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SUNSET COMMISSION: HEALTH LICENSING BOARDS SECTION 29 INVESTIGATIONS REPORT

Minnesota Health Licensing Boards
University Park Plaza
2829 University Ave SE
Minneapolis, MN 55414

Lori Swanson, Attorney General
Minnesota Office of the Attorney General
1400 Bremer Tower
445 Minnesota Street
Saint Paul, MN 55105

In compliance with Minn. Stat. § 3.197, this report cost approximately \$3,876.07 to prepare.

I. Legislative Charge and Background.

Pursuant to the Sunset Commission legislative mandates, the “health-related licensing boards and the attorney general shall review and make recommendations to the legislature by January 15, 2013, on the respective roles of the boards and the attorney general in conducting investigations of licensees of the health-related licensing boards.”

The health-related licensing boards (“HLBs”) are defined as the Board of Examiners of Nursing Home Administrators, the Office of Unlicensed Complementary and Alternative Health Care Practice, the Board of Medical Practice, the Board of Nursing, the Board of Chiropractic Examiners, the Board of Optometry, the Board of Physical Therapy, the Board of Psychology, the Board of Social Work, the Board of Marriage and Family Therapy, the Board of Behavioral Health and Therapy, the Board of Dietetics and Nutrition Practice, the Board of Dentistry, the Board of Pharmacy, the Board of Podiatric Medicine, and the Board of Veterinary Medicine, as set forth in Minn. Stat. § 214.01, subd. 2 (2012).

This report describes the manner in which the HLBs and the Office of the Attorney General (“AGO”) currently jointly conduct the investigative process set forth in Minnesota Statutes and reviews the broader goals of promoting the protection of the public and using the resources of the State of Minnesota efficiently and effectively. This report further includes a summary of the legislative background for the investigative process, a description of how the statutory process works in practice, and a roadmap for complying with the new timelines established by the Legislature in its last session.

II. Legislative framework – Minnesota Chapter 214

In Minn. Stat. section 214.103, subds. 4, 5, and 6(b), the legislature set out the roles of the AGO and the HLBs in the investigative process. The statutory framework sets forth a process jointly administered by the AGO and the HLBs. These provisions set out the following roles and responsibilities:

- When an executive director or designated board member of the HLBs determines that a complaint needs investigation before resolution, the executive director “shall forward the complaint and any additional information” to the designee of the attorney general. The designee of the attorney general is required to evaluate the complaint and any additional information and “investigate as appropriate.”
- The designee of the attorney general also has authority to investigate additional issues that the designee may identify in the complaint and supplemental information.
- The designee of the attorney general is authorized to work with the HLB executive director or designated board member to evaluate and investigate the complaint.
- The designee is required to forward the completed investigation to the HLB executive director to be processed by the board.

This statutory framework has been in place since the legislation was passed in 1993.

Additionally, Minn. Stat. section 214.10, subd. 8 mandates that all complaints alleging, “a violation of a statute or rule that involves sexual contact with a patient or client,” be forwarded to the designee of the attorney general for investigation.

During the 2011 legislative session, the Legislature added to the investigations' framework by imposing deadlines for the Boards to take certain actions during the investigative process. The deadlines are as follows:

- No more than 14 calendar days after receiving a complaint regarding a licensee, the board shall notify the complainant that the board has received the complaint and shall provide the complainant with the written description of the board's complaint process.
- No more than 60 calendar days after receiving a complaint regarding a licensee, the board must notify the licensee that the board has received a complaint and inform the licensee of: the substance of the complaint, the sections of the law that have allegedly been violated, the sections of the professional rules that have allegedly been violated, and whether an investigation is being conducted.
- The board shall periodically, but no less than every 120 days, notify the licensee of the status of the complaint consistent with the Minnesota Data Practices Act.
- No more than one year after receiving a complaint, the board must resolve or dismiss the complaint unless the board determines that resolving or dismissing the complaint cannot reasonably be accomplished in this time and is not in the public interest.

Minn. Stat. § 214.103, subd. 1a (2012).

III. Licensing Board Division of the AGO.

Investigations of HLB licensees are conducted by the Licensing Board Division of the AGO. Overall, the relationship between the AGO and the HLBs is a strong one. Using the AGO to conduct the majority of the investigative functions for the HLBs enhances public safety and helps to ensure an impartial investigation.

