

Meeting Notes  
Maine Regulatory Fairness Board (RFB)

Thursday, May 27<sup>th</sup>, 2010

Business Research and Economic Development Committee Room  
Cross Office Building, Augusta, 9:30am

Presiding, Eliot H. Stanley, Chair, MRFB

9:30 Opening remarks & Introduction of RFB members attending

Board members present: Eliot Stanley, Ed Philips, Linda Snyder, Marie Emerson, Van Perry, and Elizabeth Shissler joins shortly after the start.

Eliot introduces the Board members, describes the purpose and role of the board, and states the procedures for the hearing.

Diane Denk, public member of the Board of Dental Examiners (BDE): Will be added to the agenda to speak with the DBE this afternoon.

9:40 Joseph Benedetto, DDS

Dr. Benedetto introduces to material he distributed (*see Benedetto PDF documents*).

Dr. Benedetto states he is here because he is currently retired and feels he can speak freely about the flaws related to handling dental complaints. He feels there is an atmosphere of fear and retribution among dentists who do not want to speak out for fear of having to appear before the BDE in the future.

Dr. Benedetto explains that no dentist goes to the office in the morning with the intention of harming a patient. Benedetto retired due to increase in malpractice insurance costs resulting from a BDE disciplinary process after: a patient became rude, "crossed the line", and she wrote a letter to the BDE complaining of misconduct. The BDE requested a copy of her patient record, invited her to sit in on Benedetto's informal hearing, and "dissected" the copy of her dental chart. Benedetto stated that the patient then filed a malpractice lawsuit based on insinuations raised by the BDE during the hearing in light of the patient records, beyond the scope of the patient's initial complaint. Benedetto asserts that the patient's complaint was about the dentist's unprofessional conduct, not about dental care, and the patient should not have been privy to this discussion.

Dr. Benedetto was accused of violating the "standard of care", but explained that the "standard of care" is used as a subjective "catch-all" by the BDE. Benedetto presented a series of recommendations (*see PDF*)

Linda Snyder questions why clinical charts were investigated during a disciplinary hearing for being rude to a patient. [*This question is addressed later in the hearing by AAG Black.*]

Responding to a question from Beth Shissler concerning BDE's notification process to dentists prior to hearings, Dr. Benedetto states that he was informed that the hearing was happening, and that he was aware of the purpose of the hearing, but was not given enough time to review the legal documents that were supposed to be signed and recommends that these should be mailed further in advanced.

10:45 Denise Nadeau, DDS

Dr. Nordlander will also speak before the RFB as accompanied by Dr. Nadeau. Nordlander is a former Maine dentist and states that conflicts resulting from moving between offices led to unforeseen difficulties resulting in BDE disciplinary action accusing Nordlander of psychiatric instability and abandoning patients. Nordlander expressed concerns with BDE hearing complaints from patients or former employees, with no cost or burden to the patient or the employee, which must then be defended by the licensee (with no vulnerability to the complainant). If the licensee is found to be in error, the licensee pays the bills for the proceedings, but there are no such consequences for complainants.

Dr. Nadeau appears before the RFB at 11am and explains that the allegations that suspended her license were misunderstandings. Nadeau was never offered an informal conference, and was "forced" directly into an adjudicatory setting. Nadeau asserts that one hearing lasted 16 hours, through 1:30am the next day, and included BDE members sleeping through parts of the hearing. Dr. Nadeau claims that witnesses wanting to testify in her defense were sent away without being heard, and many witnesses provided conflicting testimonies. Dr. Nadeau explained she was also being charged for the catered meals at the BDE hearings.

Dr. Nadeau summarized her experiences in opening a dental practice, complications with MaineCare reimbursements, and conflicts with staff that escalated to complaints against Dr. Nadeau to the BDE. Dr. Nadeau recommends changes in BDE policy, especially concerning investigations into the types of complaints received from complainants making unjust accusations. Dr. Nadeau emphasizes that a complainant should have just as much at stake for making the complaint as the licensee against whom the complaint is made.

12:00 Recess for Lunch

1:00 Beth Shissler introduces Maine Association of Manufacturers (MAM) representatives: Lisa Martin, Executive Director, and Chip Roche, President NewFab.,Inc.

Lisa Martin begins with a brief introduction of MAM and explains that a major issue within her industry organization is a major lack of understanding among businesses regarding what is required to stay within regulation.

Chip Roche continues: The basic gap is that too many small companies do not have the resources or expertise to know what they must comply with, or to put a system in place to comply with many regulations. Even organizations that are trying to help businesses fulfill regulatory requirements can seem threatening if they appear to be representing an enforcement agency. Mr. Roche is not opposing any regulations, but he is looking for assistance in meeting the regulations.

Ms. Martin states that MAM is trying to be proactive to assist companies in achieving a level of compliance with regulators. Her recommendation is for compliance assistance efforts run by the state to have an interface to small businesses through industry and trade associations rather than through state agencies. Mr. Roche adds that it is easier for a company with 100+ employees to be proactive to certain regulations, as opposed to paying fines for being out of compliance. Smaller firms are forced to learn regulations retroactively. The goal is for small firms to reach a level of proactive compliance as well.

1:40 Maine Merchants Association (MMA), Jim McGregor, Director Government Affairs

Jim McGregor introduces MMA as a statewide, nonprofit trade association representing over 400 businesses in the state - from large chains to small independent retailers.

McGregor addresses two recent LDs from the second regular session of the 124th Maine Legislature.

