

New Restrictions and Requirements Relating to Investigations Of Physicians by the Louisiana State Board of Medical Examiners

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The Louisiana Medical Practice Act, La. R.S. §§ 37:1261-1292 (the “Act”) was enacted with the stated purpose of protecting the public against the unprofessional, improper, unauthorized or unqualified practice of medicine by physicians. In 2015, the Louisiana legislature amended the Act (hereafter, the “2015 Amendments”) to specifically require the Louisiana State Board of Medical Examiners (the “Board”) to “adopt rules . . . to provide for the investigation of complaints against physicians and adjudication of alleged violations by physicians of any provision” of the Act. La. R.S. § 37:1285.2(B). The 2015 Amendments further required the Board to ensure that the rules adopted thereby satisfy the “minimum due process requirements” of the Louisiana and United States Constitutions and specifically address the requisite notice to be provided in connection with such investigations, the time limits for initiating and completing such investigations and scheduling adjudicatory hearings, the procedure for conducting adjudicatory hearings, informal settlements and consent decrees in connection with such investigations or adjudicatory hearings, and how notice of final decisions of the Board shall be provided. *Id.* As required by the 2015 Amendments, on December 20, 2015, the Board published the final rules for processing and investigating complaints against physicians and initiating and resolving administrative complaints filed by the Board against physicians. See La. Admin. Code 46:XLV Chapters 97 and 99 (collectively, the “2015 Regulations”).

On May 31, 2018, the Louisiana legislature further amended certain provisions of the Act, including La. R.S. § 37:1285.2(A) and (D), and also supplemented the Act with the addition of La. R.S. §§ 37:1270(A) (9), and 37:1285.2(E) through (G) (collectively, the “2018 Amendments”). Unfortunately, the 2018 Amendments are somewhat unclear and, at times, inconsistent with the 2015 Regulations. When such inconsistency exists, the 2018 Amendments control. With this tenet in mind, we provide the following summary of those recent changes to the Act that we believe may be of particular interest to Louisiana physicians. However, we strongly encourage physicians and physician practices faced, in the future, with a complaint or investigation governed by the Act to seek advice from their own legal counsel in connection with their specific circumstances.

I. The preliminary review.

Prior to enactment of the 2018 Amendments, the Act and the 2015 Regulations provided that the Board “may” conduct a “preliminary review” to determine whether a complaint regarding a physician, whether received by the Board from a third party or initiated by the Board on its own motion,

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warranted formal investigation. La. Admin. Code 46:XLV § 9709(A). The 2018 Amendments now provide that the Board “shall” initiate a “preliminary review” to determine if cause exists to warrant formal investigation of a physician and only if: (a) a complaint is received from a person other than an employee of the Board; (b) a report is received from a law enforcement agency, federal or state regulatory agency, reporting authority verified by the Board chairman through electronic means or other means, or physician health program or other treatment program that contains information that supports an indication that a possible violation of the Act, or any rule promulgated in connection therewith, may have occurred; or (c) the Board, in executive session, duly adopts a motion by a two-thirds vote of the members of the Board making an affirmative finding that sufficient evidence exists to conclude that a violation of the Act, or any rule promulgated in connection therewith, may have occurred. La. R.S. § 37:1285.2(A)(1). In addition to mandating that the Board first conduct a preliminary review and only in certain circumstances, the 2018 Amendments also reduced the time within which the Board must complete a preliminary review to ninety (90) days, as opposed to the one-hundred eighty (180) days provided by the 2015 Regulations, although the Board is still authorized to extend the time for completion. La. R.S. § 37:1285.2(A)(2). Finally, in connection with a preliminary review, the 2018 Amendments clarify that the Board “may obtain all files and records related to the complaint and to the complainant, and may obtain no more than twenty additional files or records in connection with the review unless the board authorizes review of additional files or records.” La. R.S. § 37:1285.2(A)(3).