The AGO investigative staff is comprised of seven investigators who have a range of 12 to 32 years of investigative experience. The AGO investigative staff includes a former police officer who is a licensed psychologist, a registered nurse who worked as a clinical manager in a hospital emergency room, and a licensed dental hygienist. Cases are assigned by the Licensing Board Division Manager according to an investigator's area of expertise.

The AGO is also capable of performing expedited investigations when the allegations, if substantiated, present an immediate danger to the public. During FY10, FY11, and FY12, expedited investigations occurred, for example, when a nurse was charged with encouraging individuals to commit suicide, a physician was charged and convicted of forging prescriptions, a veterinarian's practice deteriorated dramatically and suddenly, a physician was charged with criminal sexual assault for inappropriately touching female patients, and a physician was charged with inappropriately prescribing oxycontin and conspiracy to commit sex trafficking. Such investigations are conducted immediately and with the input of the attorneys in the AGO who provide legal services to the HLB.

In FY10, the AGO completed over 300 investigations. In FY11, the AGO completed over 350 investigations. In FY12, the AGO has completed over 330 investigations. From January 1, 2012 to the present, the AGO has completed 329 investigations. The average time to complete an investigation from the time a request is received until a completed report is returned is just over 100 days. The AGO is working with the HLBs to even further reduce this time.

IV. How Investigations are Conducted

A. Complaint is Initially Reviewed by the HLB.

When a HLB receives a complaint, the executive director, board staff, and/or a board member reviews it. The complaint may be triaged by a small subsection of the Board (usually called a “complaint committee” or “complaint review panel” or “complaint review committee”) or reviewed by a consultant employed by the HLB with expertise in the area of the complaint. In accordance with the statutory scheme set forth above, if the executive director, complaint committee, and/or board member determines that an AGO investigation is necessary, the file is forwarded to the AGO for investigation.

B. Complaint Sent to AGO for Investigation.

The HLBs are authorized to obtain some information regarding the complaint prior to making a determination whether or not to forward it to the AGO designee for investigation. Minn. Stat. § 214.103, subd. 2, authorizes the HLBs to seek additional information to determine if a complaint is jurisdictional or clarify the nature of the allegations by obtaining records or other written material, to contact the complainant to clarify the allegations, and to request a written response from the licensee. This information is then forwarded to the AGO designee along with the complaint if an investigation is deemed necessary.

The HLBs send the AGO designee requests for investigations specifying the requesting board, the HLB responsible staff person, the potential statutory violations, the overall first impressions of the board members who reviewed the complaint and authorized the investigation, and any specific requests for investigative tools, including records reviews, or in-person interviews. The investigation request also contains the complaint and any additional information collected by the HLB.

Upon receipt of the investigation request, the materials are reviewed to confirm that an investigation is appropriate. The Licensing Board Division manager then reviews the complaint, assigns it to the appropriate staff investigator, and, together with the staff investigator and the Assistant Attorney General to whom the case will be assigned, determines an investigative plan. During the course of the investigation, staff investigators may contact board staff, and vice versa, for additional information and updates on the status of the investigation.

C. Scope of Investigation Varies by Board.

The current statutory framework provides flexibility for the HLBs and AGO to share responsibility for the initial parts of the investigative process. Medical and other records can be gathered, a response requested from the licensee, and the complainant contacted before referring the file to the AGO for investigation. Some HLBs gather numerous records and obtain a detailed response from the licensee prior to sending the file to the AGO. Other HLBs have the AGO perform all investigative functions.

The Board of Marriage and Family Therapy and the Board of Pharmacy represent the ends of the investigations practices spectrum. The Board of Marriage and Family Therapy has the AGO conduct all of its investigations and complete the entire investigative process, including gathering all records and interviewing witnesses. On the other hand, the Board of Pharmacy is authorized by Minn. Stat. § 151.06, subd. 1(a)(4) to conduct inspections of pharmacies and employs staff surveyors specifically for this purpose. The surveyors are licensed pharmacists who conduct most of the Board of Pharmacy's investigations involving issues of dispensing and compounding because of the surveyors' pharmacy training and experience. Other Board of Pharmacy investigations are conducted by the AGO designee. Pursuant to Minn. Stat. § 214.10, all HLBs, including the Board of Pharmacy, refer all investigations into allegations of sexual contact with a patient or client to the AGO.

