety & Professional Services

AGENDA REQUEST FORM

1) Name and title of person submitting the request:	2) Date when request submitted:
Dr. Sheldon Wasserman	September 2023
	Items will be considered late if submitted after 12:00 p.m. on the deadline date which is 8 business days before the meeting

3) Name of Board, Committee, Council, Sections:

Medical Examining Board

4) Meeting Date:	5) Attachments:	6) How should the item be titled on the agenda page?
10/18/2023	☒ Yes ☐ No	Wisconsin Medical Examining Board Historical Research – Board Review

7) Place Item in:	8) Is an appearance before the Board being scheduled? *(If yes, please complete Appearance Request for Non-DSPS Staff)*	9) Name of Case Advisor(s), if applicable:
☒ Open Session ☐ Closed Session	☐ Yes ☒ No	N/A

10) Describe the issue and action that should be addressed:

The Board will review a historical research project completed by the Wisconsin Legislative Reference Bureau.

11) Authorization

<NAME>	<Date: M/D/YYYY>
Signature of person making this request	Date
Supervisor (Only required for post agenda deadline items)	Date
Executive Director signature (Indicates approval for post agenda deadline items)	Date

Directions for including supporting documents:

1. This form should be saved with any other documents submitted to the Agenda Items folders.
2. Post Agenda Deadline items must be authorized by a Supervisor and the Policy Development Executive Director.
3. If necessary, provide original documents needing Board Chairperson signature to the Bureau Assistant prior to the start of a meeting.

Richard A. Champagne, Director
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Madison, WI 53703 • http://legis.wisconsin.gov/lrb

WISCONSIN LEGISLATIVE REFERENCE BUREAU

MEMORANDUM

TO: Sarah K. Barry, Department of Safety and Professional Services

FROM: Jillian Slaight, managing legislative analyst

DATE: September 6, 2023

SUBJECT: Questions about the Medical Examining Board

Overview

You asked us various questions about the Medical Examining Board. This memorandum reproduces your questions and provides answers.

When was the Medical Examining Board created? Who was governor at that time?

Chapter 264, Laws of 1897, created a state Board of Medical Examiners. At that time, Edward Scofield served as governor, and Emil Baensch served as lieutenant governor. (More information about both men, as well as other elected officials serving at that time, is available in the biographical sketches of the 1897 edition of the *Blue Book*.)

Although drafting files are not available for this period, Chapter 264 received some attention in the press. The *Daily Northwestern* described the bill as "a needed protection both to the medical fraternity and to the public at large." The paper continued, "It aids the medical fraternity by elevating it to a higher plane and protecting it from competition with spurious and 'quack' physicians. The regulations it imposes protects the public from the impositions of the unlearned, unskilled and unprincipled doctor who travels from city to city gulling the people into paying large sums of money in advance for promised marvelous cures."[1]

The board was later renamed the Medical Examining Board by Chapter 75, Laws of 1967.

Who has served as chair of the board? How many individuals have served in that role?

The Legislative Reference Bureau (LRB) does not have a comprehensive list of members of the board. However, all prior members may be compiled from past editions of the *Blue Book*,

[1] "After Quack Doctors: New Restrictive Medical Law Passed," *Daily Northwestern* (Oshkosh), April 21, 1897.

available through the University of Wisconsin-Madison here, starting with the 1901 edition. This list generally appears under the section relating to state government.

Is there any significant case law relating to the board?

The Wisconsin Statutes provide lists of relevant case law, including a brief summary of the case in question, below the statute history notes. The following list reproduces the case law included in the annotations for Wis. Stat. § 448.02, relating to the authority of the Medical Examining Board:

- Reading [Wis. Stat. § 448.02] (3) (b) in conjunction with [Wis. Stat. §] 227.46 (2), a "hearing" for purposes of computing the time period for rendering a decision includes the taking of evidence and all subsequent proceedings. *Sweet v. Medical Examining Board*, 147 Wis. 2d 539, 433 N.W.2d 614 (Ct. App. 1988).
- There is a five-prong test to guide the Medical Examining Board in determining whether a physician improperly treated a patient. The board must provide a written decision that separately identifies the five elements and discusses the evidence that relates to each element and provides details of why the evidence supports the board's findings. *Gimenez v. Medical Examining Board*, 203 Wis. 2d 349, 552 N.W.2d 863 (Ct. App. 1996), 95-2641.
- As used in this section, "negligence in treatment" means medical negligence, as defined by Wisconsin courts, which holds a doctor to the standard of reasonable care. The "reasonable physician" is not synonymous with the "average physician." *Department of Regulation & Licensing v. Medical Examining Board*, 215 Wis. 2d 188, 572 N.W.2d 508 (Ct. App. 1997), 97-0452.
- The five-pronged test of *Gimenez*, 203 Wis. 2d 349 (1996), does not apply to cases in which fraud and misrepresentation are alleged. *Gimenez* expressly limits the application of the test to cases in which the medical professional is charged with choosing a course of treatment that is dangerous or detrimental to the professional's patient or the public. It does not apply to allegations of unprofessional conduct by perpetrating a fraud on a patient in an attempt to obtain compensation. *Krahenbuhl v. Dentistry Examining Board*, 2006 WI App 73, 292 Wis. 2d 154, 713 N.W.2d 152, 05-1376.
- The 90-day direction in [Wis. Stat. § 448.02] (3) (b) for rendering a decision is mandatory. 72 Atty. Gen. 147.
- The Medical Examining Board does not deny due process by both investigating and adjudicating a charge of professional misconduct. *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

How has the composition of the board and number of its members changed over time?

As created under Chapter 264, Laws of 1897, the board included seven physician members: three regular, two homeopathic, and two eclectic. Chapter 426, Laws of 1903, increased the size of the

board to eight physician members: three allopathic, two homeopathic, two eclectic, and one osteopathic. Drafting files, which sometimes indicate the rationale for legislative enactments, are not available prior to the 1920s.

This composition of the board remained the same until Chapter 325, Laws of 1953, which required seven of eight members to be licensed resident doctors of medicine and one to be a licensed resident doctor of osteopathy. The drafting file for this legislation indicates that the Wisconsin Medical Society (WMS) recommended this change. In particular, WMS recommended retaining the osteopathic member but not adding another osteopathic member "in view of the fact that there are more than 3,000 doctors of medicine and about 175 osteopathic physicians in Wisconsin."

Chapter 86, Laws of 1975, added the board's first public member for a total of nine members. The drafting file for this legislation indicates that it was a redraft of 1973 Assembly Bill 678, which was requested by Governor Patrick Lucey in March 1973. A speech the governor made in March 1973 suggests that the addition of a public member was recommended by the Wisconsin Health Planning Policy Task Force "to assure that more than professional interests are represented."[2]

1983 Wisconsin Act 403 added yet another public member for a total of 10 members. The drafting file for this legislation indicates that it was a redraft of earlier legislation introduced by Representative Mary Lou Munts at the request of the Department of Regulation and Licensing, which had recommended decreasing the number of doctors on the board from eight to four and increasing the number of public members from one to three. Ultimately, this recommendation was scrapped in favor of a proposal authored by Representative Betty Jo Nelsen to "increase public members on all of the licensing boards by adding one public member for a total of two public members."[3]

Finally, sections 63 and 64 of 1993 Wisconsin Act 16, the biennial budget act, increased the number of licensed doctors of medicine on the board from seven to nine and the number of public members from two to three. The drafting file for this provision (1993 LRBb0734) indicates that the Department of Regulation and Licensing once again requested the increase in public members. As the department explained, "These new members would assist in processing disciplinary cases. Currently, each board member is assigned as board advisor on 80 to 90 cases. Additional members would help reduce this caseload and, as a result, reduce complaint processing time. These additional members are needed to provide additional professional expertise and public perspective to the Board's disciplinary work."

Under current law, membership to the board is specified under Wis. Stat. § 15.405 (7) (b).

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[2] Governor Patrick J. Lucey, "Health and the New Federalism: The Reform Role of the States," (speech, Chicago, IL, March 20, 1973), Theobald Legislative Library.
[3] Please refer to drafting materials for 1979 Assembly Bill 1070.

How has the board been covered in the press?

Per our earlier conversation, an hourly researcher with access to digital databases such as NewspaperArchive.com may be best suited to answering this question in a comprehensive manner. That said, I have attached a PDF of articles from the LRB's clippings collection that address the Medical Examining Board. Many of these articles, which cover the 1980s and 1990s, concern the board's duty to investigate allegations of unprofessional conduct and negligence in treatment under Wis. Stat. § 448.02. Several articles identify a backlog of pending cases before the board.

Who was the first woman to serve as a physician member? As a public member? Who was the first person of color to serve as a member?

The LRB does not track information about the sex, race, or ethnicity of elected or appointed officials. In the past, we have fielded inquiries relating to the identity of officeholders by searching for mentions of notable firsts in the press. An hourly researcher with access to digital databases such as NewspaperArchive.com may be able to identify such firsts by searching these databases with the terms "Medical Examining Board," "appoint," and "first."

Have members gone on to serve in national organizations?

The LRB does not have this information. However, once you have compiled a full list of members using past editions of the *Blue Book*, you may be able to cross-reference this list with lists of members of related national organizations.

Have members gone on to serve in the legislature?

The LRB does not have this information on hand. However, once you have compiled a list of board members using past editions of the *Blue Book*, you may cross-reference names on this list with the list of legislators provided in this LRB publication.[4]

How many physicians have served in the legislature generally?

The LRB does not track legislators' occupations in any comprehensive manner, although the *Blue Book* includes self-reported biographical information about legislators, including occupations. Instead, the LRB publishes a biennial profile of the Wisconsin State Legislature, which summarizes key trends for each legislative session. Recent editions of this publication (e.g., 2019, 2021, and 2023) do not expressly mention any legislators who are doctors. Although a handful of current legislators identify themselves as medical professionals (e.g., Representative Donna Rozar and Senator Rachael Cabral-Guevara, who self-reported their occupations as nurses), medical professionals do not appear to be as numerous as members of other professions, such as lawyers and farmers. That said, you may wish to consult UW-Madison's online

[4] Wis. Legis. Reference Bureau, "Serving the State: Wisconsin Legislators, 1848–2023," *Wisconsin History Project* 4, no. 2 (Madison, WI: Legislative Reference Bureau, March 2023), https://docs.legis.wisconsin.gov.

repository of past editions of the *Blue Book* for a better understanding of how many legislators identified themselves as medical professionals during past legislative sessions.

I hope this information is helpful. If you have any further questions—such as legislative history questions about the evolution of the board's authorities under Wis. Stat. § 448.02—please feel free to contact me at jillian.slaight@legis.wisconsin.gov or (608) 504-5884. In addition, I am happy to provide more information about other sources available in the LRB's library. For example, the LRB houses records of the Legislative Council Special Committee on Discipline of Health Care Professionals (1998–99).

Medical board fears loss of authority under reorganization plan

By R.T. Will II

Special to The Sentinel

Madison — A proposal to reorganize the State Department of Regulation and Licensing "cuts the heart out" of the way physicians regulate their profession, a member of the Medical Examining Board said.

Under the proposal, which has not been introduced in the Legislature, rule-making and administrative functions would be switched from professional licensing boards to the state department.

The proposal also calls for:

- Uniform professional conduct rules for licensed professionals.
- Investigation and prosecution of professionals by department investigators.

Discipline still would be handled by the boards.

Medical Examining Board officials "told me it would irreversibly castrate the power of the board," said Ann Haney, secretary of the department.

"I'm in favor of streamlining this mess (in the department), but this proposal cuts the heart out of the regulation of medical professionals by medical professionals," said Norman Moffat, Marshfield, a member and former chairman of the board.

"We don't want to make a move forward that might not be beneficial to our goals of protecting the public," said Rudolf Link, board chairman.

"The major criticism we have with the plan is the position that the board holds only an advisory role in rule-making," Link said.

Link prefers a Legislative Audit Bureau recommendation for mutual rule development by the department and the board.

Mrs. Haney and her staff have spent more than a year developing the plan. The medical board got its first look at the plan several months ago, but waited until the draft version of the plan was available before commenting on it, Link said.

Medical board members have been "the most reasonable and active in governing their own professionals," Mrs. Haney said.

