

Review of the State Medical Board of Ohio

Report of the Federation of State Medical Boards Review Team
to the State Medical Board of Ohio

Submitted June 30, 2020

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Executive Summary

In December 2019, the State Medical Board of Ohio (“SMBO” or “Board”) requested and accepted a proposal from the Federation of State Medical Boards (“FSMB”) to conduct a review of the Board’s operations, processes, and policies as it seeks to address the recommendations set forth in the 2019 Report of Governor Mike DeWine’s Working Group on Reviewing the Medical Board’s Handling of the Investigation Involving Richard Strauss (“Governor’s Working Group” or “Working Group”). The FSMB assembled a review team (“Review Team”) of Patricia A. King, MD, PhD, FACP, Past Chair, FSMB Board of Directors and Former Chair, Vermont Board of Medical Practice; Brian Blankenship, JD, Deputy General Counsel, North Carolina Medical Board; Kathleen Haley, JD, Former FSMB Board Director and Former Executive Director, Oregon Medical Board; Mark Staz, MA, Management Consultant, Regulatory Policy, FSMB; John Bremer, Director of State Legislation and Policy, FSMB; Michelle Turner, Software and Accreditation Administrator, FSMB; and Christine Wells, Agile Project Manager, FSMB.

The Review Team worked closely with the SMBO to determine the scope and focus of the project and determined that the FSMB would provide the Board a written report that engages Board staff to carefully consider processes and methods used and encourages improvements in overall operational effectiveness.

The Review Team analyzed the Board’s administrative processes through document review and interviews with Board members and Board staff conducted via webconference between May 14 – June 5, 2020.

The Review Team met multiple times remotely to discuss its findings and proposed recommendations. The following report provides an overview of the FSMB’s Board review process and recommendations to the SMBO regarding the Board’s policies, procedures, statutes, and structure.

Introduction

The State Medical Board of Ohio engaged the Federation of State Medical Boards to review and report on the Board's operations and processes. On May 20, 2019, Ohio Governor Mike DeWine issued Executive Order 2019-16D,1 creating the Governor's Working Group on Reviewing of the Medical Board's Handling of the Investigation Involving Richard Strauss. In the Working Group's report, members recommended that the Board should "implement a practice of quality assurance not only to ensure that an investigation is opened when it should be, but to review the decision of whether the investigation merits moving from investigation to enforcement against the physician's license." In doing so, it was recommended that the Board access available resources to ensure its internal controls are model policies and to improve processes where necessary, as well as perform an audit of the Board's adherence to its own standards regarding investigation of sexual impropriety allegations. As the SMBO works to implement the recommendations in the Working Group's report, it has requested the assistance of the FSMB to offer recommendations on best practices and policies for the Board's consideration. A review team of experts in medical board regulatory activities from around the country and FSMB staff was selected to conduct the review. Board members and Board staff provided the Review Team with unlimited support and access to information. This report outlines the findings and recommendations based on our work.

Goals and Objectives

The Review Team worked with the SMBO to determine the following project objectives and goals:

Project Objective: *The FSMB shall review and evaluate the Board's administrative processes and operational effectiveness regarding its handling of complaints and investigations of sexual impropriety. The FSMB assessment team shall focus on statutes, rules, policies, processes and procedures from complaint intake through investigation and disposition.*

Project Goal: *The FSMB shall provide a final assessment report that engages the Board staff to think differently about the process and methods used and to improve operational effectiveness by completing the following steps: (1) Stabilization to create a predictable and repeatable consistent approach to investigating cases of sexual impropriety; (2) Standardization to develop practices to be consistently followed by all individuals who perform a given process and its associated activities; (3) Visualization to enhance communications and balance flow while creating transparency across administrative processes; and (4) Create an environment for continuous improvement.*

Review Team

The FSMB Review Team is made up of seven individuals with a range of state medical board, regulatory, and operational experience.

Patricia A. King, MD, PhD, FACP
Immediate Past Chair, FSMB Board of Directors

Dr. King is the Past Chair of the Federation of State Medical Boards (FSMB) Board of Directors and was a member of the Vermont Board of Medical Practice from 2003 to 2015, including service as the Vermont Board Chair.

Dr. King was the Chair of FSMB's Workgroup on Education about Medical Regulation, and the FSMB's Workgroup on Physician Sexual Misconduct. She currently serves on the FSMB Foundation Board, the FSMB Pandemic Preparedness Workgroup, and the FSMB Education Committee. In addition, Dr. King is a member and past Chair of the United States Medical Licensing Examination (USMLE) Composite Committee and serves on the National Board of Medical Examiners (NBME). She previously served on the FSMB Workgroup on Innovations in State-Based Licensure, Interstate Compact Taskforce, and Editorial Committee for the *Journal of Medical Regulation*.

Dr. King is currently a Professor of Medicine at the University of Vermont Larner College of Medicine where she is active in medical school curriculum development and medical student teaching. She also has a practice in primary care internal medicine with the University of Vermont Medical Group. In addition, she has served on the Ambulatory Care Test Material Development Committee for the USMLE. Dr. King earned her PhD in Physiology from Brown University and MD from the University of Vermont College of Medicine.

Brian Blankenship, JD
Deputy General Counsel, North Carolina Medical Board

Mr. Blankenship serves as Deputy General Counsel for the North Carolina Medical Board. As Deputy General Counsel, he supervises three attorneys and manages the prosecution and defense of all cases handled by Board attorneys. Mr. Blankenship also regularly prosecutes disciplinary cases and represents the Board in state courts in appeals from disciplinary and licensing cases.

Mr. Blankenship has been with the North Carolina Medical Board since 2002. Before coming to the North Carolina Medical Board, he served as an Assistant Attorney General with the North Carolina Department of Justice where he was responsible for prosecuting law enforcement officers accused of misconduct. Mr. Blankenship has served for more than 24 years in the United States military, first as a member of the United States Navy Judge Advocate General's Corps (JAG Corps) and, since 2001, as a member of the North Carolina Army National Guard. During his 24 years of service, he has held several positions, including criminal defense counsel and Special Assistant United States Attorney.

Since 2016, Mr. Blankenship has served as the Program Director for the Certified Medical Board Investigator ("CMBI") course. Mr. Blankenship is frequently invited to speak at professional conferences on Medical Board investigations and prosecutions. In 2018, he was a presenter at the FSMB Board Attorney Workshop on *Prosecuting Professional Sexual Misconduct Cases* and in 2019, he served as a panel member of the General Session presentation, *Sexual Boundary Violations: What State Medical Boards Need to Know*.

Kathleen Haley**Past Executive Director, Oregon Medical Board; Past Associate, FSMB Board of Directors**

Ms. Haley, a Certified Medical Board Executive (CMBE), is a past Executive Director of the Oregon Medical Board, which licenses and regulates over 21,000 healthcare professionals. Ms. Haley also serves as an Affiliate Associate Professor at the Oregon Health and Science University. She is an experienced litigator, frequent lecturer, and active member of many professional societies. She is winner of the Administrators in Medicine (AIM) Board of Directors Service Award (2004), AIM Doug Cerf Executive Director's Award (2006), and a recipient of the Citizen's Advisory Council (CAC) Benjamin Shimberg Award (2016). In addition, Ms. Haley is a past member of the FSMB's Board of Directors, was a member of the American Board of Medical Specialties Committee on Maintenance of Certification, and has served on many FSMB Committees. She also co-edited the first guidebook on implementation of the Death with Dignity Law.

Michelle Turner, Med, LSSBB**Software and Accreditation Administrator, Federation of State Medical Boards**

Ms. Turner is the Software and Accreditation Administrator and has worked at the FSMB for 21 years. Ms. Turner received her bachelor's degree in Business/Computer Information Systems and Business from the University of North Texas, and her master's degree in Education and Administration from Tarleton State University. In 2014, Ms. Turner successfully completed the Lean Six Sigma Black Belt certification program at Villanova University. Ms. Turner currently oversees the FSMB's membership data base, Lean Six Sigma and operational quality initiatives around NCQA certification for FSMB. Prior to joining FSMB, Ms. Turner worked in education for 13 years serving initially as a teacher, principal, and interim superintendent focusing on the development and implementation of sound educational programs for the overall success of the learning environment.

Christine Wells**Agile Project Manager, Federation of State Medical Boards**

Ms. Wells is the Agile Project Manager for the FSMB. She has more than 20 years of experience in the IT industry, with an extensive background in leadership, business analysis, project management, and implementation of custom and packaged software solutions.