The rest of the HLBs fall into a middle category of using board staff to gather information and the AGO to investigate complaints. For example, HLB staff will often send out inquiry letters to obtain a written response to the complaint from the licensee. In some situations, HLB staff will also collect records to start the investigative process. HLB staff is typically responsible for information gathering duties that are conducted during the early stages of the investigation, including sending out inquiry letters, gathering patient records, obtaining records via subpoena or waiver, obtaining records from out-state licensing boards, and obtaining Health Professional Services Program¹ ("HPSP") records in the event

¹ The HPSP is an entity created by Minn. Ch. 214. The HPSP monitors health care professionals who have a mental or physical condition that may affect their ability to practice their profession. The HPSP creates monitoring plans for each licensee to ensure that the licensee is abiding by his or her treatment program. When a licensee fails to comply with his or her monitoring program, HPSP is authorized to file a report with the licensee's HLB.

that a licensee has been reported to the HLB by the HPSP for failure to comply with a monitoring program.

Some boards, including the Boards of Medical Practice and Dentistry, also contract with health care providers licensed by their respective boards who review complaints and investigative files to determine standard of care violations. Other boards, including the Boards of Nursing and Chiropractic Examiners, have on staff individuals licensed by their respective boards who are able to review files to determine standard of care violations.

The AGO is more likely to be involved in investigations alleging fraud on the part of a health care provider; investigations where an extensive record review is required, such as reviewing a prescriber's prescribing practices to look for abuse of prescriptive authority or patient mismanagement; investigations requiring collection of large amounts of records; investigations requiring interviews of witnesses and the licensee who is the subject of the complaint; and investigations of complaints that allege both jurisdictional and non-jurisdictional issues.

Once the investigation is complete, it is reviewed by the manager of the Licensing Board Division and the Assistant Attorney General assigned to the requesting HLB and then the file is forwarded to the HLB for action.

V. Statutory Changes to the Investigation Process Not Needed Going Forward.

The recent statutory changes to Minn. Stat. § 214.103 set a deadline of resolving complaints within one year, unless it cannot be reasonably accomplished or is not in the public interest. The HLBs and the AGO are working together to ensure that these timelines are met. The existing statutory framework will allow the AGO and HLBs to comply with these changes.

The AGO and the HLBs are working to identify ways to further streamline the investigation process where possible, while at the same time not compromising public safety. Two areas where the AGO and HLBs are working to reduce the investigative timeline involve record gathering, and the implementation of more formalized communication in the investigation progress.

As detailed earlier in this report, some HLBs gather records shortly after the receipt of a complaint, while others rely on the AGO to obtain them once the complaint is referred for investigation. Going forward, the HLBs intend to work with the AGO designee to begin gathering records before referring the matter to the AGO for investigation where appropriate. While it will not be possible to request all the records necessary to fully investigate every case, this change will allow more investigations to proceed immediately upon receipt by the AGO. In those cases where an HLB does not have sufficient staff to request records, an earlier referral will be made to the AGO to begin the record request process.

Although the average time to complete an investigation is approximately 100 days, there are circumstances that can increase this timeline, including the complexity of the investigation, and the level of cooperation from the licensee, witnesses, and complainant. To keep all parties apprised of an investigation's status, the AGO and HLBs are formalizing a more extensive communication process to ensure that cases stay on track to completion.

The HLBs requesting investigations and AGO investigators regularly talk regarding the ongoing investigations. This process is being further formalized to require regular investigation status updates. The AGO and a Board staff person will endeavor to discuss the investigation plan by telephone upon receipt of an investigation. This will provide the HLBs and the AGO the opportunity to more fully tailor the investigative process to each specific case and confirm that the investigation can be completed as expeditiously as possible.

The AGO will then provide the HLBs with a formal update on the status of the investigation after approximately 60 days and advise whether the investigator anticipates any problems in completing the investigation within 90 days. In cases where it does not appear that an investigation can be completed within 90 days, a determination will be made on what information, if any, to forward to the HLB prior to the investigation's completion. This will allow the HLB to continue its review of the complaint, including scheduling a disciplinary conference if necessary, while it awaits additional information from the AGO. This process will be tailored to the needs of each individual HLB.

The AGO and the Boards have a close working relationship and are able to adapt to changing investigatory needs as the types of cases change and as investigations themselves change. As has been the case since the investigations process was first codified in 1993, the AGO and the Boards expect to continue to build on and improve this long-standing relationship.

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