"Their professional egos are bruised," she said, adding that the board has, in recent years, developed a good working relationship with the department.

Mrs. Haney said the medical board is the flagship of regulatory boards and has developed a strong staff to handle complaints and follow through with investigations that produce results.

"But they see themselves as a professional society and not a governmental regulatory body. They see the need for regulation, but in their own way, and this reorganization cuts them to the quick," Mrs. Haney said.

The board plans to develop its own suggestions for reorganization.

"The changes will be in the area of rule-making authority and professional conduct, but as the recommendations are based on our existing practices, we are not too far away," Link said.

Audit asked of medical board work
Malpractice concerns spur request

BY JAMES BARTELT
Post-Crescent Madison bureau

MADISON — Because of concerns that the Medical Examining Board "has failed to initiate appropriate disciplinary actions," Rep. Barbara Ulichny, D-Milwaukee, Wednesday asked the Joint Legislative Audit Committee for a program audit of the board.

"Concerns have been raised that the board has failed to initiate appropriate disciplinary actions in cases of professional malpractice or malfeasance. Recent press accounts have reported that of 20 cases involving malpractice complaints referred by the state Supreme Court Patient Compensation Panel to the Medical Examining Board, two of which involved patient deaths, in no case did the board call for any disciplinary action," Ulichny said in her request.

At a hearing on the request, Sen. Gary George, D-Milwaukee, committee co-chairman with Ulichny, asked Dr. Walter Washburn, Madison, secretary of the board, whether he was not concerned with an "impression of the public" that the board was not disciplining doctors.

"What we have done with these 20 cases, after thorough examination, is to conclude that while there was negligence they were not guilty of unprofessional conduct," Washburn said.

The committee lacked a quorum Wednesday and will vote on the request by mail. The audit request follows a May 12 directive from the Joint Committee for Review of Administrative Rules for the board to develop more specific rules for disciplining doctors and revoking their licenses. The committee asked the board to have public hearings on the new rules.

The program audit by the Legislative Audit Bureau was endorsed by Ann Haney, secretary of the Department of Regulation and Licensing.

"Because regulations and government operations in the area of occupational and professional licensing have undergone enormous changes in recent decades, program review is important to mark progress, fine-tune procedures and, if necessary, restructure and redirect efforts," Haney said in a letter to the committee.

Dale Cattanach, head of the audit bureau, proposed these subjects for the program audit:

— Procedures for receiving and processing complaints, including how the board makes the public aware of its functions.

— Cause of the backlog of complaints before the board.

— Appointment procedures to the board and whether they provide public accountability.

— Procedures of Patient Compensation Panels and professional societies in referring malpractice cases to the board.

— Discipline alternatives available and used by the board.

— Regulation methods used in other states.

'We do not believe it appropriate for us to review the reasonableness of individual decisions made by the Medical Examining Board but we could report on criteria used by the board in making disciplinary decisions," Cattanach said.

Panel favors easing physician disclosures

By William R. Wineke
Medical reporter

The Legislature's Joint Audit Committee voted Monday to introduce legislation making it easier for the Medical Examining Board to obtain information on physicians who lose malpractice suits.

Following recommendations for the Legislative Audit Bureau, the committee said it will introduce a bill requiring all insurers to report all malpractice claims to the examining board.

At present, according to the Audit Bureau, the law does not require insurers to report claims that are settled prior to a formal hearing.

Robert Hawley, senior evaluator for Audit Bureau, said about 15 percent of all claims filed go to hearing.

At a public hearing on the issue, Dr. Gerald Kempthorne, Spring Green, immediate past president of the State Medical Society, said the society is rewriting its public distribution materials to tell patients they have a right to report cases of physician impairment directly to the examining board.

But he cautioned that the fact a physician may have a problem with drinking or drugs does not necessarily mean he is practicing bad medicine.

He said the society, when it learns of a physician with problems, attempts to get that physician to seek help. If the physician doesn't, the society reports him to the examining board.

"When I know of a physician doing harm to the patients of Wisconsin, I wouldn't hesitate for one minute to refer him to the Medical Examining Board," Kempthorne said.

Dr. Vaughn Demergian, a plastic surgeon, said he has no problem with malpractice cases being reported to the examining board, but said he would prefer if a panel of physicians screened those cases first.

He said many malpractice cases are settled by insurance companies because it is cheaper to settle them than defend them, Dermergian asserted. He said a physician should not face potential charges by the examining board just because an insurance company settled a claim against his wishes.

Representatives of the State Medical Society said the society would favor a law mandating insurance companies to report all malpractice claims of more than $25,000 provided that another law be passed prohibiting those companies from paying claims without the physician's approval.

Bad doctors can pay up quietly, keep licenses

By Walter Bee
of The Journal Staff

When her doctor mishandled the birth of her baby, Michelle Petersen felt the shock that only the mother of a severely brain-damaged newborn could know.

But the shock turned to anger a week later when she found out that the obstetrician in whom she had placed her trust had been accused of negligence before. It turned out that there had been a third complaint as well.

Yet the state board empowered to discipline physicians hadn't formally heard about the complaints. It hadn't taken formal action. It rarely does.

Petersen recalled that she had been in the final stage of labor with her daughter, Ellen, pushing for two hours, when she told her doctor, "If this is a C-section, you do it now!"

Instead, she said, he "walked out of the room and left me alone for half an hour." Eventually, the baby was delivered by Caesarean section.

The REGULATORS

Third in a series

Care needed

At a September hearing, a judge approved a $1 million medical malpractice settlement of a compensation claim in which the doctor had been one of several defendants. In court, Petersen said:

"Ellen is very, very handicapped. Our main concern is that Ellen lives as long as possible.

"My husband and I feel that we have to provide for her. I am 36 years old. My husband [Max] will be 40.

"We have to take care of Ellen after we are gone, and we cannot see that being a burden on our son. And we have to provide for her, and she has to have this care. So that's the reason we are agreeing to the settlement."

Petersen, who lived in Wisconsin at the time of Ellen's birth but now lives in Minnesota, is angry at her doctor. But she directs her rage even more sharply at his colleagues.

In an interview, she asked:
"Why didn't they stop him?"

Indeed, why didn't the State Medical Examining Board take any official action against the same doctor? In 1979, a young couple accused him of negligence in connection with the delivery of their daughter, who received a permanent injury to her right arm at birth. That case was settled for $550,000 last month.

Another accusation

And why didn't the board take action when, in the process of his birth, an infant boy suffered a broken spine just below the neck, leaving him paralyzed? The boy's parents had contended that the same doctor was among those negligent because he had not performed a Caesarean section.

Doctors, from Page 1

That case was settled in March 1983 in an agreement in which the boy and his family will receive a total of $1 million.

Those accusations of negligence were never proved in court. Instead, there were large cash settlements, made quietly out of public view.

Nobody admitted liability. The doctor's attorney said the doctor denied all the allegations of liability.

The claims were made before Wisconsin Patients Compensation Panels, an arm of the Wisconsin Supreme Court. Because they were settled without a formal finding of negligence, they were never referred for possible review and discipline to the

OVER

Medical Examining Board, which oversees the 8,400 physicians who practice regularly in Wisconsin.

Under state law, only formal findings of negligence by a Patients Compensation Panel are referred to the board.

In the light most favorable to physicians, settlements are nothing more than business decisions by an insurance carrier to pay a patient to avoid further legal costs. But lawyers who represent victims of negligence say some doctors settle cases to avoid attracting the attention of the Medical Examining Board.

So Michele Petersen's doctor practices medicine in Wisconsin and is fully licensed by the state to do so.

Not isolated incident

Is this just an isolated example of an allegation of negligence slipping by the Medical Examining Board apparently unnoticed?

No. A Journal investigation shows:

In major negligence payments alone, malpractice insurance carriers and doctors themselves paid more than $46 million to 88 major malpractice victims from 1975 through 1981. But rarely, if ever, has the negligent physician suffered so much as a reprimand from the board.

The Medical Examining Board neither suspended nor revoked the license of a single one of the 162 physicians found negligent by a State Patients Compensation Panel in the eight-year history of the panel system.

Since 1975, 2,934 "health care providers" have been named in negligence complaints filed with Patients Compensation Panels, according to the Legislative Council. Of them, 72 — including 27 surgeons — were the subject of four or more complaints each, but fewer than 10% of those complaints were referred to the Medical Examining Board for review.

Of 24 recent cases in which hospitals reported to the board that doctors had been disciplined by the hospital, none of them led to a complaint being issued against the physician.

Public records abound with other cases:

In March, the insurance carrier representing two pediatricians paid $1.1 million to a family that had contended that the two doctors were responsible for their daughter's brain damage and blindness after she was born in November 1979.

Then in August, the same doctors settled a different claim for $1.25 million. In that case, the parents of a young boy, now 8, blamed the doctors for an incident in 1978 when the boy suffered severe brain damage when a peanut became lodged in his lung passage.

Neither doctor has ever been formally questioned by the Medical Examining Board about the quality of care he gives patients.

Last year, a Milwaukee woman won a substantial settlement after a surgeon operated to remove a kidney stone. Instead, he took out an entire healthy kidney.

Later last year, the same doctor settled a case in which a patient had accused him of performing improper surgery on an ovarian cyst.

In March of this year, a Patients Compensation Panel awarded $694,724 to a woman after ruling that her doctor had acted negligently in treating her for a hearing problem in 1975. The panel ruled that the doctor failed to realize that the woman had a brain tumor.

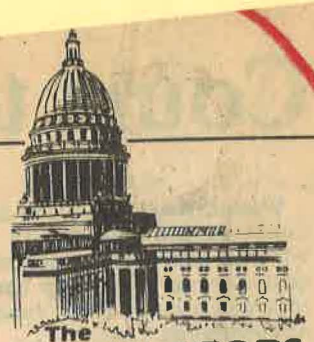
In 1980, that same doctor and another doctor were found negligent by a panel that awarded more than $400,000 to a victim and her husband because the doctors failed to detect that the woman had throat cancer. The woman later had surgery resulting in the total removal of her voice box.

The doctor told The Journal that he was now retired. But he still has his license.

The board has not disciplined yet another Wisconsin doctor who was found negligent in two cases and settled two others. The amounts of the settlements are not public record. One of the findings of surgical and post-operative negligence awarded $95,000 to the victim. The other awarded $16,700 to the second victim.

Ted Warshafsky, a Milwaukee lawyer, contends that for every victim who wins a malpractice case there are 100 who never think to see a lawyer.

Tim Aiken, another Milwauke



The **REGULATORS**

Need an answer?

The Department of Regulation and Licensing, (608) 266-2112, can answer licensing and disciplinary questions regarding the following professions: accounting, architects, engineers, designers, land surveyors, barbers, bingo operators, chiropractors, cosmetologists, dentists, electrologists, funeral directors and embalmers, hearing aid dealers, manicurists, nurses, nursing home administrators, optometrists, pharmacists, physicians, physical therapists, podiatrists, psychologists, school psychologists, real estate agents, veterinarians, boxing exhibitors, cemetery lot salesmen, private detectives, professional fund-raisers, solicitors and raffle organizers.

lawyer, said a pattern had developed in which physicians agreed to settle malpractice cases against them for huge sums of money in exchange for keeping the cases secret, thus avoiding censure and public scrutiny.

Said Aiken: "Doctors who have, over the course of the last nine years, committed repeated acts of negligence, many with horrific results, still go uncensored. Competent physicians who try their best, but still need insurance, suffer because they must bear the burden of the sometimes large verdicts and settlements.

"Consumers suffer because [monetary] damages only partially compensate them and their families. Society as a whole suffers because of increased insurance costs."

Wrong side of brain

William Cannon, a Milwaukee lawyer who has represented victims in many malpractice cases, said:

"The main problem with the whole malpractice system is the doctors who have access to virtually any expert in America they want to use to defend their actions, no matter how outrageous the negligence."

An Appleton woman, now 28, went to a physician in northern Wisconsin in 1980 after an aneurysm burst in her brain. But a specialist in micro neurosurgery made a mistake.

"He cut through the skull and reached the brain tissue below before realizing that he was operating on the wrong side," according to an exhibit on file at the Patients Compensation Panel.