2. The formal investigation.

If, as a result of its mandatory preliminary review, the Board determines that cause exists to warrant formal investigation of the applicable physician, the 2018 Amendments now provide that the Board “shall” appoint a “director of investigations to act as the lead investigator for any complaint regarding a physician” otherwise subject to the Act. La. R.S. §§ 37:1270(A)(9). This director of investigations shall (a) serve at the pleasure of, and be answerable directly to, the Board, (b) not concurrently serve as the Board’s executive director, and (c) be a physician licensed to practice in Louisiana, who has engaged in the active practice of medicine for at least five (5) years. *Id.* Presumably, this “director of investigations,” who must be a licensed Louisiana physician, replaces the “lead investigator” referenced in the 2015 Amendments, who could be any staff member of the Board, except the Board’s executive director.

3. The administrative complaint.

If, as a result of its formal investigation, the Board determines that there is sufficient information and evidence to indicate that a violation of the law has occurred, an administrative complaint may be filed with the Board against the applicable physician. La. Admin. Code 46:XLV § 9711(G). In connection with such a complaint, the 2018 Amendments now provide additional rights and protections for the

applicable physician. Significantly, these rights and protections often require action by the “independent counsel,” which although not defined within the Act, presumably refers to legal counsel that may assist the Board and who otherwise “is independent of complainant counsel” and “has not participated in the investigation or prosecution of the case.” See La. Admin. Code 46:XLV § 9921(D). In any event, the 2018 Amendments now provide that, in connection with the filing of an administrative complaint, (a) the Board “shall” notify the applicable physician that he or she has the right to face any complainant at the administrative hearing unless the independent counsel, after reviewing all evidence related to the complaint submitted by the complainant and physician, rules that the complainant may remain anonymous – which ruling may be overruled by a duly adopted motion of two-thirds vote of the Board, (b) all files of the Board regarding the complaint which are not required by law to remain confidential or which are not otherwise privileged shall be made available to the applicable physician (although it is unclear whether the physician must engage in formal discovery to obtain these files or may simply request such files), (c) ***any evidence which may potentially exculpate the applicable physician shall be disclosed to the physician whether or not requested and whether or not reduced to recorded or documentary form*** (emphasis added); and (d) all relevant information, documents, and records gathered in an investigation of the applicable physician shall be noted in the record or file of the case, except that the Board may object to including particular material in the record or file of the case – which objection may (or may not) be overruled by the independent counsel. La. R.S. § 37:1285.2(E) and (F)(2). The 2018 Amendments also provide that the Board “shall” notify the applicable physician (and his or her counsel) if the Board intends to use records from any prior investigation of the physician in a current case, which records shall then be deemed records of the case otherwise subject to certain provisions of the Act (although it is unclear whether or how any conflict with such other provisions will be resolved). La. R.S. § 37:1285.2(F)(3).

4. Consent orders.

The 2015 Regulations provide that before, during or following an investigation, or after filing an administrative complaint, the Board may dispose of any complaint through informal disposition. See La. Admin. Code 46:XLV § 9713. Informal disposition includes informal settlements and consent orders. The 2018 Amendments now require that prior to offering a consent order to a person licensed by the Board, the Board shall make available to that person all files and records which pertain to the case against him or her—and which are not required by law to remain confidential or are otherwise privileged—except that the Board may object to making particular files and records available – which objection may (or may not) be overruled by the independent counsel. La. R.S. § 37:1285.2(F)(1).

5. Site visits (and medical records requests) outside of active investigations.

The final amendment of note for physicians concerns action that may be taken under circumstances in which physicians are not subject to (or not yet subject to) an active investigation under the Act.

Specifically, the 2018 Amendments provide that the Board may only conduct a site visit concerning, or request medical records from, an individual licensed by the Board who is **not** subject to an active investigation if the executive director of the Board first requests, and ultimately obtains, approval therefor by a duly adopted motion of two-thirds vote of the Board, meeting in executive session. La. R.S. § 37:1285.2(D)(1). The 2018 Amendments further provide that the executive director's request for such approval must include the basis upon which the site visit or records request is warranted, the number of records to be requested, if applicable, the date, time, and anticipated length of the proposed site visit, and the dates of any previous site visits. *Id.* Significantly, the 2018 Amendments also make clear that the Board "shall" be prohibited from disclosing the identity of any individual included in any such request for approval, while clarifying that these provisions are applicable to practice performance reviews of physicians practicing telemedicine.

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