Mark Staz, MA**Management Consultant, Regulatory Policy, Federation of State Medical Boards**

In his role at the FSMB, Mr. Staz is responsible for developing organizational policy related to medical regulation, advising on educational initiatives and supporting the FSMB's work in Ethics and Professionalism and the Workgroup on Physician Sexual Misconduct. He also supports the FSMB's international collaborations with medical regulators outside of the U.S., including its involvement in the International Association of Medical Regulatory Authorities (IAMRA). Mr. Staz serves as teaching faculty

for the Professional Problem-based Ethics Program (PROBE), has worked in medical regulation in Canada as a policy analyst for the College of Physicians and Surgeons of Ontario (CPSO) and has been involved in several policy and research initiatives addressing human resources for health, social determinants of health, and physician performance enhancement. He received his master's degree in philosophy at York University and is currently writing his doctoral dissertation on conflicting rights in health policy.

John Bremer

Director of State Legislation and Policy, Federation of State Medical Boards

Mr. Bremer is Director of State Legislation and Policy at the Federation of State Medical Boards. In this capacity, Mr. Bremer monitors state regulatory and legislative actions, provides testimony before state legislatures, staffs the organization's workgroups and policy development projects, and provides policy and support services to member boards. Mr. Bremer has been with the FSMB since 2014. Prior to that, he worked for the U.S. House of Representatives and the Michigan House of Representatives. Mr. Bremer is a graduate of Michigan State University's James Madison College where he received his Bachelor of Arts degree in International Relations and Economics, with a specialization in Political Economy.

Scope and Methodology

The Review Team identified the following tasks in its charge to review and report on the Board's processes:

- Review current practices focusing on Board structure and function, administrative processes, operations, and processes and procedures from complaint intake through investigation and disposition;
- Compare best practices of other state medical boards and from FSMB policy;
- Make recommendations for improvements and enhancements

The Review Team's assessment began with a comprehensive document review of the Board's processes and policies (**see Attachment 1**). This included, but was not limited to, the SMBO's organizational chart, relevant statutes and rules, process maps, and written Board protocols. Administrative procedures that are followed but not already captured in writing by the Board were requested to be recorded by key staff for review. The Review Team also examined redacted reports and case preparation materials. The Review Team also studied the 2019 Report of Governor Mike DeWine's Working Group on Reviewing the Medical Board's Handling of the Investigation Involving Richard Strauss. Additionally, the Review Team attended the virtual Board Meeting held on June 10, 2020, as well as the virtual meeting of the Governor's Working Group held on June 16, 2020.

Once the document review phase was completed, the Review Team conducted eighteen virtual interviews over the course of five days (May 14-15, May 19, and June 4-5, 2020). The Review Team met and interviewed members of the Board, including the President, Secretary, Supervising Member, and a Public Member, an Assistant Attorney General, department heads of the Board's staff and other staff members involved in the investigation and enforcement of complaints (**see Attachment 2**).

Members of the Review Team met frequently before, during, and after interviews to discuss findings. After interviews were completed, the Review Team analyzed key themes that arose during the interviews and related them to the Board's goals and agreed upon deliverables. The Review Team relied on collective state medical board experience, as well as FSMB model policies¹ and data² regarding the practices and operations of state medical and osteopathic boards.

Report writing took place in June 2020 following the completion of all interviews. Members of the Review Team communicated primarily through email to write an initial draft of the report. The initial draft was sent to the SMBO for review and comment. Upon receiving feedback from the SMBO, the Review Team completed the report.

¹ In order for policies to become FSMB model policies, they must be voted on and adopted by all FSMB member state medical and osteopathic boards, thus reflecting the best practices recommended by the collective medical board community. FSMB model policies are available at the FSMB website: <http://www.fsmb.org/advocacy/policies>.

² The FSMB's The U.S. Medical Regulatory Trends and Actions Report is a biannual report of national data on physician licensure and discipline and the structure and operations of each of the nation's 71 state and territorial medical boards. Section III of the document details state-by-state information on many of the issues addressed in this report: <https://www.fsmb.org/siteassets/advocacy/publications/us-medical-regulatory-trends-actions.pdf>.

Issues Identified and Recommendations

The document review and virtual interviews conducted with staff and Board members provided a thorough background to the Review Team on the SMBO's current administrative processes and operational effectiveness regarding its handling of complaints and investigations, including, but not limited to, sexual impropriety.

The Board is dedicated to making the SMBO a high functioning medical board and desires to implement best practices established around the country to improve its operations. Members of the Board are highly qualified and committed to protecting and serving the public. Board personnel are dedicated and experienced, with a new Executive Director who is knowledgeable and committed to making concrete changes to improve the Board and its work.

The Executive Director, although new to the position, has taken great strides to improve the culture of the Board. Since the beginning of the Executive Director's tenure there has been increased communication and dialogue with staff, especially among board investigators where regular meetings have been established between investigators and the Executive Director. The Board President has also met with one division of investigators and while meetings with the remaining divisions are planned, they have been delayed because of the COVID-19 pandemic. Board staff appreciate the efforts taken by the Executive Director since the start of her tenure and acknowledge that staff morale has improved. Staff are receptive to adopting new processes and procedures and are hopeful that the recommendations of this report may bring improved communication among divisions, clarification of roles and responsibilities within the agency, and an improvement in overall morale.

The Review Team applauds the Board taking actions to establish the Victim Advocate Program, which began with a pilot phase during the first quarter of 2020. Now operational, this program allows victim advocates to be incorporated in the daily work processes to better protect the public and minimize further trauma to victims, while helping support complete and thorough investigations.

The SMBO is uniquely positioned to consider its operational and administrative processes as it has overwhelming support both internally and externally as a response to the Report of the Governor's Working Group.³ The recommendations herein are intended to offer operational and practical suggestions for the Board's consideration and are informed by the assessment of the SMBO and the collective knowledge of the Review Team of state medical board governance, operations and processes. The Review Team made a number of recommendations that will require significant change to processes and participation from more people, especially Board members, and public members of the Board in particular. These recommendations are to allow more people with different skills and life experiences to provide perspectives on cases. Difficult cases, such as those similar to the Strauss case, will benefit from involvement of more individuals.

I. Board Structure and Function

a. Board Membership and Term Limits

The mission of the State Medical Board of Ohio is to protect and enhance the health and safety of the public through effective medical regulation. To accomplish this, the SMBO is currently comprised of 12

³ Governor's Working Group on Reviewing the Medical Board's Handling of the Investigation Involving Richard Strauss, August 30, 2019.

members: nine physicians (seven MD, one DO, one DPM) and three non-physician public members. Board members are appointed by the Governor and serve five-year terms. There is no limit on the number of terms Board members can serve. One member is selected by their peers on the Board to serve a one-year term as Board President. Two members are selected by their peers on the Board to serve one-year terms as the Board's Secretary and Supervising Member, both of which oversee the Board's investigatory and enforcement processes.

Nationally, 50 percent of boards have five-year terms for Board members, while 25 percent have four-year terms. With respect to the number of consecutive terms that Board members can serve, nationally, 60 percent of boards have a two-term limit, while 17 percent have no term limits and 13 percent have a three-term limit. To meet best practices and national standards, it is recommended that the Board maintain the already established five-year terms but impose a two-term limit.

The Review Team recognizes the value of public members in board composition and the role they play in fulfilling the Board's mission to protect and serve the public. Public members can be a powerful voice by bringing fresh perspectives that may not otherwise be included. In recent years, there has been a growing trend nationwide to add additional public members to boards. FSMB's *Guidelines for the Structure and Function of a State Medical and Osteopathic Board*⁴ recommends that boards should be composed of at least 25 percent public members. Some boards are composed of a higher percentage of public members, such as the Medical Board of California, the Osteopathic Medical Board of California, and the Rhode Island Board of Medical Licensure and Discipline, which have 47 percent, 44 percent, and 46 percent public member representation, respectively. The Review Team recommends that the SMBO add one additional public member to their board, increasing public member representation to 31 percent.

The SMBO currently rotates the Board President, Secretary, and Supervising Member positions on an annual basis. The Review Team applauds this as an effort to increase leadership opportunities and to maximize Board member expertise. While the Board President position has rotated consistently on a regular basis, the Secretary and Supervising Member positions have much lower turnover. Despite the very strong role played by the current individuals in these roles, the Review Team believes that there is greater opportunity to utilize the expertise of the other Board members and that the work of the Board would benefit from a greater range of perspectives. One way to begin incorporating additional members could be by looking at ways in which the role of the Vice-President can be expanded to include duties delegated from the President. Additionally, it is recommended that a limit of two one-year terms be instituted for both the President and Vice-President, in addition to a limit of three one-year terms imposed on the Secretary and Supervising Member. It should be reinforced that those who hold these positions should be appointed based on skill and merit, not by seniority alone. Board members will gain additional insight and experience of the investigative process if given greater opportunity to serve as Secretary and Supervising Member.