Because the case was settled, it was never referred to the Wisconsin Medical Examining Board.

The incident had no effect on the physician's license, but it continues to haunt the victim. The woman has "extensive scarring on both sides of her forehead, stretching approximately from ear to ear along the hairline," according to panel records. "Wires are holding her skull in place where it was cut.

"From time to time, she experiences sharp pains in the area of the incision and on the top of her head. Her eyesight is often blurred, which is most noticeable when she is reading, as the print seems to get smaller and then larger. Her jaw is still stiff because of the muscle that was cut during surgery."

"A mistake"

The document says she "has had several episodes of uncontrollable shaking of her right arm, and has had trouble climbing steps and lifting heavy objects."

She "has suffered severe psychological and emotional harm resulting from the acts of malpractice. ... [The] negligent acts caused radical changes in her personality, character, and disposition, which resulted in the dissolution of her marriage. ..."

The case was settled in August for less than $200,000. Lawyers for the victim said they viewed the physician as a good doctor who made a mistake.

In a telephone interview, the victim, who now lives with her two young daughters, said: "[The doctor's mistake] was hard to accept.

"I thought I was some kind of a monster. He's a good doctor, an excellent doctor. I'm alive. I put myself in his hands, relied on him. He made a mistake."

Although settled cases are not formally referred to the Medical Examining Board, the board could find out about many of them by reading the papers.

One major malpractice settlement was widely reported in headlines throughout the state in August 1981.

In that case, the family of Matthew Heath, a Baraboo boy who suffered irreversible brain damage when doctors failed to properly diagnose a throat inflammation, won a $5 million settlement.

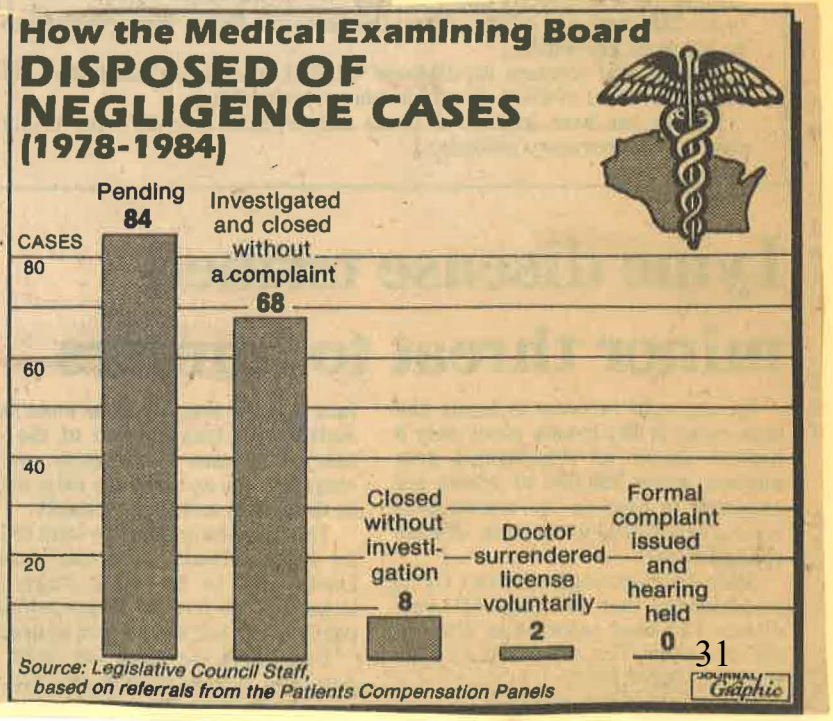
There is no public record to indicate whether anyone representing the Medical Examining Board investigated the doctors involved. The public record does show that nobody was disciplined by the board in the case.

The cases are numerous of those who never were formally questioned by the Medical Examining Board about the quality of care they offer.

Meanwhile, Ellen Petersen probably will never walk or talk, and her mother struggles to raise her crippled child. And she struggles to understand.

"What the heck is wrong with the medical community?" she wants to know. "How do those people look at themselves in the mirror every day?"

Next: Flaws in the system



OVER

Victims get $46 million

Although requirements set up by the Legislature do not allow the public to find out settlement amounts in cases involving adults, an indication of the money involved in the largest malpractice judgments and settlements can be found in public records at the Wisconsin Insurance Commissioner's Office.

Records there reveal that 88 medical malpractice claims greater than $200,000 resulted from court rulings, panel judgments and settlements from 1975 through 1981. For each of those 88 large payments, at least $200,000 was paid from a private insurer and the amount over $200,000 was paid from the Patients Compensation Fund, a pool of money used to pay large malpractice claims.

Those figures do not reflect settlements or judgments of less than $200,000, of which there could have been hundreds.

The total payments to these 88 victims of major medical malpractice alone exceeded $46 million in that period.

Rarely has any of that $46 million worth of malpractice inspired the Medical Examining Board to so much as slap the wrist of a negligent physician.

MALPRACTICE PAYMENTS

Payments from Wisconsin Patients Compensation Fund above the $200,000 paid by other sources.

Date of Incident	Money Paid	Medical Specialty
1975-'76		
7/24/75	$ 53,500	Internal Medicine
8/ 5/75	150,000	Surgery
6/25/76	92,500	Internal Medicine
7/18/75	59,757	Orthopedic Surgery
10/13/75	200,810	Gen. Practice, Surgery
4/27/76	444,809	Family Practice, Minor Surgery
Total: 6 claims	**$1,001,376**	
1976-'77		
1/27/77	$ 300,000	Neurosurgery
9/ 8/76	597,550	Surgery—Vascular
8/ 2/76	350,000	Surgery—Thoracic
9/27/76	100,000	Anesthesiology
8/17/76	450,000	Anesthesiology
12/ 3/76	173,033	Family Practice, Minor Surgery, Hospital
2/ 7/77	315,493	Surgery—Orthopedic
8/26/76	200,000	Surgery—Obstetrics/Gynecology
10/28/76	15,000	Gen. Practice—Surgery
8/21/76	39,216	Surgery—Obstetrics/Gynecology
5/ 1/77	75,000	Surgery
2/ 8/77	559,660	Surgery
2/ 1/77	42,968	Surgery—Orthopedic
7/15/76	476,319	General Practice, Hospital
8/ 5/76	234,000	Surgery—Obstetrics/Gynecology, Hospital
11/ 6/76	105,569	Surgery
Total: 16 claims	**$4,033,808**	

1977-'78		
1/ 4/78	$ 275,000	Surgery—Orthopedic
5/10/78	500,000	Surgery, Hospital
5/27/78	375,000	Surgery—Cardiac
7/ 5/77	321,736	Surgery—General
7/ 1/77	476,090	Surgery
10/24/77	700,000	Minor Surgery
1/ 4/78	202,254	Minor Surgery
10/15/77	128,600	Internal Medicine
6/23/78	108,333	Surgery
6/ 1/78	200,000	Radiology—Diagnostic
5/ 8/78	147,500	Radiology—Diagnostic
7/22/77	132,500	Surgery, Hospital
3/29/78	650,000	Surgery, Hospital
8/15/77	163,084	Obstetrics/Gynecology
1/10/78	86,586	Obstetrics/Gynecology, Hospital
Total: 15 claims	$4,466,683	

1978-'79		
7/12/78	$ 50,000	Radiology—Diagnostic
7/17/78	147,500	Radiology—Diagnostic
8/15/78	100,000	Surgery
4/15/79	800,000	Surgery
10/24/78	823,175	Surgery
4/25/79	300,000	Surgery
5/10/79	600,000	Surgery, Radiology–Diagnostic
12/13/78	112,500	Internal Medicine, Pediatrics
5/27/79	300,000	Anesthesiology
12/18/78	300,000	Surgery
11/16/78	701,000	Pediatrics—Minor Surgery
2/24/79	50,306	Surgery
7/31/78	38,000	Surgery
10/ 5/78	141,689	General Practice
Total: 14 claims	$4,464,170	

1979-'80		
8/ 3/79	$ 500,000	Surgery, Hospital
8/30/79	226,608	Hospital
9/25/79	441,028	Family Practice—Minor Surgery, Emergency Medicine, Hospital
1/27/80	75,000	Hospital
5/12/80	100,000	Hospital
7/25/79	893,831	Surgery
4/11/80	600,000	Surgery
5/17/80	100,000	Internal Medicine
6/15/80	150,000	Surgery
7/31/79	341,940	Family Practice—Minor Surgery, Hospital
8/ 2/79	321,982	Surgery, Family practice
10/ 9/79	300,000	Surgery—Plastic
11/29/79	733,239	Anesthesiology
5/ 6/80	225,000	General Practice—Minor Surgery
10/20/79	150,000	Obstetrics/Gynecology, Hospital
3/13/80	700,000	Family Practice—Minor Surgery, Hospital
11/ 8/79	800,001	Hospital, Podiatrics
Total: 17 claims	$6,658,629	

1980-'81

6/12/81	$ 69,680	Nurse Anesthetist
3/19/81	392,436	Surgery
2/ 3/81	25,000	Surgery
12/ 4/80	1,000,000	Anesthesiology
6/ 7/81	410,876	Surgery, Hospital
4/16/81	1,000,000	Surgery
4/17/81	400,000	Surgery—Orthopedic, Hospital
6/10/81	185,629	Surgery
Total: 8 claims	**$3,483,621**	

1981-'82

2/18/82	$ 153,039	Surgery—Plastic
12/ 2/81	100,000	Hospital
3/ 1/82	250,000	Surgery—Vascular
1/ 1/82	250,000	Internal Medicine
9/23/81	800,000	Neurosurgery
12/26/81	175,000	Surgery
3/18/82	1,000,000	Anesthesiology
10/ 5/81	180,000	Neurosurgery
11/ 1/81	576,500	Surgery—Obstetrics/Gynecology, Hospital
11/ 9/81	130,000	Gastroenterology
9/ 3/81	200,000	Nurse Anesthetist
6/19/82	562,500	Neurosurgery
Total: 12 claims	**$4,377,039**	

Note: Payments out of the fund recorded here are for incidents through June 30, 1982.

Source: Wisconsin Office of the Commissioner of Insurance.

Medical board rarely hears of worst malpractice cases

By Walter Fee
of The Journal Staff

Fifteen doctors licensed to practice in Wisconsin have had at least two settlements or findings of negligence against them in the last two years alone, a Journal investigation of public records shows.

Nobody knows how many of those same doctors, or others in Wisconsin, may have quietly settled up with victims before formal claims were filed with a State Patients Compensation Panel.

Some have received reprimands for technical matters, but not one of those doctors ever has had his license suspended or revoked for a quality-of-care incident.

Why not?

Because the system set up to protect the public from being hurt or killed by incompetent doctors has flaws that block investigators from reviewing many devastating medical injuries.

Two public bodies deal with medical malpractice: the Medical Examining Board, which licenses and disciplines doctors, and the Patients Compensation Panels, which decide whether and how much to pay malpractice victims.

Fourth in a series

Here are some of the flaws in the system:

Insurance companies are not required to report to any public body if they pay a malpractice claim against a doctor that has not been filed with a Patients Compensation Panel.

The Patients Compensation Panels are not required to report allegations and evidence of malpractice to the Medical Examining Board if a settlement is reached before the panel issues a formal finding of negligence.

A doctor can avoid formal disciplinary proceedings simply by surrendering his or her license. Then the doctor can move to another state and honestly say on a license application that his or her license never was revoked elsewhere.

Turn to **Doctors**, Page 18

The REGULATORS

The Medical Examining Board and the state's court system have been tied in knots over defining what constitutes medical incompetence. The board has not come up with a satisfactory definition of unprofessional conduct for doctors.

The board is ill-equipped to investigate the complaints it does receive about doctors. Partly because Wisconsin has one of the lowest license fees in the nation for doctors, the board is short of staff and, as a consequence, has a bigger backlog of complaints than almost every other state.

There are three ways in which a malpractice complaint can be disposed of:

The patient and the doctor agree privately to a settlement before the patient files a claim.

The parties reach a settlement after a claim is filed.

A Patients Compensation Panel reaches a finding of negligence, a step that is required before the patient can sue in court in an attempt to get more money.

Only in the third instance does the Medical Examining Board formally hear about the allegation of unprofessional conduct.

