

Professional Regulation of Medicine

The North Carolina General Assembly and the North Carolina Medical Board (NCMB) both play important roles in regulating the practice of medicine across the state. The North Carolina Medical Society (NCMS) is actively engaged with both of these organizations with the goal of preserving the physician-patient relationship while also assuring public safety. In 2009, the NCMS was successful in effecting changes to rules regarding the NCMB disciplinary proceedings and online profiling system.

2009 Legislative Action

Disciplinary Rules and Proceedings of the North Carolina Medical Board

Legislation to address shortcomings in the law governing due process at the NC Medical Board was approved by the General Assembly and signed into law this year. SB 958 – Disciplinary Proceedings/NC Medical Board - provides a number of procedural and substantive safeguards for physicians that were not guaranteed by law or medical board policy. This bill was strongly supported by the NCMS and made substantial improvements to the Medical Practice Act. Significant changes include:

- Requires the Board's process to be transparent
- Requires notice when an investigation is initiated
- Requires an investigation lasting more than six months to be justified by the Board in writing
- Requires the Board to communicate through licensee counsel
- Bans Board members from initiating an investigation on their own
- Bans Board members from serving as expert witnesses for the prosecution
- Requires the Board to make efforts when making hearing panel appointments that at least one physician appointed is the same or practices a similar specialty of the licensee being investigated
- Bans Board members from serving on both the hearing committee and the quorum that issues final decisions against a licensee
- Requires final agency decisions be based on a majority of the evidence admitted during a hearing
- Permits a licensee 30 days to appeal any public disciplinary sanction imposed by the Board
- Requires the Board to provide the licensee a copy of a complaint when it involves the care of a patient

Medical Malpractice Online Profiling by the NC Medical Board

The NCMS sought legislation in 2009 to disapprove NC Medical Board rules that enabled the Board to include certain medical malpractice payments in its online licensee profiles. Efforts to reform the medical malpractice system in 2003-2005 drew a response from the plaintiff's bar challenging that effectiveness of the Board in addressing quality problems. A series of newspaper articles emerged in major daily papers across the state detailing Board licenses with extensive histories of criminal behavior, substance abuse, health problems, or medical malpractice payments, but no disciplinary action or warnings to the public from the Board. In 2007, the General Assembly mandated the Board develop profiles of its licensees to contain relevant professional history and "certain malpractice information", to be determined by the Board through rules. The Board proposed rules that would lead to online publication of all malpractice payments made since 2001. The NCMS organized opposition to the proposal, seeking implementation instead of a system that would use the Board's expertise to determine which malpractice payments were connected to substandard medical care. Under the NCMS proposal, only those payments would be profiled. NCMS and others also objected to the publication of any payment made pursuant to a confidential settlement agreement. Following extensive formal comments from physicians and a rule hearing conducted by the Board, a threshold of \$25,000 was established, below which payments would not be published. It was also determined that any malpractice payments made before October 1, 2007 would be excluded from the profiles. The Board approved the rules, as amended. The NCMS filed letters of objection that effectively prevented the Board's rule from taking effect until the General Assembly had an opportunity to consider legislation to disapprove the rules.

HB 703 – Disapprove NC Medical Board Profile Rule - became the vehicle for disapproval of the Board's rules and implementation of changes and does the following:

- Implements a three-fold increase in the threshold for profiling settlements, from \$25,000 to \$75,000;
- Eliminates retroactive application of the profiling rule to settlements made on or after May 1, 2008 (the first date of publication of the NCMB rule);
- Clarifies that all judgments and arbitration awards, regardless of amount, will be profiled.

The rationale for increasing the threshold was to ensure the rule did not discourage settlements. Establishing a threshold high enough to capture the costs associated with getting a case to settlement requires a threshold of \$150,000 based on litigation costs as they existed at the time H703 was under consideration. The elimination of retroactive application of the rules was supported by well-reasoned arguments that it would be unconstitutional to vitiate confidential settlement agreements executed before the Board published its profiling rules. Judgments and arbitration awards are not subject to the threshold because there is no policy argument for doing so that is analogous to encouraging settlements. The NCMS continues to support an approach that incorporates a substantive review of the medical care behind malpractice payments as the principal basis for determining if a payment

should be included on a licensee's Medical Board profile. The legislation took effect on June 30, 2009 and the NCMB implemented its online profiles in December 2009.