⁴ Federation of State Medical Boards. *Guidelines for the Structure and Function of a State Medical and Osteopathic Board*. April 2018. <http://www.fsmb.org/siteassets/advocacy/policies/guidelines-for-the-structure-and-function-of-a-state-medical-and-osteopathic-board.pdf>

- ❖ *Recommendation: Ensure Board Member diversity, especially Public Members, by drawing from as many different regions of the State, as many different specialties and careers as possible*
- ❖ *Recommendation: Add one additional Public Member to the Board*
- ❖ *Recommendation: Institute a term limit of two terms for Board Members*
- ❖ *Recommendation: Expand the range of duties performed by the Vice-President*
- ❖ *Recommendation: Institute a term limit for Board officers – two one-year terms for President and Vice-President; three one-year terms for Secretary and Supervising Member*

b. Board Involvement

Throughout the document review and interviews with Board members and staff, it became apparent to the Review Team that Board members are not sufficiently involved, nor are they involved early enough, in the investigative process. The Review Team believes that it is extremely important that more Board members are involved in the investigative process, and are involved earlier in the process, to ensure that safeguards are in place to protect the public and handle cases, such as the Strauss case, properly.

As stated in the previous section, public members are an important voice on medical boards. As they bring the public's perspective, they are also the public's voice. Unfortunately, during the investigation process, while the Secretary and Supervising Member are actively involved, there is no public voice. Although a public member does not have the clinical experience of a physician member, their other experiences offer great value. The Review Team recommends that all complaints, investigations, and dispositions that are currently handled and reviewed by the Secretary and Supervising Member be reviewed instead by a three-person Investigations Committee, with one member of the Committee being a public member.

There are various models utilized across the country to increase Board involvement in the earlier stages of the investigation process. The SMBO may wish to consider these as alternatives to the Secretary/Supervising Member/Public Member review team option. For instance, the Arizona Board of Osteopathic Examiners in Medicine and Surgery has two established committees (Case Review Committee A and Case Review Committee B) to review substantive complaints and recommend action to the Board. In addition to the two case review committees, there is also a Compliance Review Committee that is tasked with reviewing the compliance of physicians with the Board confidential monitoring program, disciplinary orders, non-disciplinary orders, consent agreements, interim consent agreements and interim orders and to recommend action to the Board. For the Colorado Medical Board, there are three standing panels – Panel A, Panel B, and the Licensing Panel. Board members are appointed to one of the three panels. Panel A and Panel B act as both an inquiry and a hearing panel. All matters that are referred to one panel for investigation are heard, if referred for formal hearing, by the other panel.

The Review Team identified discrepancies and potentially narrow interpretations of statutes or internal policies that are more restrictive than what the statutes provide. Some of these discrepancies are in regard to the duties of the Secretary and Supervising Member. Ohio Rev. Code § 4731.22(F)(2) states that all investigations must be “supervised” by the Secretary and Supervising Member. The term “supervision” is undefined in statute and the Review Team questions whether the board has employed a

narrow interpretation of the term. Additionally, Ohio Rev. Code § 4731.22(F)(3) requires only that subpoenas for patient record information be approved by the Secretary and Supervising Member. Activities that do not require Secretary and Supervising Member approval include administering oaths, taking depositions, inspecting and copying accounts, records or documents, issuing subpoenas (except in certain instances), compelling the attendance of witnesses, and production of documents. Based upon interviews, the Review Team believes the Supervising Member and Secretary are asked to approve things not required by statute. Implementing these recommendations could result in streamlined processes and increased efficiencies in investigations.

It is recommended that the Board review all processes and procedures to ensure that all governing statutes and internal policies are in harmony and that the Board is not being unnecessarily constrained by narrow interpretations. All board members should be aware of the internal policies and protocols that are used in processing complaints, for investigation, adjudication, etc.

To increase additional involvement, the Review Team believes it is also important that staff should provide as much information as possible to Board members so they are aware of Board operations. The Review Team recommends that regular reports be provided to Board members providing a snapshot of current Board caseload. These reports should include, but not be limited to, the following: a breakdown of the number and status (including current timeline) of cases based on department, number of investigations reviewed, external inquiries, licensing applications reviewed, consent orders issued, letters of concern, etc.

- ❖ *Recommendation: All complaints, investigative reviews, and dispositions that are handled and reviewed by the Secretary and Supervising Member should be reviewed by a three-person Investigations Committee, with at least one member of the Committee being a public member*
- ❖ *Recommendation: Review all Board processes and procedures to ensure governing statutes and internal policies are not unnecessarily constrained by narrow interpretation*
- ❖ *Recommendation: Board members should approve all new protocols and procedures*
- ❖ *Recommendation: Board members should be provided regular reports on current complaints and caseload*

c. Committees and Disciplines Under the Purview of the Board

The SMBO currently has 13 health care disciplines that fall under the purview of the Board. Those disciplines are allopathic physicians, osteopathic physicians, physician assistants, anesthesiologist assistants, respiratory therapists, podiatrists, acupuncturists, radiologist assistants/radiographers, massage therapists, cosmetic therapists, dietitians, genetic counselors, and oriental medicine practitioners.

The Board has 10 advisory councils and committees that address various responsibilities of the entire board. These committees are Compliance, Finance, Licensure, Medical Marijuana, Physician Assistant Policy, Policy, SMBO Executive Director Review, and Sexual Misconduct. The advisory councils, which provide additional oversight and regulation of certain disciplines, are the Dietetics Advisory Council and the Respiratory Care Advisory Council.

The Review Team believes that some of these committees should be consolidated or reorganized, while additional committees should be created to fill gaps. The Board should carefully review the role,

makeup, and effectiveness of each of the committees and identify which ones should change. It is recommended that an Investigations Committee be created, in addition to the already established Licensure Committee. This newly created Investigations Committee should be comprised of three members – the Secretary, Supervising Member and one additional member, with the Supervising Member and/or the additional member being a public member – and will investigate each complaint and recommend disposition to the Board, with the assistance of Board personnel. The Board may wish to add an additional member or two to the committee to increase Board involvement in the investigations process. The Review Team recommends that the Licensure Committee be reorganized to include members of the Board that are not part of the Investigations Committee to decrease the workload of the Investigations Committee and increase board participation. The Licensure Committee should be given the responsibility of reviewing any license applications or other licensing questions presently considered by the Secretary and Supervising Member, as well as any additional issues related to licensure.

- ❖ *Recommendation: Identify committees that can be consolidated or eliminated to reduce redundancies and maximize Board member experience and time*
- ❖ *Recommendation: Establish a three-person Investigations Committee comprised of the Secretary, Supervising Member, and one additional member, one of which must be a public member.*
- ❖ *Recommendation: Reorganize the Licensure Committee's membership to include only non-Investigations Committee members*

II. Board Personnel

a. Structure

The organizational structure of the SMBO is similar to that of most state medical boards in terms of its departmental breakdown. Communication across departments seems to occur frequently. However, aside from instances where particular staff members are assigned to cases from the outset (i.e., in cases involving allegations of sexual misconduct), the responsibility for this communication falls almost exclusively on department managers and chiefs. An illustration of this was conveyed during staff interviews regarding information sharing from the Investigations Department. The Review Team was told that when investigators need to communicate with other departments, they do this through their own managers who will pass information and messages up the chain of command. Managers and department chiefs will then convey information to chiefs and managers of other departments before it makes its way back down to a relevant staff member of that department. This means that the most common (and with many cases, the only) form of cross-departmental communication that occurs is at the very top of the organizational structure, leading to a perception of siloed departments within the organization.

In addition to the low number of points of communication across departments, the siloed nature of the organization is demonstrated by the ways in which cases are completed in one department and handed off to another. When an investigation is completed, the investigator will draft a report of investigation (ROI) and submit this for consideration by the Enforcement Department. Unless the enforcement attorney who has been assigned the case needs additional information from the investigation,

submission of an ROI will typically be the final time an investigator hears about their case, unless they choose to verify its status in Salesforce, something the Review Team was told rarely occurs.

The Review Team believes that the team-based approach used in cases involving allegations of sexual misconduct holds promise for eliminating silos between departments. This approach involves the assignment of an enforcement attorney and an investigator to a case at the outset of the investigation and ongoing communication and collaboration between the two over the duration of the investigative portion of the case. The Review Team recommends expanding the use of this model to all case types, not only sexual misconduct cases. Further, the Review Team recommends that investigator involvement in a case continue beyond the completion of the investigation. This recommendation is not only intended to reduce silos and increase communication, but also to demonstrate respect for the expertise of the investigator and the value of their role, make use of the knowledge they have gained over the course of the investigative process, and offer opportunities to receive feedback and improve, as well as identify potential biases. Building and emphasizing a team-based approach across all Board processes will normalize consultations among colleagues. If done properly, efficiencies will be gained and it will become routine.

Given the long history of the current organizational structure and the embedded processes and habits it has created, the Review Team also recommends that continuous communication occur across the organization as changes such as these are implemented.