But the statistics suggest that doctors and their insurance companies are paying huge sums of money to victims of medical malpractice. In almost every case, the Medical Examining Board either never finds out about it or doesn't do anything about it.

State law also requires hospitals to report the names of any staff member who loses his hospital privileges for 30 days or more, has his staff privileges reduced for 30 days or more, or resigns from a hospital staff for 30 days or more.

In the last 2½ years, 24 cases have been opened as a result of such hospital referrals. But the board did not issue a single complaint against any physician as a result of any of those referrals, according to the Legislative Council.

Things may change

Throughout the summer and fall, a variety of people on all sides of the medical malpractice issue attended meetings of the Wisconsin Legislative Council's Special Committee on Medical Malpractice. The 47 formal recommendations made may result in proposals for new laws when the Legislature meets next year.

At its October meeting, Medical Examining Board members agreed to ask the Legislature to change the law so compensation panel settlements could be referred to them for review. A bill was introduced earlier this year but was not voted on before the Legislature adjourned.

One former board member, Milwaukee lawyer Mary Reddin, perceived herself as a consumer advocate when she was on the board in the late 1970s. She said being informed of cases settled outside the panel process would give the board a broader base of information and eventually enable it to concentrate on cases important to medical consumers.

Said Deanna Zychowski, administrator of the Medical Board, "We

OVER

aren't getting many of the serious cases."

John R. Zwieg, a lawyer with the Department of Regulation and Licensing who handles cases against doctors, said:

"It seems logical that the worst cases are not taken to a hearing. They are settled because there is no question about liability.

"We are not being made aware of the worst practitioners. This is a serious flaw in the system."

William J. Hisgen, a Madison physician who is vice chairman of the board, agreed.

"I would suspect some of the worst cases are settled out of court," he said.

Not the last word

The board, currently made up of eight doctors and one public member, is the only agency with power to revoke the license of a physician. It usually meets about 20 days a year.

Disciplinary decisions of the board are not final. Doctors whose licenses are revoked can take their cases through the courts.

From 1975 through the end of this summer, the board had revoked the licenses of 36 physicians and taken less severe disciplinary actions against about 145 others. In almost all these cases, the discipline was for violations of law or rules — not for instances involving quality of medical care.

The board's actions range from public reprimands to limited licenses, suspensions, and license revocations issued for a variety of reasons, among them felony convictions in Circuit and Federal Courts.

The staff assigned to handle investigations for the board is not large and is under the control of the Department of Regulation and Licensing, not the board. The board has the equivalent of 4.75 investigators and 2.10 lawyers assigned to it to handle complaints about the state's 8,400 physicians.

A 1983 Legislative Audit Bureau report said Wisconsin took longer to resolve complaints about doctors than any other state except Pennsylvania. On average, the report said, it takes the Wisconsin Board 12½ months to resolve a complaint.

Cases increase

In California, by contrast, the average complaint is resolved in one month.

The Audit Bureau report stated said that as of October 1982, about 30% of the 270 allegations under investigation were more than two years old. By September of this year, the number of allegations being investigated by the board had grown to 343.

The report also said that while investigators and board members worked diligently and put in long hours, enforcement procedures were needed. Since then, the department has concentrated on the most serious cases.

Nelson Moffat, a physician at the Marshfield Clinic in Wood County and a former board member, said he favored referring settled cases to the board, but questioned whether the board's staff could keep up with complaints.

"It can't begin to deal with what it's got now," Moffat said. "They're enormously understaffed and underfunded."

He criticized the Legislature for "political sniping" and an unwillingness to allocate money to provide the additional staff.

One isn't enough

Richard A. Reas, executive assistant of the State Medical Society, wrote a letter to legislators in 1983 in which he said the society would not be opposed to having settlements of more than $25,000 and "all claims involving death" referred to the board.

All the physicians interviewed for this story said they did not think one act of medical malpractice constituted unprofessional conduct. They said a pattern of negligence would have to be present before the board should take the steps that could lead to revoking a physician's license.

Several also pointed out that it required more evidence to prove unprofessional conduct than it did to prove a physician had committed one act of malpractice.

Gerald Kempthorne, a Spring Green physician who is an expert on peer review, said:

" . . . A formal panel includes only one physician in the specialty of the [defendant] physician, and the panel is reviewing a single incident which gave rise to a malpractice claim.

"A decision on this limited review should not be considered an allegation of unprofessional conduct. Instead, the State Medical Society suggests that it should be considered reasonable cause for peer review."

Claims fell in '83

There are plenty of complaints about doctors on the record. Since the Patients Compensation Panels were set up by the Legislature in 1976, there have been 2,012 cases filed naming 5,073 defendants. Among the defendants were 2,389 physicians and 1,083 hospitals.

Malpractice claims rose steadily every year until 1983. Last year, 376 new cases were filed by patients claiming injuries, a 9% decrease from the previous year.

Nearly half the cases filed with a panel have been settled before a formal finding of negligence. Findings of negligence are arrived at by a group — usually one lawyer, two physicians and two public members — that reaches a conclusion in a process similar to the methods used by a jury in a civil lawsuit.

State records show that panels have issued 123 formal findings of negligence since 1975 for an average award of $181,283. In none of those cases have the physician or physicians had their licenses suspended by the Medical Examining Board.

Mistakes will happen

Sarah Pratt, a Sheboygan physician and a member of the Medical Board, pointed out that even a perfect system could never prevent medical error. In September, she told the Legislative Council Special Committee:

"It is very difficult to say that a single error means that a doctor lacks minimal competence accepted in the profession and poses unacceptable risks to his or her patients.

"If every doctor who is truly incompetent were forcibly retired tomorrow, mistakes would still be made by perfectly competent doctors.

"And some of these mistakes would have painful and even tragic consequences. I don't particularly like admitting that, but I believe that it is true."

Susan Behrens, a Beloit physician who is chairwoman of the Medical Examining Board, said the board would be accused of a witch hunt if, without being told to do so by the Legislature, it went after physicians who settled cases.

"[The legislators] look with great scrutiny at everything we do," she said.

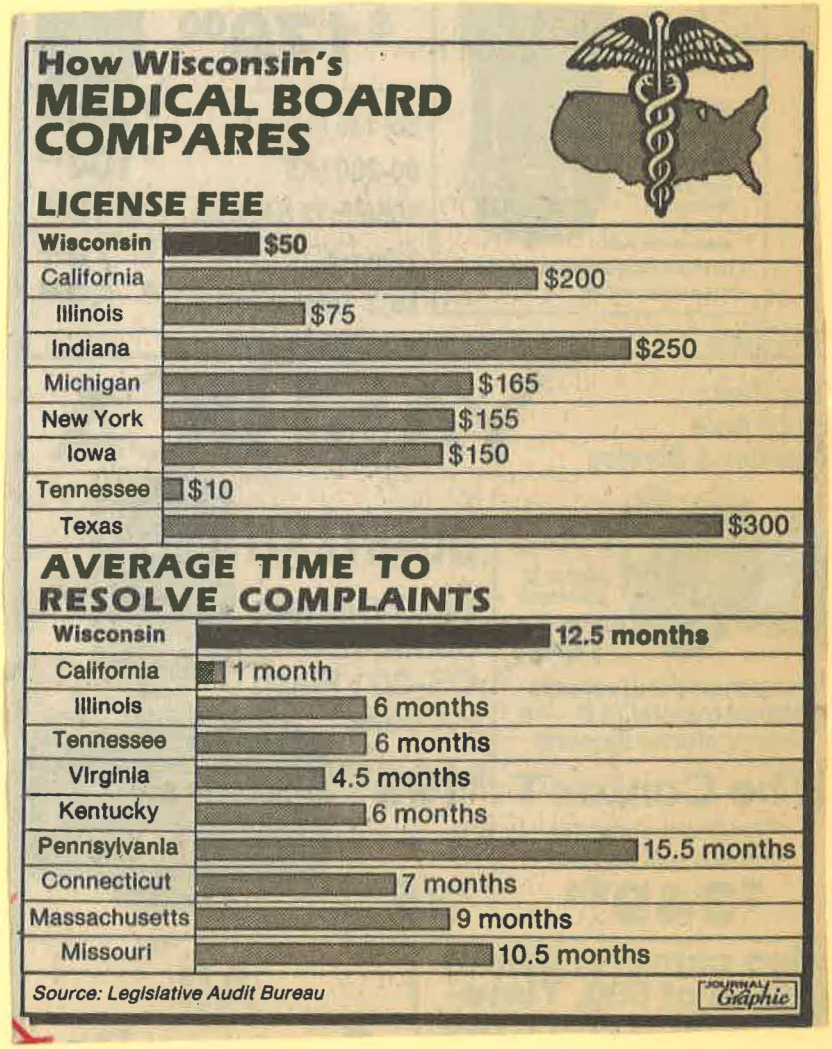
"If the public does want us to look at those cases, the public is going to have to let their legislators know . . . appear at hearings, write their legislators."

Next: Revoking a license

The REGULATORS

Need an answer?

The Department of Regulation and Licensing, (608) 266-2112, can answer licensing and disciplinary questions regarding the following professions: accounting, architects, engineers, designers, land surveyors, barbers, bingo operators, chiropractors, cosmetologists, dentists, electrologists, funeral directors and embalmers, hearing aid dealers, manicurists, nurses, nursing home administrators, optometrists, pharmacists, physicians, physical therapists, podiatrists, psychologists, school psychologists, real estate agents, veterinarians, boxing exhibitors, cemetery lot salesmen, private detectives, professional fund-raisers, solicitors, and raffle organizers.



Medical board left paralyzed by crash

By Walter Fee
of The Journal Staff

Renee Pfaff, 23, a nurse at Milwaukee Children's Hospital, died of shock and blood loss after a car accident in Kewaunee on Sept. 27, 1975.

That accident, as things turned out, also paralyzed the Wisconsin Medical Examining Board.

In 1981, a hearing examiner recommended that Francis X. Gilbert, a physician accused of unprofessional conduct in his treatment of Pfaff, be reprimanded.

The medical board, apparently more impressed by the gravity of the matter, decided instead to revoke Gilbert's license.

Gilbert appealed. Dane County Circuit Judge Angela Bartell upheld the revocation.

Gilbert appealed again. The Wisconsin Court of Appeals reversed

Francis X. Gilbert

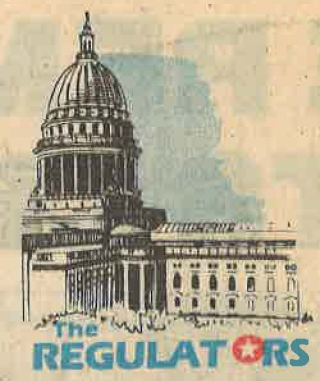
Bartell and said Gilbert could keep his license. The ruling said the law cited by the board in revoking Gilbert's license was unconstitutional.

Doctor still practicing

Finally, on June 14 of this year, almost nine years after Pfaff's death, the Wisconsin Supreme Court reversed the Court of Appeals on the same legal issue. The court found the state's unprofessional conduct law and the Medical Examining Board's rules to be constitutional, but it said there wasn't enough evidence to revoke Gilbert's license.

The Supreme Court sent the case back to the board.

Francis Gilbert continues to practice medicine in Kewaunee.



Fifth in a series

And today, the Medical Examining Board finds itself in the same condition it was in five years ago when the board issued a complaint against Gilbert — paralyzed.

That sequence of events has left people who try to protect the public from incompetent doctors in a state of confusion. And the case has raised a fundamental and disturbing question:

If medical professionals cannot decide to the satisfaction of the courts what constitutes unprofessional conduct, then who can?

Wayne Austin, the Medical Examining Board's legal counsel who worked on the Gilbert case with other lawyers, observed:

"Quality-of-care cases are by far the most difficult cases coming before the board, both in terms of their factual complications and the legal issues involved.

Failures cited

"The extraordinary expenditure of time and effort on the Gilbert case without ultimate success was obviously discouraging to the board."

Why was there so much disagreement?

Let's start with that autumn day nine years ago when Pfaff, a La Crosse native and 1974 nursing graduate from the University of Wisconsin — Madison, arrived at St. Mary's Kewaunee Area Memorial Hospital at 10:35 a.m.