- LD 1779 prohibits merchants from applying a surcharge to debit card transactions. McGregor asserts this mandates a business sector to stop a practice it had not started, and had no plans to begin -- banning a business activity that had never generated a single consumer complaint.
- LD 1565 gives the executive director of the Maine Workers' Compensation Board authority to shut down a work site the agency head believes is using a misclassified, independent contractor. Maine Merchants and others felt the new law established a dangerous precedent and sent a message that the state is unfriendly to business.

McGregor suggests that RFB recommend to the current chief executive and to the next governor that they assemble a cabinet-level task force to find ways to limit undue business regulation, and to make Maine more attractive to business. MMA's criticism of the governor's Joint Enforcement Task Force on Employee Misclassification was that it was pro-regulation in nature, and that it did not include members from the private business sector.

2:00 Panel on Due Process in State Licensing Board Systems

- Commissioner Anne Head, DPFR
- AAG Andrew Black, AG's Office
- Kenneth Lehman, Esq.
- David McConnell, Esq.

Eliot Stanley welcomes panel members. Commissioner Anne Head starts the discussion and describes the process of the LD 1608 working group and resolve for BRED with recommendations due for Feb 2011. There are many ways to structure the complaint resolution process and adjudicatory hearing process, and the working group will be working on this.

AAG Black emphasizes that the RFB hearing is not a venue for re-trying the adjudications presented by the dentists during the morning session.

In response to the enquiry about why clinical records would be used in an investigation on unprofessional conduct, AAG Black explains that an investigation into an issue other than what the original complaint was addressing is not uncommon. Complainants do not necessarily know how to address specific violations, but they can raise an alarm that something is wrong, and investigators must consider any evidence made available.

AAG Black states that the role of the AAG is not as a decision maker in the any investigative process. All decisions, terms, agreements, and etc are made by the boards themselves, and the AAGs serve only as legal advice for the boards. In no role does the AAG make a decision that affects the rights of an individual.

Linda Snyder questions the statement that a complainant might not know what he or she is complaining about. AAG Black explains that a complainant may report a practitioner for rudeness, but investigators have an obligation to explore other issues necessary to determine the nature of the relationship between complainant and practitioner. A licensing board's duty is to protect the public, and if the board finds something that is not specifically addressed by the complainant, this must be addressed by the board members – they cannot ignore it.

Ed Philips asks if paid hearing officers are involved, how hiring an administrative law judge would be different. LD 1608 calls for the hiring of administrative law judges, and there is a difference in authority between the two. A hearing officer is not a decision maker; he or she just regulates the proceedings as a trained attorney, familiar with litigation with hearings, who makes evidentiary rulings, typically helps the board in deliberation, and drafts the decision at the end pursuant to the directives of the board. An Administrative Law Judge, as referenced in LD 1608, is an individual who makes all the decisions, himself or herself, and the difference there is that 1608 removes the professionals from the decision making process. The current policy is that professionals hear the complaints of peer professionals in their respective fields; LD 1608 removes this. Professionals understand when a complaint is meritless even when an attorney may think it's a legitimate complaint – this means professionals may be more likely to dismiss the complaints against their peers.

### 3:30 Maine Board Dental Examiners Panel

- Denise Theriault, DDS, Board President – speaks first
- Philip Higgins, Jr DDS Board V-P – speaks second, goes over complaint process
- Diane Denk, Public Member of BDE
- Dennis Smith, AAG assigned to BDE

*[Handouts are distributed illustrating the numbers of licensees and complaints and the statuses of each over time.]* The BDE complaint process is explained: BDE does use the current administrative procedures act and is provided with an AAG to make sure the BDE stays within the bounds of APA. BDE will recuse itself in any situation where it feels it cannot adequately weigh evidence. Licensing boards dismiss about 50% of complaints with no disciplinary action. About 70% brought to BDE are dismissed without discipline. The vast majority of complaints come from patients or parents of patients, and second from the BDE itself – usually from unfulfilled consent agreements, but the board cannot take further action on this unless a complaint is generated. Other complaints are received from outside sources, perhaps from law enforcement. Nothing can be investigated without a complaint being filed.

Names of licensees and complainants are not discussed – BDE discusses complaints by number, and sends complaints to licensee to respond within 30 days. The complainant receives a response of the licensee and has 10 days to make a rebuttal. BDE, with complaint officers, then has a conference call to discuss merits of the complaint. BDE must then determine if there is a violation recognized by the dental practices act. BDE can then dismiss the conference and invite the licensee to an informal conference (which occurs in executive session unless licensee wishes otherwise), and a licensee must

have signed an agreement confirming that they understand nothing in this meeting will be used outside of it. Following this informal hearing, the BDE can draft a consent agreement. Within 30 days, if the licensee does not sign the consent agreement, then BDE can schedule and adjudicatory hearing. All discussion in adjudicatory hearing must come from the hearing, not from any previous informal hearing, and this must all be documented. The BDE may dismiss or may issue a decision (which may be taken to court) after the adjudicatory hearing.

Marie Emerson asks: during a complaint process, how far back in time does the BDE investigate? Dr. Higgins replies that the only information brought to the board is the information related specifically to the complainant until the BDE feels that there has been a violation of “the standard of care”. BDE does not mine records for additional information, but when information stands out, BDE must consider it.

Diane Denk introduces herself as the public member of the board, serving as a public advocate. Ms. Denk describes the monthly workload, including the level of objective detail of complaints that are reviewed by all members of the BDE. “Ours is not a country club board which does drive-by business quickly over sumptuous lunches with large stipends. Our 1,400 page board books take hours and hours of reading, note taking, and study. There is not a single member of our board who enters the room with a personal agenda, a grievance to settle, or less than a 100% open mind.”

4:55 Hearing Adjournment