- ❖ *Recommendation: Utilize a team-based approach for all cases*
- ❖ *Recommendation: Investigators should be involved in cases beyond completion of the case to ensure opportunities for feedback and improvement, and to identify potential biases.*
- ❖ *Recommendation: Maintain continuous communication across the organization as changes are implemented*

b. Additional and/or Reorganized Positions

The SMBO does not currently have a medical professional on staff, relying instead on two nurse experts from the Standards Department for their clinical expertise, several academic resources, including UpToDate which is the most frequently used resource for the nurse experts, and the Board Secretary and Supervising Member when additional internal clinical input is needed. When a case requires further expertise for a minimal standards evaluation, external expert review by medical professionals is sought. The Review Team learned during interviews that obtaining expert reviewers with suitable backgrounds and expertise often presents challenges and can be a reason for significant delays in case processing.

It is common for state medical boards to employ an individual with a medical background, often a physician and/or physician assistant, to serve as Medical Director of the Board and advise the board's Executive Director. Depending on the specific board needs, the Medical Director is either a full-time, part-time, or contract employee. Thirteen (13) boards have full-time staff who serve as medical directors. For example, the North Carolina Medical Board employs three (3) full-time medical directors, two (2) MDs and one (1) PA. Nineteen (19) boards also employ part-time, temporary/seasonal, or contractors who serve in a medical director capacity to support the work of the board.

The Review Team recommends the addition of a Medical Director on staff. The Medical Director would play a role in providing clinical expertise for minimal standards cases prior to the involvement of the

Secretary and Supervising Member. However, while the Medical Director could directly manage the nurse experts, it is recommended that the position report directly to the Executive Director and serve in an advisory capacity to all departments when medical questions arise. They would be expected to advise the Executive Director as well as board staff, where needed. They should also be required to attend rounds, along with the Investigations Committee. The Medical Director can also assist with compliance by conducting chart reviews to follow-up on any practice restrictions or required continuing medical education.

In hiring a Medical Director, whether they are full-time or part time, the Review Team recommends seeking a board certified physician who is still in practice. If a retired physician is considered for the role, they should have retired in the recent past to ensure currency of medical knowledge. Beyond being board certified, the individual would ideally have good standing in the community, a clean disciplinary record, and possess knowledge of the medical community to facilitate securing additional external expert reviewers, when needed. Having a board certified physician on staff may also decrease the need for expert reviewers, resulting in potential cost-savings.

❖ *Recommendation: Employ a Medical Director who reports to the Executive Director*

c. Education and Training

The Review Team received reports of training undertaken by board members and staff as part of onboarding and ongoing education. Several of the courses listed are relevant to cases involving sexual misconduct, including Forensic Experiential Trauma Interview (FETI), Trauma-Informed Investigations through Administrators in Medicine (AIM) and the Ohio Attorney General's Office, as well as Justice3D. The team also notes regular attendance from department heads at FSMB events, including Annual Meetings, Board Attorney Workshops, and Medical Board Roundtables, some of which have addressed sexual misconduct.

The Review Team found the training undertaken to be valuable and recommends that it continue for Board staff, but also include Board members, where feasible. This is especially important for ensuring that the adjudicatory processes of the Board are informed by the same best practice recommendations that staff are receiving and implementing in their own work. The team also recommends that training in implicit bias be undertaken by all Board members and staff.

❖ *Recommendation: Continue to provide educational and training opportunities to Board staff, as well as Board members, where feasible*

❖ *Recommendation: All staff and Board members should complete training in implicit bias*

d. Culture

Many of the interviews undertaken with Board staff highlighted longstanding issues related to the organization's culture. It appears that many of these issues arise from a lack of communication between and among departments, as well as the segmented structure of the organization that are noted above. Differences in expectations among departments likely also contribute to low morale in some departments, such as investigations, where expectations related to completion times are perceived as high and rigid relative to other departments. Despite these engrained cultural issues, there was a significant degree of optimism on the part of most interviewees about recent positive changes to the

organization's culture, many of which have been occurring since the hiring of the current Executive Director.

The Review Team believes that enhanced communication, including all-staff meetings, and consistent expectations across departments will help to sustain these positive cultural shifts and make ongoing contributions to improved morale. The Review Team also recommends that staff surveys be conducted by the Executive Director at least every three to five years, in collaboration with another senior staff member (e.g., HR manager or Deputy Director) to garner feedback and opinions on a variety of topics, such as Board operations and staff morale.

The Review Team also learned that Board staff will collaborate with the Board in strategic planning over the next fiscal year. The Board is encouraged to develop strategic priorities on an annual or biennial basis that provide guidance and direction to Board staff. Departmental involvement in the development process should also be encouraged. Departments should develop annual goals at a tactical level and relate these to the priorities developed by the Board. Consideration should also be given to how priorities developed relate to the "goals" that are published on the OSMB website. These goals certainly relate to the mission of the Board, but should be less broad and vague to ensure implementation.

- ❖ *Recommendation: Maintain enhanced communication and consistent expectations across departments to ensure positive cultural shifts*
- ❖ *Recommendation: Conduct staff surveys at least every three to five years to garner feedback on a variety of topics, including Board operations and staff morale*
- ❖ *Recommendation: Involve Board members and staff at all levels in the development of the Board's strategic plan.*

III. Complaints and Triage

The Board employs a triage process whereby complaints are directed to one of the following upon intake: ASAP Investigation, Investigation, Standards Review, PI-UNC Process, Secretary of the Board, PI-Referral, Protocol Close, Enforcement, and Other.

Triage occurs based on the nature of the complaint and not necessarily its severity. The triage process follows an initial pre-triage review involving licensee look-up and verification of previous complaint and disciplinary history. Pre-triage is performed by administrative clerks, while triage is performed by the Chief of Standards Review and Compliance, Chief of Investigations, Chief Legal Counsel, and two attorneys from the Legal Department, each spending one day per week in the triaging role.

There do not appear to be established timelines for triage or expected maximum times that a complaint can remain in triage before being assigned to a particular department. The Review Team reviewed data related to the triage process, broken down by individuals performing the function, noting significant variance in time taken to triage. Average times vary from six days to nearly twenty days. Some interviewees, however, conveyed that particular complaints can remain in triage for much longer.

The team also noted significant variances in the pathways through which each person performing the triage directs the complaints. As an illustration, one of the five triagers directed 38 percent of their total number of records to the Board Secretary, whereas another triager sent only four percent of records in the same direction. For records triaged to Standards Review, two triagers sent 22 percent of their

records, whereas another sent only seven percent. These discrepancies demonstrate a need to focus on uniformity in the triage process.

One potential option would be to have a single person performing all triaging. However, the Review Team was informed during interviews that the Board had previously employed this process and while uniformity was achieved, it resulted in significant case backlogs.

The Review Team encourages the Board to develop uniform guidance for triage to standardize the decisions involved in the process of assigning case records. We also recommend giving consideration to shifting the triage step to the administrative clerks who perform pre-triage. With clear protocols for triage and adequate training, this step could be performed by administrative staff, rather than taking time from highly skilled attorneys, some of whom also serve as chiefs of departments. We further recommend that any difficult cases encountered by the administrative triagers be sent to a multi-departmental group made up of department chiefs who will decide by consensus where they should be directed. While this triage process may not be perfect, there are several opportunities down the line to redirect cases back to triage or to the multi-department triaging group.

We also recommend establishing timelines for cases to be triaged, both at the administrative level, as well as by the multi-departmental triaging group. If cases languish in triage, efforts should be made to ensure that they are completed, and not merely closed based on the length of time since the complaint was made.

Finally, consideration should be given to changing the reporting structure so that the administrative triagers report to the Chief Investigative Officer since the majority of complaints will be processed and investigated by staff within the Investigations Department.

- ❖ *Recommendation: Develop uniform guidance for triage to standardize the decisions involved in the process of assigning case records*
- ❖ *Recommendation: Shift the triage step to the administrative clerks who perform pre-triage*
- ❖ *Recommendation: Any difficult cases encountered by the administrative triagers should be sent to a multi-departmental group made up of department chiefs who will make a consensus decision*
- ❖ *Recommendation: Establish timelines for cases to be triaged*
- ❖ *Recommendation: Administrative triagers should report to the Chief Investigative Officer*

IV. Standards Review & Compliance

The Standards Review department is staffed by two nurse specialists, one with a background in cardiology and the other with a background in pediatrics. Departmental oversight is provided by the Manager of Standards and Compliance who reports to the Board's Executive Director.

From January 1, 2019 – December 31, 2019, the nurse experts created 609 reports for review by the Secretary and Supervising Member. During this same period, the Board closed 1065 complaints related to minimal standards of care, most of which would have come through standards review. The department has completed 258 reports thus far in 2020 (one report may be associated with multiple individual complaints).