The 1979 complaint against Gilbert stated that while Pfaff was under

Turn to **Death,** Page 16

Death, from Page 1

Gilbert's treatment, the doctor failed to respond properly to the emergency. Pfaff died at 5:33 that evening.

The complaint also stated that Gilbert did not provide competent care in several ways, including failure to properly treat shock and low blood pressure, and failure to diagnose and treat Pfaff's ruptured spleen. The matter was brought to the state's attention by a former administrator at St. Mary's.

Gilbert denied all allegations of unprofessional conduct throughout the proceedings. He said he believed he had acted properly in his treatment of Pfaff.

Four hearings were held in 1980. Nine months later, the hearing examiner ruled that Gilbert "breached a fundamental standard of proper medical practice by failing to promptly make a visual assessment of the auto accident victim."

Board goes further

The nine-member medical board, not bound by the ruling of a hearing examiner, then heard from Gilbert C. Lubcke, a lawyer with the State Department of Regulation and Licensing. It was Lubcke who, in effect, had prosecuted Gilbert at the hearing before the examiner.

Lubcke filed a long list of objections to the examiner's recommendation to issue only a formal reprimand.

Among them was an assertion that the hearing examiner "seems to suggest that the mere exercise of judgment by a physician, regardless of the quality of that judgment, is a perfect defense to any disciplinary action. To take this position is to misunderstand the very function of the disciplinary process — the protection of the public.

"The essence of the disciplinary function is to measure the quality of the judgment made by the physician against the minimum standards of the profession."

The Medical Examining Board decided on Oct. 27, 1981, to impose its maximum penalty.

Gilbert appeals

That decision, written by Walter L. Washburn, a physician who was secretary of the board, said Gilbert's treatment constituted unprofessional conduct in three respects: treatment for low blood pressure and shock was neither timely nor adequate; failure to adequately treat the ruptured spleen; and the decision not to transfer Pfaff to a hospital that was better staffed and better equipped.

The board said:

"Nothing less than revocation of Dr. Gilbert's license will serve the purposes of assuring the public of the fitness and competency of licensed physicians, of protecting the public from future unprofessional acts, of deterring other licensees from engaging in similar acts of unprofessional conduct, and of effectively expressing the board's and the public's disapproval of Dr. Gilbert's conduct."

Gilbert exercised his right to judicial review by subsequently filing a petition in Dane County Circuit Court stating that the licensing board had acted illegally.

Gilbert also asserted at the time that the board was arbitrary in its choice of disciplinary targets.

Courts disagree

On June 28, 1982, Bartell ruled that Gilbert had not proved that the board had abused its discretion or violated Wisconsin law by revoking his license.

She said, "One incident of professional misconduct may properly support license revocation."

The Wisconsin Court of Appeals looked at the same facts and came to the opposite conclusion. On April 15, 1983, it said that the board had to give Gilbert his license back, and that the laws and rules the board had followed to revoke licenses were unconstitutional.

"A regulatory board has no power to make unreasonable rules under the guise of exercising its discretionary powers," the court said.

In June of this year, the Wisconsin Supreme Court disagreed with the Court of Appeals. It said the laws and rules used to revoke licenses were constitutional.

But it also said the testimony from the 1980 hearing did not contain enough medical evidence from the state's expert witness to justify revoking Gilbert's license.

In short, the State Supreme Court said there was not enough evidence to prove "unprofessional conduct."

A confusing result

The state's highest court, therefore, allowed Gilbert to resume the practice of medicine and told the board it had to begin anew if it wanted to take any disciplinary action against him.

In a recent interview, Gilbert, 55, said that the protracted legal battle was "very painful" and that he was in a "very bad financial situation now because of that."

How has the ruling affected the system? What does the Supreme Court's decision in the Pfaff case mean for the licensed professionals in Wisconsin and the millions of people who seek their services?

The Supreme Court said it did not agree with Gilbert's characterization that a state board was an entity that could act on impulse or whimsy.

The court acknowleged that the ability to revoke the license of a professional was a "broad grant of legislative power," but it also said the board's own rules required a standard for revocation "sufficiently definite so that physicians should have no difficulty providing a standard of care which meets the requirement of professional conduct."

Barbara Nichols, secretary of the Department of Regulation and Licensing, pointed out that although the Supreme Court let Gilbert have his license back, it upheld the rule used to define unprofessional conduct.

Nichols said the ruling applied to all licensed professions in Wisconsin. She said it was an acknowledgement that the department and the Medical Examining Board had the right to "function to prohibit practices which are harmful to the public . . . to protect the public from incompetent practitioners."

Nonetheless, since the Supreme Court handed down its ruling in the Gilbert matter in June, the board has taken no further public action.

Next: Too close a relationship?

Woman wins case

Earlier this year, the Supreme Court also ruled on a second case involving Gilbert. That case involved a Neenah woman, Linda Rector, who asserted that she became brain damaged when Gilbert treated her with a powerful combination of drugs: the anti-depressant Elavil, and the tran-

quilizers Stelazine and Valium.

In July 1981, Rector won $50,000 from the Patients Compensation Panel that heard the case. She appealed that award to Circuit Court and, in May 1982, a jury said she was entitled to $238,000.

In December 1983, an Appeals Court upheld that award. On Feb. 14, 1984, the Supreme Court declined to review the Appeals Court decision, which, in effect, affirmed the verdict.

Need an answer?

The Department of Regulation and Licensing, (608) 266-2112, can answer licensing and disciplinary questions regarding the following professions: accounting, architects, engineers, designers, land surveyors, barbers, bingo operators, chiropractors, cosmetologists, dentists, electrologists, funeral directors and embalmers, hearing aid dealers, manicurists, nurses, nursing home administrators, optometrists, pharmacists, physicians, physical therapists, podiatrists, psychologists, school psychologists, real estate agents, veterinarians, boxing exhibitors, cemetery lot salesmen, private detectives, professional fund-raisers, solicitors, and raffle organizers.

When are licenses lifted?

When the Medical Examining Board lifts a doctor's license, it is usually because a law or rule was violated, not because of malpractice.

This is a sample of the kinds of incidents the board has considered serious enough to warrant revocation:

On March 12, 1979, the board revoked the license of Joseph A. McNearney, saying he had "knowingly submitted false information on his application for re-registration in that he denied that his license to practice in another [state] had ever been . . . revoked."

The order said that his license had been revoked in Missouri in 1970, but that McNearney had failed to inform Wisconsin officials of that.

In Oct. 1981, the board revoked the license of James R. Couch, of West Allis. It cited his September 1980 conviction in Federal Court in Milwaukee for illegally dispensing the drug Quaalude.

Couch was sentenced to 100 days in jail after he had pleaded guilty to two federal charges of prescribing drugs not for medical purposes, and for writing a prescription when he was not registered to do so.

In December 1981, the board revoked the license of Horace F. Smith, a Sister Bay physician. It said Smith had violated state law by issuing prescriptions for obtaining Demerol without keeping required records.

It also said Smith had dispensed Demerol without keeping required records, and issued prescriptions for Percodan, Seconal, and Dilaudid without maintaining any medical records.

In April 1982, the board revoked the license of Alice Dean, a former Whitefish Bay psychiatrist who was convicted of two felonies in a jury trial in Milwaukee County Circuit Court in 1980.

Dean, whose case was widely publicized, had been convicted of the theft of $13,285 in Medicaid money and of false swearing.

3 leaders seek state overhaul of regulators

By James Rowen and Walter Fee
of The Journal Staff

Two key legislators and the head of a consumer group called for reforms Monday in the state's system of regulating the 26 professions and occupations licensed to do business in the state.

The proposals were offered after the conclusion Sunday of a series by The Milwaukee Journal that showed that the regulatory system fails to protect consumers from incompetent and unprofessional conduct by licensed professionals.

Those proposing reform were:

Sen. Susan Engeleiter (R-Menomonee Falls), who will be the Republican Senate leader when the next session opens in January. Engeleiter said she would ask the Legislative Council, which is primarily composed of the leaders of both houses of the Legislature, to appoint a committee to study the structure and mission of the State Department of Regulation and Licensing and send a reform proposal to the Legislature next fall.

She said the department needed an in-depth review and should provide better service to consumers.

Engeleiter said she also would introduce a resolution into the Legislature in January asking that a study committee be formed. But she said that as a member of the Legislative Council, her request to that panel should be sufficient to create the committee.

Sen. Gary George (D-Milwaukee), co-chairman of the Joint Finance Committee for the 1985-'87 legislative session. George said Monday that he would reintroduce a bill that would require the Medical Examining Board to review the licenses of all doctors who privately settle malpractice cases brought before a Patients Compensation Panel. George introduced similar legislation earlier this year without success.

Under current law, the only doctors who must be referred to the examining board are those who are formally found negligent. The Journal reported last week that millions of dollars in settlements are paid to victims of malpractice long before the cases reach the stage of formal rulings.

George said the bill was not intended to make scapegoats of doctors, but he emphasized that "repeated incidents" of medical injury by the same doctor should be reviewed by the state.

Louise Trubek, executive director of the Center for Public Representation. Trubek outlined a comprehensive reform agenda that the Legislature could enact to improve the regulatory system. Among the components of her proposal:

Automatic referral to the Medical Examining Board for possible discipline the names of doctors who make malpractice settlements in cases brought to the Patients Compensation Panels.

Greater disclosure by lobbyists of the amount of money spent by special interests, and greater legal control over political action committees.

Greater resources for public board members, including better training and independent staff, including lawyers, to help them resist the majority of board members, who are licensed in the profession they are regulating.

Restitution programs managed by the boards using revenue from licenses. Trubek cited as an example a real estate restitution program run by the State of Illinois that makes payments from license fees to people who lose money because of fraud or real estate agents' incompetence.

Substantial deregulation of the professions to encourage competition.

Trubek said that if the Legislature did not make major changes in the licensing system, the boards should be reduced to advisory bodies and state agencies should be given the direct authority to license and discipline the professions.

Norquist disagrees

Sen. John Norquist (D-Milwaukee) said the boards were anti-competitive and should be abolished. He said adding more staff to the department would make a bad situation worse.

"They would just spend more time harassing people who are just trying to make a living," Norquist said.

Gov. Earl was in Washington and was not available to comment on the regulatory system, but an Earl spokesman called for minor changes in department procedures that would make the department more accessible to the public.

The Journal series showed that the Department of Regulation and Licensing does not protect consumers and is characterized by mild to nonexistent discipline by the 17 boards attached to the department, lengthy delays in processing complaints against licensees, tendencies by the boards to use their authority to make anti-competitive rules and ubiquitous lobbying and political action committee spending that benefited public officials.

The Journal found, for example, that not one of the 162 doctors found negligent by the Patients Compensation Panels had been disciplined by the Medical Examining Board, and that the Wisconsin Real Estate Board failed to revoke the licenses of real estate agents who had stolen clients' earnest money.

The majority of the members of the boards represent the professions being regulated.

Investigators sought

Susan Behrens, a physician and the chairwoman of the Medical Examining Board, said Monday that she would lobby the Legislature to add six investigators or lawyers to the department's enforcement staff just to investigate complaints against doctors.

Spokeswomen for the department and the Patients Compensation Panels said contacts from citizens rose last week after The Journal published the telephone numbers of the panel and the licensing boards. A spokeswoman for the Patients Compensation Panels said the panels received 20 calls Thursday, while it normally receives two calls per week.

Ron McCrea, Earl's press secretary, said Monday that the governo

was reviewing, but had not made a decision on, a 1985-'87 budget request from the department for five additional enforcement employes.

McCrea said that Earl had full confidence in Barbara Nichols, the department secretary, but that the governor's office had told Nichols Monday that the boards should list their phone numbers in the telephone book and take steps to guarantee that the public has access to all board meetings.

McCrea said Earl would make every effort to have good public members appointed to 15 new public member board seats in January.

"Some review needed"

McCrea said he hoped consumers would organize and demand reform of the occupational licensing system because trade associations that represent the regulated professionals were powerful.

"Taking them on is a weighty question politically," McCrea said. They have "the ability to organize and make life miserable for legislators," McCrea said.

Sen. James Harsdorf (R-Beldenville), the outgoing Republican leader in the State Senate, said Monday that "there's no doubt that some of the boards are in need of some review, but I'm not going to say which ones."

Harsdorf said he had no specific proposals to make to reform the licensing system.

Other key legislative leaders could not be reached for comment or said they had not read The Journal's stories on the regulatory system.

Another legislator, a Democrat, offered this bleak, off-the-record explanation Monday as to why major, pro-consumer reform of the occupational regulatory system would not pass the Legislature:

"It would mean taking on 25 lobbys at once. It's hard enough to get something passed taking on one lobby. You need a guy outside the Legislature to grab it [the issue]. You need a consumer group with some clout to grab it."

Wisconsin's medical malpractice claims system needs sound cure

CAPTIMES
DEC. 3 1984

WISCONSIN'S system for redressing medical malpractice claims is in for a checkup.

The system — last overhauled by the Legislature in 1975 — still results in awards to injured patients that are way too big and insurance premiums for doctors that are way too big, according to the State Medical Society.

And some lawyers who represent patients claiming to have been injured by a doctor's carelessness also don't like the system. The State Bar of Wisconsin — the association of lawyers — believes the present system results in delay and increased expenses for people making claims against a doctor. And lawyers fear any attempts to limit the fee they can charge in medical malpractice cases.

MEANWHILE, BOTH the State Insurance Commissioner and private insurance companies fear that the system — based in part on a state-sponsored doctors' insurance plan — will go broke soon if some adjustments are not made.

What is the present system, and what are the problems? In 1975, the state Legislature looked at malpractice suits against doctors and hospitals and didn't like what it saw: increases in the number of malpractice suits and the size of damages awarded, malpractice insurance either skyrocketing in cost or unavailable, doctors practicing defensive medicine — ordering unnecessary tests and procedures because of the fear of being sued — or not practicing certain riskier types of medicine — such as obstetrics — at all; and the cost of everything was being passed on to patients via higher medical bills.

So the Legislature established a two-part system composed of patients compensation panels and the patients compensation fund.

When you approach a lawyer with a possible medical malpractice claim, what follows is not Paul Newman's performance in the movie "The Verdict." The attorney, who has to be something of a medical expert, first evaluates your case, examining your medical records and calling on experts for advice. Then, if there's something to the claim, the lawyer

OVER

It's the Law

By Steve Levine

files a complaint that is referred to a patients compensation panel.

THE SIZE OF the panel and its membership depend on the size and type of your claim. A panel might be composed of doctors, lawyers, hospital people and lay people.

The panel holds a hearing — something like a court trial — and must decide the case within 30 days after the hearing. That was one of the ideas behind the panel system — remove malpractice cases from the crowded court system and process claims as quickly as possible. And according to one malpractice insurance company, Wisconsin's panel system is one of the most efficient in the country in processing cases.

Another idea behind the panel system is that the panels should screen out unmeritorious cases that should never get to court. After a panel's decision — which includes determining damages if it finds a doctor or hospital liable — your attorney can still file suit in court, but, depending on the circumstances, the panel's decision may be presented to the jury in the trial. And if the panel's decision is in favor of the doctor or hospital, your lawyer will certainly think twice before trying to persuade a jury to go the other way.

THE PANEL SYSTEM may be efficient, but it just hasn't worked to reduce the number and size of malpractice claims or the fast-increasing insurance premiums doctors have to pay. So all sides are flooding the Legislature with reams of facts and figures to document their cases for change.

Doctors want a $100,000 lid on the amount that can be awarded for "pain and suffering" in malpractice cases and a sliding-scale limit on contingent fee recoveries by lawyers, so that the injured patient actually receives most of the award. Contingent fees are agreements where the lawyer charges nothing up front — even though malpractice cases are very expensive to prepare — but takes a certain percentage of any recovery.

Lawyers reply that a limit on malpractice awards will hurt injured parties, and that a limit on contingent fees is just a subterfuge to discourage claims from being filed, since attorneys can't accept cases that are expensive to bring and not-so-profitable to win.

ALL SIDES FAVOR increasing the role of the State Medical Examining Board — the agency that is supposed to discipline doctors for misconduct. Right now the board never even hears of malpractice claims that are settled before a decision by a patients compensation panel. And of the negligence findings that have been referred to the board, the board hasn't disciplined anyone.

That part of the system involving the Medical Examining Board is sure to be changed when the Legislature re-examines medical malpractice this January.

Again the high cost of bad doctors

The malpractice crisis among physicians has reawakened after a 10-year snooze. Solutions are elusive, but one thing is certain: Every time you visit a doctor or hospital you help pay the problem's shockingly high cost.

The board that governs Wisconsin's Patients Compensation Fund, a pool of money available to victims of malpractice, has asked the Legislature to approve a colossal 160% increase in the fees that doctors are required to pay into the fund. Big awards — a recent one worth $9.8 million — have depleted the reserves.

Malpractice and insurance for it exact their price in several ways. Most commonly, doctors and hospitals simply charge patients more. Sometimes a physician orders unnecessary but costly tests as a hedge against any finding of negligence in a malpractice suit. A few physicians — particularly in the higher-risk, higher-premium specialties such as obstetrics and neurosurgery — simply give up medicine, which in certain areas can cause a shortage of doctors, thereby boosting the demand (and cost) for the remaining ones.

There are many ways to attack the problem, including education of the public to expect less from doctors and limits on the amount that malpractice victims may recover. But paramount must be a strong self-policing mechanism, which is conspicuously absent in Wisconsin.

The board statutorily empowered to discipline the medical bad actors seldom hears about them. That's because screening panels handling claims are not required to report to the doctors' disciplinary agency, the Medical Examining Board, unless a physician is actually found to be negligent. The panels have made just 123 such findings in the past decade; most cases are settled between doctor and patient before the screening panel reaches a conclusion. Besides, not one of the 123 cases reported to the Medical Examining Board has resulted in so much as a suspension.

Moreover, it takes Wisconsin a little over a year on average to resolve a case. All the while the physician, even a truly incompetent one, is free to incur still more malpractice claims.

If the Medical Examining Board is to be anything more than a pretense, it needs more than its present five investigators and two lawyers. And the law should be amended to require reports to the board of *all* doctors named in malpractice claims, not merely those found to be negligent, so the board can watch for patterns of complaints and investigate the repeaters.

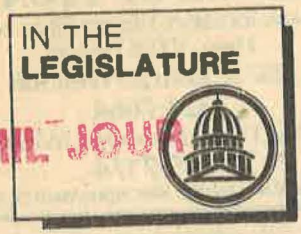
Physicians, too, must do their part. The vast majority are competent. If they are to spare themselves still higher malpractice fees (and further blemishes on their profession), they must demand that the law root out the rotten few.

Doctors say malpractice bill may bury board

Journal Madison Bureau, AP, UPI

Madison, Wis. — A proposed change in medical malpractice reporting may have a fatal flaw, lawmakers were told Tuesday.

A bill that would increase the number of medical malpractice allegations reaching the State Medical Examining Board could drown the



board in complaints, said Gerald C. Kempthorne, a physician and past president of the Wisconsin State Medical Society.

He agreed with the general outlines of a measure to alter malpractice reporting, but suggested that the Medical Society help screen what could be a flood of new reports.

Under current law, many claims of malpractice never come to light because they are settled before the board sees them, Sen. Gary George (D-Milwaukee) told the Senate Agriculture, Health and Human Services Committee.

George's legislation, Senate Bill 75, would require insurance companies to notify the Medical Examining Board of all malpractice claims. In addition, the board would gain access to patient compensation panel records, now closed to the public.

Screen out small claims

Kempthorne offered a modified proposal that would expand doctor peer review.

He suggested funneling extra malpractice allegations through the Medical Society to weed out paid claims of less than $25,000.

The Legislative Council's Committee on Medical Malpractice approved the Medical Society screening plan Monday.

Without the society's screening, the Medical Examining Board's caseload would triple, he said. Even with the society's help, the caseload still would grow 50% to 75%, he said.

In other legislative news:

It takes too long to discipline doctors

One way to maintain confidence in the medical profession is to make sure that incompetent doctors are promptly disciplined — and, if necessary, weeded out of the health-care system.

At the moment, that isn't happening in Wisconsin. The State Medical Examining Board, which judges disciplinary complaints against doctors, has a backlog of 385 cases.

One doctor says the backlog is so large that it takes four years for a disciplinary case to be resolved.

Officials in the Department of Regulation and Licensing say the turnaround time is more like 22 months. Either way, it's too long.

Quick resolution of discipline cases would help protect the reputations of competent doctors. It also would help protect patients from incompetent doctors (in nearly all cases, doctors are allowed to continue practicing medicine while disciplinary cases are pending).

Last week, a special legislative committee recommended one change to help reduce the backlog: Ordering the Medical Examining Board to meet at least 12 times a year rather than the current eight.

Barbara Nichols, secretary of Regulation and Licensing, has other ideas that could help. One is to hire more investigators in her department to look into disciplinary complaints. That idea makes sense at least until the backlog is cleared.

However, an additional change proposed by Ms. Nichols promises to be more controversial.

In Wisconsin, a Patients' Compensation Panel decides malpractice claims against doctors.

The findings of the compensation panel cannot be used as "conclusive" evidence by the Medical Examining Board as it considers disciplinary action.

Barbara Nichols

A legal point is involved. To declare a doctor guilty of malpractice, the Patients' Compensation Panel is required to find that a "preponderance of evidence" shows negligence.

But to discipline doctors — by suspending their licenses to practice medicine, or placing conditions on their practices, for example — the Medical Examining Board must meet a tougher standard, finding "clear and convincing evidence" that a doctor does not meet minimal professional standards.

Thus, the Medical Examining Board cannot accept the compensation panel's findings as conclusive. Its 2½ investigators must begin each investigation from scratch.

If a "preponderance of evidence" is sufficient grounds to award malpractice claims, some exceeding $1 million, it should be sufficient grounds for evidence in disciplinary proceedings.

Unless doctors can make a very good case to the contrary, the Legislature should adopt Ms. Nichols' suggestion.

LETTERS

The Editors would like to encourage physicians to contribute to the LETTERS section where they can ventilate their frustrations as well as opinions. This feature is intended to be lively and spirited as well as informative and educational. As with other material which is submitted for publication, all letters will be subject to the usual editing. Address correspondence to: The Editor, Wisconsin Medical Journal, Box 1109, Madison, Wis 53701.

The public, malpractice, the Wisconsin Patients Compensation Fund, and us

TO THE EDITOR: The public, politicians, trial lawyers, and physicians are all concerned about malpractice. Some individuals in each group accuse other groups and individuals of bad faith, conniving, misrepresentation, and so forth. Newspaper articles and editorials pick and exploit various points of view. There may be a grain of truth in all the various positions on this issue.

The State Medical Examining Board has been criticized. Comparisons were made with other boards and more activity was suggested. One wonders of the 400 odd cases the Medical Examining Board has under advisement, awaiting disposition, how many of these physicians have had malpractice claims against them. There is a financial incentive for the physicians in Wisconsin to weed out the incompetent practicing doctors. The Wisconsin Patients Compensation Fund (WPCF) needs to run "lean and mean" rather than "thin and grim" as it is presently. With the possible exception of some trial lawyers, the consensus is that something really ought to be done to correct the present situation regarding the huge escalation in premiums for the Wisconsin Patients Compensaton Fund.

Suggestions have been offered as to a solution and now action is needed. I believe an ideal solution would be to:

— protect the public from incompetent physicians,

—keep good physicians in practice (especially important in rural areas) by holding down premium payments,

— protect the Wisconsin Patients Compensation Fund from further dollar erosion and escalation of premiums, and

— reduce the number of frivolous claims.

I suggest the State Medical Society recommend the Legislature pass enabling legislation to establish a committee or panel with precisely this mission. Changing, modifying, or increasing the charge to the Medical Examining Board would be awkward, take too long, and probably wouldn't work.

This committee would review all malpractice claims, beginning obviously with those successful claims for the largest dollar amounts. But ultimately this would include even unsuccessful claims.