The standards review process was described to the Review Team during our interview with one of the nurse experts. Once a complaint is directed to standards review during the board's triage process, records are sought by the department's administrative staff person and delivered to the nurse experts. The nurse experts begin their process with an initial review of the complaint and evaluation of the overall context to determine the crux of the complaint. The licensee's complaint history is then verified, followed by educational history and certification. The medical records are then reviewed against the complaint and the current standard of care. Online databases, medical journals, PubMed, and UpToDate are used to establish the standard for each case. Nurse experts can also ask for an external expert review.

Outcomes following case review include closure, letter of caution with or without educational recommendations, and informal meeting with the Secretary and Supervising Member. The nurse experts will often discuss difficult cases with the Secretary and Supervising Member or with investigators. If a case rises to the level where the nurse experts feel that enforcement may be needed, they will liaise with the Secretary and Supervising Member and will often initiate the process for obtaining external expert reviewers.

When letters of caution are used at case closure, the process and the letter are internal and the closure is not made public, nor is it communicated with the complainant. Rather, the complainant will receive a letter notifying them only of the case closure. Further, when these letters include educational recommendations, these are not necessarily required of the physician as they do not amount to formal disciplinary action.

The Review Team recommends that the complainant receive a more fulsome explanation of the nature of the case closure, including, when possible, the fact that remedial education was recommended to the complaint subject physician. The team recommends further that consideration be given to ways of ensuring compliance with remedial education recommendations.⁵ One suggestion for accomplishing this is by keeping cases open until remedial education is completed. This will involve a trade-off between ensuring that remediation occurs and extending case processing times. However, as long as case milestones are appropriately tracked as recommended below, an explanation for longer duration of these cases will be available.

- ❖ *Recommendation: Complainants should receive an explanation of the nature of the case closure, including the fact that remedial education was recommended to the complaint subject physician*
- ❖ *Recommendation: Consideration should be given to ways of ensuring compliance with remedial education recommendations*

a. Expert Reviewers

The SMBO uses external expert reviewers for complicated minimal standards complaints, or in instances where the expertise of the nurse experts, other internal staff, and the Secretary and Supervising Member are not suited to conducting an appropriate standards assessment. Interviewees estimated that expert reviewers are used in less than 10% of standards cases.

⁵ See recommendations in Section IX. Quality Assurance.

The Board's current process for recruiting expert reviewers is through a link on the Board's website where interested parties may submit an application form, along with a CV to the Compliance Department. The Board has also worked with a headhunter to recruit additional reviewers.

The Review Team heard of several challenges related to obtaining external expert reviewers. These relate mainly to finding reviewers with suitable backgrounds and expertise to match cases under review. However, the process used by the board to obtain and pay a reviewer is also quite cumbersome, involving at least five individuals and twenty-seven steps.⁶

While the review team anticipates that the need for external expert review of complaints will be reduced through the employment of a staff medical officer, the SMBO may wish to consider additional options for recruiting and retaining expert reviewers.⁷ Many state medical boards post informational resources, FAQs, and videos about their expert review process, including expectations and compensation on board websites. The North Carolina Medical Board created a new staff position to manage that board's expert review process, including recruitment and retention. Other boards contract with private companies to secure expert reviewers. The FSMB has heard anecdotally that engaging private companies has resulted in significant time savings and often higher quality reviews. Finally, the OSMB's Board members themselves are often well-connected within the medical community. They should be encouraged to speak with their colleagues in practice about the importance of expert review of cases as a way of supporting medical professionalism across the state.

- ❖ *Recommendation: The board should consider whether different models for obtaining external expert reviewers would increase the efficiency of this process*
- ❖ *Recommendation: Board members should be encouraged to leverage their medical contacts within the state to find additional expert reviewers*

b. Chaperones/Practice Monitors

The review team did not review information about the Board's use of chaperones or practice monitors as part of its preparatory materials. However, the use of chaperones was discussed briefly during interviews in relation to the compliance monitoring practices of the Board. The review team was pleased to learn that the Board has been implementing new practices with respect to the use of chaperones, including random site visits to ensure compliance with monitoring conditions or gender-based restrictions, and interviews are taking place with the chaperones themselves.

The nature of the monitoring relationship between a chaperone and a licensee with practice limitations nevertheless appears to be relatively informal. The review team learned that licensees are responsible for supplying the name of a chaperone to the Board. This may differ with respect to more formal practice monitors, but this was unclear based on the reading material and interviews conducted.

⁶ The review team learned through emails from licensing staff that recent minor changes have occurred which may have reduced the number of steps involved in the expert acquisition process, but that it remains substantively similar.

⁷ In 2018, the FSMB compiled a state-by-state list of legislation related to expert witness qualifications and licensure requirements that may be helpful to the SMBO. The list is available here: <http://www.fsmb.org/siteassets/advocacy/key-issues/expert-witness-by-state.pdf>

The review team recommends that the SMBO refer to any formal Board-imposed monitoring arrangement as “practice monitoring” rather than using the term “chaperone.” As defined in FSMB policy,⁸ a practice monitor’s primary responsibility is to the state medical board in support of the Board’s patient protective mandate. A practice monitor has a formal reporting responsibility to the Board and should have a health professional background, receives formal training in the expectations of practice monitors, and is not connected to the licensee being monitored through employment or other pre-existing connections.

With respect to gender or age-based restrictions, the Board is encouraged to consider the FSMB’s newly adopted policy which states the following:

“The appropriateness of age and gender-based interim restrictions should be considered carefully before being imposed by state medical boards. Sexual misconduct often occurs for reasons related to power, rather than because of a sexual attraction to a particular gender or age group, thereby making these restrictions ineffective to protect patients in many cases.”

- ❖ *Recommendation: Refer to any formal Board-imposed monitoring arrangement as “practice monitoring,” rather than “chaperone”*
- ❖ *Recommendation: Establish requirements for practice monitor backgrounds, training, independence from monitored physicians, and reporting expectations to the Board*

c. Compliance

The Review Team did not explore the issue of compliance in great depth during the document review or interview process, but believes that this is an important component of Board processes with respect to all case types to ensure that the decisions of the Board are represented in the practice of licensees. As such, the Review Team recommends that the Board create the position of Compliance Officer. This would be a quasi-investigatory position where the individual would go into the field to investigate compliance through office visits, informal interviews with clinic staff and periodic chart review, depending on the nature of the case and practice restrictions involved. It is anticipated that this work would be supported by a Medical Director (recommended above) for case and chart review to ensure Board orders are appropriately followed.

- ❖ *Recommendation: Create the position of Compliance Officer to ensure compliance with Board orders*

V. Investigations

The SMBO employs 17 investigators who are divided geographically into three groups. Each group is overseen by an investigative supervisor who reports to the Chief of Investigations. The entire department is supported by one administrative assistant.

⁸ Federation of State Medical Boards Policy on Physician Sexual Misconduct, available at <http://www.fsmb.org/siteassets/advocacy/policies/report-of-workgroup-on-sexual-misconduct-adopted-version.pdf>

The Investigations Department appears to employ timelines for completion⁹ to a greater degree than other departments. Investigative staff interviewed demonstrated a sense of responsibility for meeting their timelines, while emphasizing that the priority from Board leadership is on thoroughness of investigations, rather than speed. There seems to be some frustration on the part of investigators that cases can often take much longer to process before and after they are managed by investigators, implying that timelines in other departments are not followed to the same degree.

During interviews with members of the Investigations Department, the Review Team heard detailed accounts of how investigators carry out their job functions that demonstrated a deep understanding of their role. However, the involvement of investigators in cases after an investigation is completed is very minimal. In fact, investigators will only typically hear about cases they have investigated if they are contacted by an enforcement attorney who is in need of additional information.

Given the geographic distribution of investigators, it has been historically rare that the investigative staff have opportunities to assemble together to discuss cases, the nature of their work or to develop relationships with other investigators beyond their regional divisions. Also, while those investigators who are part of the central division will have more frequent opportunities to spend time in the Board's office, most investigators will only typically attend the Board office on occasions where a licensee is not compliant with an investigation and is therefore issued a subpoena to visit the Board in person. Each regional group of investigators meets approximately once per month.

The reporting structure within the department may contribute to this historical isolation of investigative staff because the investigators themselves will report to their supervisor who will then report to the Chief of Investigations. The Chief of Investigations is typically the only individual responsible for liaising with other departments through their chiefs and managers.

During interviews with the Chief of Investigations and investigative staff, the Review Team was told that the recent shift towards a trauma-informed approach has resulted in more frequent meetings with staff from outside the investigations department, including victim advocates and enforcement attorneys.