This legislation should give the committee the authority to:

— **rescind, or not offer,** Patients Compensation Fund coverage to any physician they judge to be unfit to practice,

— **rescind coverage selectively;** *ie,* not all thoracic surgeons should be doing open heart surgery, not all neurosurgeons should be doing intracranial vascular anastomosis, not all orthopedic surgeons should be doing spine surgery,

— **add surcharges** to the premiums of physicians who are outliers in the number of malpractice claims. The system needs to be fine-tuned. It is not reasonable that a neurosurgeon, gynecologist, obstetrician, or thoracic surgeon with no malpractice claims in five or ten years should pay the same premium as one who has had a claim per year.

It would be important for all the players, most importantly the Legislature, to understand our position is that there are circumstances when even an excellent physician can have a successful malpractice claim against him or her because we are, as physicians, also human. The question of how many successful claims against a single physician are evidence that he is incompetent has not been determined. What is known is that in ten years 21 physicians have had three or more successful malpractice claims filed. Are these physicians incompetent? Are they insured by the WPCF? How many dollars from the Fund were paid out for these 21 physicians? Are they included in those cases under advisement by the Medical Examining Board? Such questions could be answered by such a committee.

The number of physicians having two or more claims filed against them is not known. Perhaps the number of unsuccessful claims filed against an individual physician are also important because they may only reflect the quality of his/her defense attorney and not the issue of negligence.

The question of negligence needs to be addressed by the committee. Perhaps if gross negligence (which requires precise definition) is proved, a single malpractice claim is sufficient to withhold insuring that individual or doubling his surcharge.

This could be left to the judgment of the committee. Obviously, there would need to be peer representation to the committee in arriving at such decisions.

Important to consider is that maybe there are too many incompetent physicians practicing

in Wisconsin. There also may be too many trial lawyers, weak, easily influenced juries, and so forth. The committee could not successfully address all of these issues but could at least remove the Wisconsin Patients Compensation Fund from the risk of covering incompetent physicians.

Perhaps the committee should be authorized to take action against attorneys who file numerous frivolous claims either through the courts or the Bar Association. Perhaps a percentage of the Patients Compensation Fund should be set aside for rehabilitation of the impaired physician. Informing the patients of the malpractice problem would be worthwhile. Perhaps a general educational program on malpractice issues may be in order for *all* physicians. If physicians wished to continue receiving coverage from the Wisconsin Patients Compensation Fund, attendance could be made mandatory. Certainly the findings of the committee should be reviewed by the Medical Examining Board.

The composition of such a committee is critical. It is best to remember that large committees have an inherent inertia. Chairmen of such committees seldom get the work done without a substantial time commitment. Without authority, necessary actions don't take place. Without action, committee members rapidly lose interest. The committee must see decisions result in action. Halfway measures seldom get even halfway results. Without high quality and sufficient staff, failure could be predicted.

Our Society's immediate past president, Timothy T Flaherty, MD, and our current president as well, John K Scott, MD, recognize this problem; and during Doctor Flaherty's term he recommended establishment of a panel to do much of what I have recommended. Now what is needed is action.

—*Richard D Sautter, MD*
1000 North Oak Ave
Marshfield, Wisconsin 54449

Fee discrimination

TO THE EDITOR: Are you tired of the high cost of continuing medical education? Have you also noticed that many nonphysician health professionals are attending medical education conferences? Have you also noticed the other health professionals often pay greatly reduced fees for these same conferences?

For example, at a recent Sports Medicine conference at the University of Wisconsin-Madison, the fee for physicians was $165. The fee for nonphysicians was $85. Both nonphysicians and physician attendants received the same course booklets, heard the same lectures, and occupied the same amount of space in the conference hall. Yet, the physician pays almost twice as much money for this educational product. Is this fee discrimination really justified?

Even if we assume that all physicians are rich and all nurses, physical therapists, physician assistants, etc are poor, the price differential is unreasonable. Often, the registration fees are paid for by employers—that is, clinics, hospitals, and other institutions—whose expense accounts are far larger than the individual medical practitioner. In addition, if the nonphysician practitioner is self-employed and paying his or her own fee, is it fair for the MD to pay twice as much—in effect subsidizing the education of his competitors?

In any case, I resent having to pay twice as much for my continuing medical education as other health professionals.

Equal conference—equal fee.

—*Robert L Schwarz, MD*
N84 W16889 Menomonee Ave
Menomonee Falls, WI 53051

Tourette Syndrome

TO THE EDITOR: Our daughter, Susan, was 2½ years old when we first sought neurological evaluation for "unusual eye movements." When her problem was not identified, we assumed that we were doing things which made her nervous. Nine years later she was finally diagnosed as having Tourette Syndrome.

We urge all physicians who recently received the SMS mailing on Tourette Syndrome to carefully read the information on this disorder. Although many more physicians are knowledgeable about this not-as-rare-as-was-thought condition, many families are still spending thousands of dollars and years of frustration trying to learn why their child makes strange movements and sounds and has some other unusual behaviors, often to the point of its preventing the living of a normal life.

There are drug therapies which can help control TS. The benefits of early diagnosis and treatment are enormous in that frustration is more easily dealt with and the social and emotional aspects of the disorder can be managed more efficiently.

We thank the CESF and SMS for undertaking this educational project, and we urge all physicians to learn about Tourette.

—*Dr and Mrs Richard H Ward*
1821 N Racine Street
Appleton, WI 54911

EDITOR'S NOTE: The publication entitled "A Physician's Guide to Diagnosis and Treatment of Tourette Syndrome" is available by contacting the Charitable, Educational and Scientific Foundation (CESF), PO Box 1109, Madison, Wisconsin 53701.■

Board will probe allegations against physician

By Bill Hurley
Sentinel Madison Bureau

Madison — The Medical Examining Board will be asked to investigate allegations that a physician on a panel reviewing a malpractice claim privately told the defendant he would "do his best" to help him out, a state official said Tuesday.

Kathleen M. Murphy, administrator of the Patients Compensation Panels, said that if the allegations are true, it was the first time she knew of that a physician serving on a panel contacted a defendant privately.

The physician, was removed from the panel by the attorney in charge, Jack Koeppl, of Madison, after the allegations surfaced late last week.

After receiving two affidavits Tuesday indicating the physician had telephoned the defendant, Murphy said she thought the Medical Examining Board should determine whether any misconduct occurred.

"I'm real concerned about it because it gives a real negative picture of doctors serving on panels," she said. "It's something that bears looking into."

The physician told a reporter Tuesday he had never contacted the defendant — a Madison surgeon — about the case. He said he did not know why he was removed from the panel.

The compensation panel is investigating a complaint by a Madison man that the surgeon provided inadequate medical care.

In one of the affidavits, the surgeon said a man who identified himself as the physician serving on the panel called him Thursday and asked several questions about the case.

"The individual who identified himself as . . . (the physician on the panel) indicated a willingness to help and invited . . . (the surgeon) to call if he could think of anything that might be of help," according to the surgeon's affidavit.

The other affidavit was from an attorney for the Madison man who alleged he received inadequate medical care from the surgeon.

The attorney for the Madison man said he received a call Thursday from an attorney representing the surgeon.

According to the Madison man's attorney:

The surgeon's attorney said the surgeon had told him that a man identifying himself as the physician on the panel called and said "he would do his best to help . . . (the surgeon) in the course of the hearing and that he (the physician on the panel) had just been to a seminar on medical malpractice in Milwaukee and felt that he should do what he could to help . . . (the surgeon)."

Patients Compensation Panels, set up by state law, are designed to prevent medical malpractice cases from going to circuit court. No action can be filed in court until the case is handled by a panel.

No doctors' licenses revoked by board

MILWAUKEE (AP) — The Wisconsin Medical Examining Board received 268 complaints against physicians last year, but didn't revoke the license of any of the state's 9,000 licensed doctors in connection with quality-of-care cases, the Milwaukee Journal reported Tuesday.

A review of state records showed the Wisconsin Department of Regulation and Licensing, which oversees a system of 17 licensing boards, received 1,687 written complaints last year, compared with 1,558 in 1984.

The department began 119 disciplinary actions in 1985, down from 126 the previous year.

The medical board ended the year with 376 complaints pending, compared with 348 pending at the end of 1984.

The board did not receive reports of 18 cases in which physicians settled malpractice complaints out of court. A state law took effect Jan. 1 that requires the medical board to review the licenses of all physicians who privately settle malpractice claims.

"The insurance companies didn't tell us about it," Deanna Zychowski, administrator of the medical board, said.

"Normally the complainant doesn't tell us and the doctor surely doesn't tell us," she said.

The medical board didn't revoke any licenses in 1985 on quality-of-care complaints.

But the board did take 30 disciplinary actions. It reprimanded seven physicians, suspended two licenses and revoked the license of a Madison doctor who was sentenced to six years in federal prison for illegally distributing prescription drugs.

The board also limited some licenses and some physicians voluntarily surrendered their licenses.

The Wisconsin Real Estate Board led all agencies in 1985 with 513 complaints. The board issued 29 disciplinary rulings, compared with 23 in 1984.

LETTERS

The Editors would like to encourage physicians to contribute to the LETTERS section where they can ventilate their frustrations as well as opinions. This feature is intended to be lively and spirited as well as informative and educational. As with other material which is submitted for publication, all letters will be subject to the usual editing. Address correspondence to: The Editor, Wisconsin Medical Journal, Box 1109, Madison, Wis 53701.

Wis. Medical Journal April 1986

Medical malpractice: True police powers needed

TO GOVERNOR ANTHONY EARL (dated February 26, 1986): On several occasions at which I have been present in the past six months, you have responded to inquiries about the medical liability issue with the statement in effect, that "don't expect government to help you with that problem until you doctors police yourselves."

With every due respect, Governor, that assertion begs the question and is severely misleading to others in government, including legislators, as well as the public.

The *only effective* way in which doctors can "police" themselves is through the agency with police powers, the Wisconsin Medical Examining Board. You appoint that Board; your designee runs the Department of which the Board is a part. And the Board *has not* and *is not* doing the job of being tough about discipline that we in the Medical Society expect it to do, that I believe you expect it to be, and that the public expects it to do.

There are many reasons for this, and most can be remedied.

For starters, SB 328 now pending in Joint Finance (the medical liability bill) does some very important positive things that you should be aware of:

1. It requires the Medical Board to meet at least 12 times per year to clean up a big backlog of cases.
2. It permits the Board to impose education requirements when they think a doctor is deficient in knowledge. We think it ought to go further and permit re-examination (testing) if a doctor appears to have competence deficiencies.
3. It authorizes the Board to require an errant doctor to be supervised in his practice or in certain procedures if the Board feels that's needed.
4. It declares that a finding by a court or a Patients Compensation Panel *will* be *conclusive* as to whether negligence occurred, thus relieving the Board of the need to re-investigate or start from scratch in evaluating that doctor.
5. Greater protection is provided to peer review committees against lawsuits when they act in good faith. Bad faith must be proven by "clear and convincing evidence." This will encourage better peer review and more direct accusation when justified.
6. Surcharges can be imposed on health care providers when they have multiple claims. This is only an economic sanction, but it could be helpful in removing some doctors from practice or forcing them to practice more carefully.

The law recently was changed to require *all* settlements and panel or court awards to be reported to the Medical Examining Board. This will add greatly to the workload in an already badly overburdened Board and staff.

There are many more very important changes to be made in the system in which that Board operates. Our Society's Task Force on Physician Review and Discipline will be making major recommendations soon. That report will be public and we intend to strongly pursue the changes it proposes.

The public is not well served by the present statutes, structures or operations of the Board and the Department of Regulation and Licensing. That hurts the public, it hurts you and it hurts us. Our Society does not intend to tolerate further the inability of this system to police the profession as needed. Our Society has no true police powers; the Board does. We want it to work. We need your help, not your mistrust.

I'm eager to talk with you further at your convenience to aid in resolving this critical problem.

—*John K Scott, MD,* President
State Medical Society of Wisconsin
330 East Lakeside St
Madison, Wisconsin 53701

Editor's note: See articles elsewhere in this issue relative to the medical malpractice crisis, SB 328, and the Medical Examining Board.

More efficient discipline of professionals is urged

Associated Press

Legal and medical professionals in Wisconsin are about equal in dealing with the occasional bad apple in their disciplines, state records suggest.