The Review Team also learned that under the Board's new Executive Director, additional opportunities for meetings between and among investigative colleagues are occurring. The Executive Director has gone into the field to meet with investigative staff and the Board President has attended some of these meetings, as well. Additionally, there has recently been an all-staff meeting in Columbus that offered investigators an opportunity to visit the Board's offices and meet with some of their colleagues from other departments. During the COVID-19 pandemic, all-staff meetings via e-conferencing have also been occurring. The Review Team commends the Board for these additional efforts which allow for better integration of investigative staff into the broader team. This not only offers important opportunities for camaraderie to develop among staff and between departments, but also provides an avenue for investigators to learn about how others see and benefit from their work. It can also help to foster more of a team environment and boost staff morale. The Review Team strongly recommends that these opportunities to meet in person continue for the benefit of the investigators and the Board as a whole. We also recognize the value of virtual meetings when meeting in-person is not feasible, and understand these have been taking place successfully during the COVID-19 pandemic.

⁹ Timelines can vary from 30 days to 120 days, depending on the nature of the complaint.

The team further recommends that efforts be made to better integrate investigators into the entire process of case management, all the way through to adjudication. Investigators should receive updates about the cases they have worked on as they reach milestones throughout the process and they should be consulted where input would be valuable, such as during discussion of cases at post-mortem case review (recommended below). Investigators should also be present during rounds when their cases are being discussed and should be able to provide brief case summaries. Finally, in order to facilitate a greater understanding of the adjudicatory process with respect to their cases, investigators and investigative supervisors would benefit from attending Board meetings on a rotational basis.

- ❖ *Recommendation: Continue to hold in-person meetings, both in the field and at the Board's main offices, between the executive director and investigators, as well as the Board President, when possible.*
- ❖ *Recommendation: Integrate investigators into the entire process of case management, all the way through to adjudication*
- ❖ *Recommendation: Investigators should be in attendance at rounds when their cases are being discussed to serve as informational resources*

VI. Enforcement

The Enforcement Department of the SMBO is overseen by the Chief Enforcement Officer and employs eight enforcement attorneys and is supported by one administrative assistant. Historically, there have been anywhere between seven to ten enforcement attorneys on staff.

The role of enforcement attorneys at the SMBO involves conducting pre-hearing legal analysis of cases, issuing subpoenas, and conducting interrogatories and depositions, but they are not permitted to prosecute cases themselves. Their role essentially involves case preparation for the assistant attorneys general. The Review Team heard during interviews that enforcement attorneys are typically responsible for between 40 and 50 cases at a time.

a. Case Management Timelines

During interviews with the Chief Enforcement Officer and staff, it was expressed that there have been long standing issues regarding established deadlines and the use of the Board's current case management system.¹⁰ It was also stated that there are often chokepoints during casework. The Review Team believes that there should be strong efforts made to move the case forward if additional information is needed and this is often information which could be gathered by Investigations, Standards Review, or administrative staff.

The Review Team heard from enforcement staff and staff from other departments about heavy workload within the enforcement department and it was suggested by more than one interviewee that additional attorneys in this department would benefit the Board in terms of moving cases forward. However, based on the Review Team's document review and interviews, we would not qualify the workload issues as related to understaffing in the department. Rather, we believe that many of the tasks currently performed by the enforcement attorneys do not require legal training and should therefore be reassigned to non-attorneys and administrative staff. Examples of such tasks include the issuance of subpoenas, triage-related functions, drafting letters of postponement and settlement letters. The

¹⁰ See recommendations in Section XI. Case Management Systems.

Review Team recommends that these tasks be performed by legal assistants or paralegals, rather than lawyers.

During an interview with an enforcement attorney, it was stated that much of his time is spent on quality of care (standards) cases, yet those cases represent a minority of the Board's disciplinary cases. It may be beneficial to the Board if an enforcement attorney is shifted to the Standards Department to resolve such cases.

Another suggestion with respect to increasing accountability for timelines among enforcement staff comes from the North Carolina Medical Board where staff provides the Board with a bi-monthly "Attorney's Report," which is also available to the Chief Enforcement Officer. The Board also maintains a "12 Month" list, which includes any case that has not been resolved in 12 months. This list is presented to the Chief Enforcement Officer every other month and includes the date the case was received by the legal department, the last action taken, and the next steps for moving the case forward.

The Review Team also believes that current benchmarks for case processing within enforcement seem reasonable. However, the Team also learned that processing times can often take longer than the prescribed duration, effectively removing meaning from the established guidelines. In order to learn more about processing timelines and increase accountability for meeting them, it is recommended to establish milestones throughout the process, breaking up processes into smaller tasks and tracking cases to ensure that milestones are reached. Making this tracking visible in a uniform case management and tracking system would also provide more of a sense of why particular cases are delayed to staff in other departments who have also worked on them. While there are certainly legitimate reasons for why some cases take longer to process than others, a demonstration of progress along a series of steps could help other departments understand where delays are occurring and could even benefit the ways in which investigations take place and are reported. The Review Team also encourages efforts from enforcement attorneys to convey to investigators who worked on their cases the reasons for why particular cases did not move forward to provide additional collaboration between departments and offer opportunities for improvement to investigative staff.

- ❖ *Recommendation: Reassign job tasks currently performed by attorneys that do not require a legal background to administrative staff*
- ❖ *Recommendation: Reduce the number of enforcement attorneys on staff, or repurpose them to do legal work*
- ❖ *Recommendation: Consider whether enforcement attorney tasks related to preparing minimal standards cases can be accomplished by staff in the Standards Review Department*
- ❖ *Recommendation: Draft ongoing "Attorney's Reports" which are made available to the Chief Enforcement Attorney and shared regularly with the Board*
- ❖ *Recommendation: Set and adhere to realistic and enforceable deadlines*
- ❖ *Recommendation: Break processes up into smaller tasks by establishing milestones; track and share progress based on these milestones*

b. Negotiation of Settlements

The Review Team was told by multiple interviewees that the board has a very high success rate in cases that go to formal hearing. Frustration was also expressed about a perceived lack of willingness to move

forward with cases without a verbal concession from a licensee for fear of losing the case. Additionally, there appears to be relatively few settlements reached in advance of hearings. These findings may indicate that there are instances where disciplinary action or limitations on licensure are warranted but are not occurring. It is suggested that Board attorneys receive training in settlement negotiation. With this training should also come encouragement to more aggressively work at reaching timely and appropriate settlements.

- ❖ *Recommendation: Offer training in settlement negotiation and encouragement to enforcement attorneys to reach timely and appropriate settlements*

c. Departmental Reporting Structure

The Enforcement Department has historically had a high degree of autonomy relative to other departments at the SMBO. This has been perceived by staff interviewed as related to a lack of legal training, and therefore a lack of knowledge of the work of the Enforcement Department, on the part of the previous Executive Director. While the current Executive Director has a law degree, this might not be the case with future Executive Directors. The Review Team recommends that consideration be given to altering the organizational structure by combining the Legal and Enforcement Departments. Under this structure, the Chief Enforcement Attorney and the Enforcement Department would report to the Chief Legal Officer. We feel this would increase interdepartmental collaboration, accountability within the Enforcement Department, and provide another layer of collaboration between Board staff and Board members.

- ❖ *Recommendation: The Chief Enforcement Officer, as well as the Enforcement Section, should report to the Chief Legal Officer*

VII. Hearings

A hearing can be requested by a licensee upon issuance of a notice of formal action by the Board. When this occurs, the case goes to the Hearings Department where staff will schedule the hearing, address any legal issues that arise, and hold the hearing. All hearings are transcribed, witnesses are sworn in, the responding physician typically has legal representation and the state has a prosecuting attorney from the office of the Attorney General. Upon review of evidence, the hearing examiner will write a report for the Board, including a summary of evidence, findings of fact, conclusions of law, and a proposed order. The order is only a recommendation as the final decision-making authority rests with the Board. The Review Team was told during interviews that recommendations are frequently amended by the Board.

The SMBO conducted 33, 43, and 46 hearings in the years from 2017 to 2019. The Board uses a case management schedule to ensure that hearings are scheduled without significant delays. Once a hearing is closed, there is a statutory requirement to file a report and recommendation to the Board within 30 days. Despite these timelines, the Review Team heard from interviewees about case backlogs in the Hearings Department. The reasons for these backlogs were not clear to the Review Team. However, it appears that Proposed Finding on Proposed Board Orders (PFPBOs), which occur in part when the Board adjusts the terms of a settlement, are referred to the Hearing Examiner. Given the case backlog, the Board may wish to consider other ways of handling PFPBOs when there has not been a request for hearing. This is another area where increased Board involvement earlier in cases may help achieve

greater alignment between the Board and staff recommendations, resulting in greater efficiency and a reduction of PFPBOs.

The SMBO created a Hearings Examiner position in 1986. Prior to this, the Board conducted its own hearings, would assign a Board member as the hearing examiner and respondents would appear before the Board. The SMBO's hearing examiner is an employee of the Board and reports to the Executive Director.

States use a variety of different models regarding hearing officer employment status. Thirteen boards employ hearing officers directly, two boards work with hearing officers employed by the office of the state attorney general, and four work with hearing officers employed by an outside contractor. The two most common models used by state medical boards are working with a hearing officer employed by another state agency (30 boards) and using a panel of hearing officers that serve all state agencies (27 boards).

In Ohio's case, the model used allows for some forms of contact between the Chief Hearing Examiner and members of the Board. Several interviewees commented on the ability of the hearings examiners to create strong boundaries between themselves and other board staff to ensure that complaints are not discussed around hearings examiners and that they are not influenced by opinions or work of investigators, attorneys, or the Executive Director. However, the hearings examiners can sit in on hearings while their recommendations are discussed, and they have contact with Board members outside of hearings. This may present a risk of appearing unfair to respondents in hearings and to the public. Depending on the nature of the contact, it could also risk being considered *ex parte* contact.

Despite the reporting structure which involves reporting to the Executive Director, the Chief Hearing Officer has never had a performance review, although the Review Team learned during interviews that such reviews are likely to begin soon. Therefore, the only means of measuring performance for the hearing examiners is the degree to which the board agrees with their recommendations.

The review team recommends that the Board consider a contract model for hearings examiners, rather than an employment model. Multi-year (3-5 year) contracts are recommended to allow for periodic review. This will provide greater ability to the Executive Director to set and enforce expectations on timelines and performance.

- ❖ *Recommendation: The Board should consider a contract model for hearing examiners, specifically multi-year (3-5 years) contracts*

VIII. Sexual Misconduct Cases

The review team has followed progress made by the Board in implementing the recommendations of the Governor's Working Group and wishes to commend the Board for its impressive progress in a short amount of time, including its review of 25 years of sexual misconduct cases that were closed without disciplinary action. Many of the Working Group's recommendations are echoed throughout this report and will not be repeated in this section. Rather, the review team hopes to complement these recommendations with additional advice for implementation of changes to the Board's structure and processes.

The formal expectations for licensees of the SMBO with regard to sexual misconduct are set out in Ohio Admin Code § 4731-26: Sexual Misconduct and Impropriety. The Board formerly had a position statement on physical examinations by physicians, but this has since been retired and much of its content transferred to Board rule. Given the significance of sexual misconduct between a licensee and patient, its traumatic effects, and the associated disciplinary actions at the Board's disposal, the Review Team strongly recommends that the Board draft a stand-alone position statement about professional expectations of licensees with regard to appropriate conduct, including physical examinations and sexual contact with patients. This statement should provide a clear statement of the Board's understanding of sexual misconduct, building from the content established in Ohio Admin Code § 4731-26. The Board's Sexual Misconduct Protocol could also prove helpful through its inclusion of "words, gestures, inappropriate touching, inappropriate intimate examinations, potential violations of the Board's sexual misconduct rules, or criminal acts of a sexual nature."

In terms of how the Board's accepted definition of sexual misconduct is incorporated into Board processes, the Review Team encourages consideration of sexual misconduct as occurring along a spectrum of severity, as expressed in the FSMB's newly adopted Policy on Physician Sexual Misconduct.¹¹ This spectrum begins with "grooming" behaviors which may not necessarily constitute misconduct on their own, but are often precursors to other, more severe violations, including sexually inappropriate or improper gestures or language that are seductive, sexually suggestive, disrespectful of patient privacy, or sexually demeaning to a patient. Regardless of where an act or language is located along this spectrum of severity, it should still be considered as related to sexual misconduct and investigated as such.

These behaviors do not need to occur between a physician and patient to be considered sexual misconduct. Rather, they can be with patient surrogates, physician colleagues, other members of the health care team, and hospital or clinic employees. The impact of inappropriate or unprofessional behavior in any part of the health care setting can have negative impacts on the care that patients receive.

In terms of Board processes with respect to handling complaints involving allegations of sexual misconduct, these complaints are sent to administrative triage, flagged as involving sexual misconduct and coded as "ASAP." Once the complaint is triaged, it is assigned to an Investigator, a Victim Coordinator, and an Enforcement Attorney. While the Enforcement Attorney liaises with law enforcement to either report criminal conduct or, when alleged behavior falls short of a crime, to verify whether any previous sexual conduct has been reported, the Investigator and Victim Coordinator collaborate on the development of a plan for interviewing the victim. All contact with the victim during the investigation takes place in the presence of the Victim Coordinator.

If at any point during an investigation there is evidence of substantial risk to the public, consideration should be given to immediate cessation of practice. Also, if the Investigator and Investigative Supervisor feel there is sufficient evidence to substantiate that sexual misconduct occurred, there should be a process to determine whether immediate cessation of practice should occur. The priority here should be protection of the public.

¹¹ Federation of State Medical Boards Policy on Physician Sexual Misconduct, available at <http://www.fsmb.org/siteassets/advocacy/policies/report-of-workgroup-on-sexual-misconduct-adopted-version.pdf>

Upon completion of the investigation, if closure is recommended, the complaint and investigative information are considered by a committee of administrative triagers, investigative staff and enforcement staff, who can either send the complaint back for additional investigation or forward the recommendation for closure to the Secretary and Supervising Member for final approval of the closure. If the Investigator recommends that the case proceed to enforcement, the assigned Enforcement Attorney can either develop the case for formal action, return the case to the Investigator for further investigation, or recommend closure.

In all of the above scenarios where recommendations for closure or enforcement are made by the Investigator and Enforcement Attorney, the only outcome which would allow Board members beyond the Secretary and Supervising Member to have input into the case or consider the reasons for its closure would be when a case is developed for formal action and goes to hearing. Cases that have been thoroughly investigated and developed by enforcement attorneys could also be closed without the input of public members if the Supervising Member is not a public member.

The Review Team strongly recommends increasing both public member and Board involvement in decisions to close complaints involving allegations of sexual misconduct through the newly created Investigations Committee. Where cases are recommended for closure by an Investigator without going to enforcement, we recommend review by the Investigations Committee (includes a public member of the Board, in addition to the Secretary and Supervising Member). Where cases are recommended for closure after having gone to enforcement, we recommend removing the step that currently involves internal committee review, but rather referring these cases to the Investigations Committee, with additional review by another public member of the Board. Consideration should be given to seeking input from the assigned attorney from the Attorney General's office who is responsible for prosecuting the case. If a public member disagrees with a recommendation for closure, the case should be sent back to investigations prior to consideration of closure by the full Board. The responsible Investigator should collaborate with the Investigative Supervisor, assigned Victim Coordinator and Enforcement Attorney to amend the investigation plan.

As mentioned above, the Review Team commends the SMBO for its careful look at implementing victim coordinators into its processes. The team suggests that the role of the Victim Coordinator will be most effective if they serve as the primary point of contact during all stages of an investigation and processing of cases through to adjudication, providing both support and updates as needed by the victim. While the investigators often serve in this role, there are challenges inherent in providing support and performing an investigatory role. As such, the Review Team recommends that victim coordinators not also have investigator duties related to the same case for which they serve as coordinator. Unless investigators are always involved in all steps of case development and adjudication, they will be absent for later portions of cases and will not be as capable of informing the victim about the enforcement and adjudicatory steps taken. Further, anything the victim says to the Investigator will be discoverable. This could present barriers to approaching victims in a trauma-informed way. Finally, the Victim Coordinator needs to be non-judgmental and coordination or assistance should not be contingent on whether the coordinator believes the victim or whether there is a prosecutable case.

- ❖ *Recommendation: The Board should draft a stand-alone position statement about professional expectations of licensees regarding physical examinations and sexual contact with patients*
- ❖ *Recommendation: If at any point during an investigation there is evidence of substantial risk to the public, consideration should be given to immediate cessation of practice*
- ❖ *Recommendation: The newly created, Investigations Committee should review all cases that are recommended for closure by an Investigator without going to enforcement. We recommend review by a public member of the Board, in addition to the Secretary and Supervising Member*
- ❖ *Recommendation: A committee comprised of the Secretary, Supervising Member, at least two public members, and additional members where feasible, should be directly referred cases that are recommended for closure after having gone to enforcement*
- ❖ *Recommendation: No complaint involving allegations of sexual misconduct should be closed without public member input*
- ❖ *Recommendation: If a public member disagrees with a recommendation for closure, the case should be sent back to investigations prior to consideration of closure by the full Board*
- ❖ *Recommendation: Victim coordinators should not also have investigator duties*

IX. Quality Assurance

a. Quality Intervention Program (QIP)

The SMBO is required by law to have a confidential investigatory process for quality of care complaints that do not rise to the level where they may require disciplinary action. The program involved the use of two review panels, each comprised of six physicians and one public member who would review cases and make recommendations for disposition to the Secretary and Supervising Member. The recommendations from each panel could include case closure, remedial education, confidential letters of caution, or an escalation to enforcement for formal action.