In either profession, it may take eight months or more to handle the average complaint, even if it is decided no action should be taken. Where disciplinary action is pursued, cases can take far longer.

Complaints by the public that disciplinary investigations and hearings are too lengthy are not falling on deaf ears.

A streamlining of procedures for actions involving physicians is expected to be proposed soon by the Gov. Anthony Earl's Task Force on Professional and Occupational Discipline, headed by Dane County District Attorney Hal Harlowe.

"I was extremely dismayed by the length of time it is taking all cases to move through the system," said Harlowe, whose panel is drafting recommendations.

The system now "represents a classic model of government inefficiency" and is in need of substantial change, Harlowe added.

Disciplinary actions involving 30 of Wisconsin's 11,598 physicians were handled last year by the Medical Examining Board.

In one case the license was revoked. In six cases licenses were voluntarily surrendered, according to John Temby, administrator of the Division of Enforcement in the Department of Regulation and Licensing.

In the legal profession, disciplinary actions in the last fiscal year were imposed on 119 Wisconsin lawyers.

Forty-five were disciplined for violating the professional conduct code, said Gerald Sternberg, administrator of the Board of Attorneys Professional Responsibility.

Of those, 16 attorneys were disbarred. Eleven lost their licenses for varying lengths of time, and 16 received public reprimands from the board or the state Supreme Court.

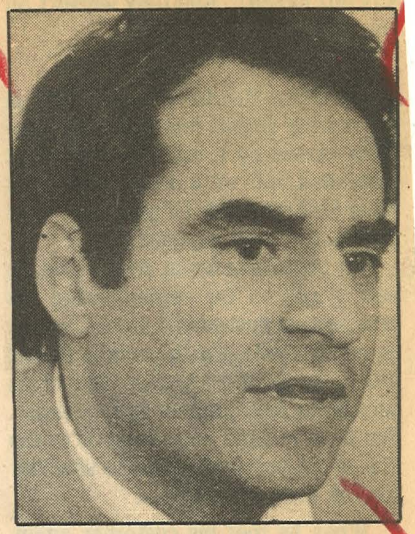
Harlow said he was concerned procedures for investigating and disciplining physicians can take two or three years.

He said his panel would like a system that "will create economic disincentives for people charged with malpractice to delay the process."

Complaints against physicians that are investigated and determined to be without merit can be dismissed by the Medical Examining Board generally within a year, Temby said.

Some cases have have taken far longer, he said, but often for good reason.

"We're dealing with a person's livelihood, and these are very serious matters," Temby said. A person against whom a complaint is filed likely will want "to fight it tooth and nail," he added.



Hal Harlowe

Harlowe said he would like to see procedures streamlined so that a single person would be accountable for the disciplinary action. The Medical Examining Board, should act as a "catalyst" for speeding cases along, he said.

The secretary of Regulation and Licensing should be ultimately responsible, Harlowe suggested.

Harlowe said he wasn't convinced the process for disciplining attorneys is a great deal better than the one for the medical profession.

"I'm not so sure I agree with the assessment of some that the system of monitoring lawyers is all that terrific," Harlowe said.

Sternberg, however, said the Board of Attorneys Professional Responsibility has a good record for pursuing only the cases in which there is clear and convincing evidence the complaints were legitimate.

In 133 cases the board took before

the state Supreme Court in the past three years, "the court found clear and convincing evidence of a violation of attorney misconduct in 129 cases," he said.

Legislator disputes rate of disciplinary action

By STEVE SCHULTZE
Journal Madison bureau

Madison, Wis. — Despite its claims to the contrary, the Wisconsin Department of Regulation and Licensing has made only a small dent in its chronic backlog of cases, a state lawmaker says.

The department had 1,355 cases pending in July, 69 fewer than it had a year earlier, down 4.8%.

"I don't think that is a significant reduction in backlog," said State Rep. John Robinson (D-Wausau), the author of a proposal to reorganize the department.

However, department Secretary Marlene Cummings claimed a much greater success rate in reducing the number of pending cases, and labeled her efforts a success.

She said the case backlog had been cut by nearly 60%, a figure she has reported to Gov. Thompson as evidence that the department has made great strides in its effort to dispose of old cases and handle new cases faster.

Moreover, the average age of pending cases has declined from 11½ months to about 8 months since she took over the department, Cummings said.

Cummings used the case statistics differently, however, to come up with the optimistic-appearing result.

She based her figures on a definition of "backlog" that included only cases that were more than a year old last Jan. 1, when Cummings took over the agency. Of the 605 cases more than a year old as of that date, 57% have been resolved, she said.

She did not include in that statistic any new cases filed since that date or any cases that were less than a year old on that date.

Still, Cummings' efforts to institute a set of priorities for determining which cases should be investigated first won some guarded praise.

Arlen Delp, a Muskego osteopath and member of the State Medical Examining Board, said Cummings' case backlog efforts had been an improvement.

The medical board disposed of 114 cases that Cummings defined as backlogged, leaving 124 on the books.

The board also has 291 medical cases pending that were filed since

Marlene Cummings

January or were less than a year old as of Jan. 1, said John Temby, who heads the department's Division of Investigation.

Many of the cases that were resolved since Cummings was appointed department secretary were essentially dormant or classified as "less serious," she said.

"We have been able to move the ones through the system that were old and essentially moving nowhere," she said.

Because many of the cases had been inappropriately referred to the department, the backlog looked worse than it really was, she said.

She also has proposed that future complaints about unlicensed practitioners be referred immediately to district attorneys for possible prosecution. In the past, the department hadopened case files but had no authority to take any action against unlicensed practitioners. The cases remained on the books, however, until some legal action was taken, she said.

She also wants no more cases opened in which a licensee is not currently practicing in Wisconsin.

Cummings' department is the umbrella agency for investigating complaints against a variety of professionals. Actual discipline is meted out by 21 boards that covering doctors, nurses, real estate agents and others.

Cummings has issued a new set of priorities to be followed in handling of cases, but not all boards have adopted the proposals.

614.25

Doctor can still prescribe, in person

4-23-98

Deal with state halts Web sales of impotence drug; investigation continues

Milwaukee

By Neil D. Rosenberg
of the Journal Sentinel staff

Madison — The state Medical Examining Board cut a deal Wednesday that allows a Wauwatosa physician to retain his medical license but bans him from prescribing by telephone or using the Internet to solicit phone subscriptions.

State officials also acknowledged that they did not act on information they received in 1995 that David Michael Thomas, 36, had been court-martialed on sex charges; and in another matter, had surrendered his medical license in Arizona.

Also Wednesday, the director of consumer protection for the state said his office would meet with the Federal Trade Commission to learn whether Thomas violated federal deceptive advertising laws by advertising the impotence drug Viagra on his Web site. Federal action could result in an injunction against Thomas, said Jerry Hancock, director of consumer protection for the Wisconsin Department of Justice.

The issue, Hancock said, involves Thomas' Vascular Center for Men advertising Viagra as offering "more enjoyment" and better sexual performance, when the drug actually is prescribed to treat impotence. "The general laws of deceptive advertising would apply on the Internet in the same way it does to any other medium," Hancock said.

Wednesday's agreement backed away from an initial petition to summarily suspend Thomas' license for 30 days while the board investigates his practices.

The move to halt Thomas' free-wheeling offers of Viagra prescriptions came after the Journal Sentinel reported that he prescribed the drug at least 700 times in the past few weeks to people briefly screened by telephone. Most of the calls came after Thomas set up a Web site that offered $50 consultations that could lead to prescriptions, which cost extra. He charged a $25 fee for consultations on refills.

On the Web site and in an interview, Thomas said his criteria to qualify for the drug were for the caller to be male, at least 18, and not taking nitroglycerin-type drugs. Business was so brisk, Thomas said, his medical assistants were doing the telephone screenings.

Under Thomas' agreement with the Medical Examining Board, the investigation of him and the way he prescribed the anti-impotence pills will continue, and he pledged to cooperate. The probe could lead to a formal complaint of unprofessional conduct against him, said Arthur Thexton, prosecuting attorney for the Department of Regulation and Licensing.

Thomas "shall not prescribe any prescription drug or otherwise treat any patient he has not physically examined and for whom he does not have a patient health record," that conforms to state medical regulations, Thexton told the board at a meeting Wednesday morning. Thomas' license would be suspended immediately if he violates the conditions, according to Thexton.

Thexton said the agreement "meets the concern of immediate danger to the public," while it permits Thomas "to practice freely pending our investigation."

Thomas' attorney, Hal Harlowe, a former Dane County district attorney, told the board that he concurred with Thexton on the agreement. "I think it is an appropriate interim resolution of what will be a complex case."

What was not addressed in the agreement was why the state Department of Regulation and Licensing had not taken action concerning Thomas sooner.

Thomas surrendered his license to practice medicine in Arizona in 1993, while under investigation there. He also was court-martialed by the Army in 1994, after serving in Somalia, on charges that included coercion not to report sodomy. He was found not guilty of of allegations that the alleged victim was under 16. After his conviction, Thomas spent more than a year in a military prison.

It was learned Wednesday that the Division of Enforcement of the Department of Regulation and Licensing has known of Thomas' court-martial and Arizona license surrender since late 1995, but has not completed its investigation of those matters.

Steven M. Gloe, a division attorney, said his team did not get Thomas' case until 1997, and could not explain the delay. Since then, investigators have worked with the military to get witnesses the attorneys could interview regarding the incident in Somalia.

Asked why the conviction and sentence were not proof enough of criminality, Gloe said: "Homosexual activity by itself is not a basis for taking action against a doctor's license, nor should it be. We are more concerned with the underlying allegations. The law requires us to take action on a conviction where the facts and circumstances must be substantially related to the practice of medicine."

As for the Arizona situation, Gloe said that until recently, the Medical Examining Board did not consider an adverse action by another licensing board enough to provoke a complaint. Also, the surrender of Thomas' license occurred without any findings.

But Gloe said investigations continue here on those matters.

Deanna Zychowski, administrative assistant with the Bureau of Health Professions for the Department of Regulation and Licensing, said the department does not use material from the National Practitioner Data Base. The database, a registry of disciplinary actions against all licensed physicians, is too expensive, she said.

It costs $15 to check on a physician; and with 12,000 physicians statewide, an annual check would cost too much, she said.

When a physician wants to apply for a medical license in Wisconsin for the first time, the Medical Examining Board does want to know what the data bank may have on that doctor. But to save the $15 fee, it requires the applicant to contact the database, pay the fee, and have the report sent in a sealed envelope to the department.

Harlowe, Thomas' attorney, said the case raises issues of access to new medications, especially for individuals who do not have medical insurance or normal access to medical care. He said he expected a formal complaint to be lodged against Thomas, even though the issue of prescriptions issued by phone was not clear cut.

Joe Manning and Mary Zahn of the Journal Sentinel staff contributed to this report.

On the Web
Join a discussion on www.jsonline.com on cyber prescriptions.

Wisconsin State Journal April 29, 1998

Bill would spare doctors hearings in some cases

By Alisa LaPolt
Associated Press

Doctors accused of misconduct could receive confidential warnings instead of facing disciplinary hearings under a bill passed by the Assembly on Tuesday.

The bill, authored by Rep. Frank Urban, R-Brookfield, would allow the state Medical Examining Board to issue warnings to physicians accused of unprofessional conduct and negligent treatment. The public would have no access to the warnings' details.

Current law requires the board to hold a disciplinary hearing when the board investigates complaints and finds there is probable cause that unprofessional conduct or negligence has taken place.

"You're going to have some cases where there may be a violation that may be minor, and you don't want to go through the hearing process," said Jack Timby, who administers the Department of Regulation and Licensing's enforcement division.

State licensing officials said the bill would allow them to issue warnings to physicians in cases where regulators believe there is misconduct but cannot verify it.

Now, those cases are permanently closed. The bill would allow officials to re-open them if new evidence appears.

The bill would apply to first-time, minor complaints.

Cases such as sexual advances to patients or violations in prescribing medication would be considered major offenses that would warrant more than a warning, said Marlene Cummings, secretary of the Department of Regulation and Licensing.

If the bill is signed into law, the Medical Examining Board would have to decide what cases would merit warnings instead of hearings, Cummings said.

The Assembly passed the bill on voice vote and sent it to the Senate.