During interviews with Board staff, the Review Team learned that QIP is no longer being utilized. It was not clear whether it has been replaced by other processes or if the fact that some letters of caution include recommendations for remedial education when warranted is meant to account for this potential disposition. However, the absence of QIP removes an additional opportunity for physicians and Board members, including public members, to engage in the regulatory process and identify learning opportunities for licensees who are subjects of quality of care complaints. Further, the QIP process involves a review for compliance with remedial education requirements, thereby adding an element of assurance that efforts will be made by the licensee to remediate a gap or deficiency in their practice. The understanding of the Review Team is that no such assurance is provided through mere letters of caution, despite potential revisiting of educational recommendations if the licensee receives a subsequent complaint.

The Review Team recommends that new QIP panels be created and used in quality of care cases where warranted.

- ❖ *Recommendation: New QIP panels should be created and utilized in quality of care cases*

b. Post-mortem Review of Closed Cases

When a case is closed under the direction of the Secretary and Supervising Member, the details of the case and the associated determination to close are not revisited, unless subsequent complaints are made, or disciplinary action occurs. This means that Board members are not privy to the reasons for closure of cases that did not result in a hearing or disciplinary action.

The Review Team believes there are missed opportunities for public member involvement and additional Board member involvement in the decision-making process through a regularly scheduled post-closure review of cases, analysis of trends, and subsequent report to the full Board. This would provide assurances to the Board and the public that closures are occurring for appropriate reasons that are generally acceptable to all Board members. In addition to post-mortem reviews, the Board should also consider instituting quality checks throughout the investigative process to provide ongoing assessment of the Board's processes and procedures.

The Review Team learned that the Board previously had a Quality Assurance Committee comprised of four physician members that would meet regularly and was responsible for reviewing closed complaints of all types, in addition to statistics related to timelines for complaint processing, numbers of open complaints, and complaint dispositions by category. The Review Team was able to consider meeting agendas and minutes from this committee for a selection of meetings that took place from 1993 to 2002. This committee appeared to present several elements related to quality assurance in regard to complaints and case closures that are currently absent from processes at SMBO, including a post-mortem review of closed cases and an analysis of complaints and case processing data. The Review Team recommends restarting the Quality Assurance Committee. In addition to the physician members, the new Committee should have public member involvement.

❖ *Recommendation: Reinstate the Quality Assurance Committee, comprised of both physician and public members*

X. Communications with Licensees and Complainants

a. Communication with Licensees

During interviews with staff, the Review Team heard that varying degrees of communication exists between the Board and licensees during the complaint process, specifically relating to if and when a licensee is notified of a pending complaint. It was communicated by staff that there are certain types of complaint offenses that are not shared with a licensee until a certain number of complaints are received by the Board.

The Review Team recommends that the Board send the licensee a copy of the complaint with a standard letter stating that a complaint has been filed against them, that the letter is not a notice of a formal hearing, and that the respondent must respond within a certain number of days. For cases where the Board has initiated an investigation, it is recommended that the Board send a letter to the licensee providing notice of the investigation and describing the matters for which a response is required.

Equally important as notification of when a complaint is filed against a licensee is notification of when investigations are completed or closed. The Review Team also recommends that the Board provide notification to licensees in these situations.

- ❖ *Recommendation: Provide written notification to licensees when any complaint is received by the Board*
- ❖ *Recommendation: Provide written notification to licensees when investigations are completed or closed*

b. Communication with Complainants/Victims

Filing a complaint against a licensee or reporting a possible violation can often be a difficult choice made by a patient, employee, or family member. It can also be difficult to navigate the complaint process. In Ohio, confidentiality is assured to those who report violations in good faith. An individual's identity is not required prior to filing a complaint or report and is not shared with the licensee whose conduct is in question.

Once an individual files a complaint with the SMBO, they should be notified of the status as the investigation process proceeds. It is important that those who file a complaint, as well as those who serve as key witnesses during an investigation, are given adequate and timely information regarding the status of the complaint. The Review Team recommends that complainants be offered a navigator/coordinator who they can contact with questions, and that complainants and key witnesses are provided regular updates regarding the status of the case.

- ❖ *Recommendation: Offer complainants a complaint navigator/coordinator*
- ❖ *Recommendation: Provide regular status updates to complainants and key witnesses*

XI. Case Management Systems

The Review Team reviewed the SMBO's procedures, processes, and systems, including the Board's current use of Salesforce, a customer relationship management system. Through interviews with Board staff, it became clear that Salesforce is not providing the resource that is needed to sufficiently fulfill the needs of the Board. While the Board may wish to modify their Salesforce system, it would still not result in a product designed for case management.

It is recommended by the Review Team to implement case management software that would give the Board the industry-specific tools they need for triage, communication, investigation, and reporting. Lack of a centralized system for managing all aspects of a case lends itself to delayed reporting, fragmented communication, absence of security oversight, and potential loss of data. While it might be possible to extend the existing Salesforce case tracking solution to include added functionality, it would be prudent to consider implementing a legal case management system instead. Case management software can provide organization and tracking for improved process flow, communication, and transparency. A good case management solution provides an end-to-end management of a case from intake to closure. It allows for cross-team collaboration, real-time work updates, document sharing, workload/resource management and visibility, alerts and notifications, increased transparency, and clear audit trails. If the solution is web-based and/or in the cloud, it enables the ability to update cases from any location.

Some key elements to consider when selecting a case management system:

- *Centralized database with multi-user access* – facilitates information sharing and encourages collaboration between team members

- *Communications* – tasks, notes, discussions, and email integration enable better communication and collaboration
- *Built-in dashboards, reporting, and advanced data analysis tools* – real-time reporting allows for data-driven decisions
- *Workflow and scheduling capabilities* - workflow rules and alerts ensure that due dates are met and to make it easy for investigators, managers, and executives to quickly understand the status of cases
- *Configurable, flexible, and scalable* – needs to be customized to fit the business requirements of the organization
- *Web-Based and accessible* – with a system that is always available, users can update notes and status, and upload files and recordings in real time
- *Access and controls* – ensures security and confidentiality of case data
- *Other key considerations* - security standards, robust product support

❖ *Recommendation: Implement case management software that would give the Board the industry-specific tools needed for triage, communication, investigation, and reporting*

Conclusion

The Review Team wishes to commend the SMBO for embracing this opportunity and its commitment to the wellbeing of the agency. The Board and staff have demonstrated a sincere desire to make meaningful improvements to their processes for promoting patient safety in Ohio and ensuring the Board follows best practices in medical regulation.

The SMBO has a unique opportunity to consider its operational and administrative processes at a time when there is overwhelming support, both internally and externally, in response to the Report of the Governor’s Working Group. It is the hope of the Review Team that the recommendations provided in this report will contribute to improving administrative processes and operational effectiveness regarding the Board’s handling of complaints and investigations, including, but not limited to, sexual impropriety.

The review team wishes to extend our thanks to the SMBO staff and Board members who were extremely helpful in providing information, making themselves available for interviews, and offering carefully considered and detailed responses to our questions. This project has been an enjoyable and rewarding experience for the FSMB, and we hope to continue to support the Board as it implements these recommendations and regulates the practice of medicine in Ohio. We welcome the opportunity to present our report and recommendations to the Board, offer advice on future challenges, and explore potential improvements and initiatives.

Attachments

[Attachment 1: Document Review](#)

[Attachment 2: Virtual Interview Schedule](#)

Attachment 1
Document Review

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3. SMBO Organizational Chart
4. SMBO Employee Position Descriptions
5. SMBO Employee Tenure Data
6. SMBO Staff Participation in FSMB Educational Events
7. SMBO Staff Training
8. Alternate Headquarters Policy
9. Statewide Onboarding or Annual Training Required
10. Training Report for Board, Jan. 2019
11. Board Member Compensation Policy
12. Medical Board Reference Manual, 2010
13. Public Services Manual
14. Intro to the Medical Board – FY19 Update for Orientation
15. Medical Board Members Duties & Responsibilities, Dec. 2019
16. Enforcement/Investigations Sexual Misconduct Teams
17. Investigator Field Map
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20. Statutes and Rules Pertaining to the State Medical Board of Ohio
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- 51. Quality Assurance Committee Agendas and Minutes

Attachment 2
Virtual Interview Schedule

Virtual Interview Schedule

Thursday, May 14, 2020

Alexandra Murray, Standards Review and Compliance	11:00am-12:00pm
James Roach, Chief of Investigations	12:00pm-1:00pm
Greg Porter, Deputy Director, Hearing Unit and Chief Hearing Examiner	1:00pm-2:00pm
Lunch Break	2:00pm-3:00pm
Cynthia Erwin, Board Nurse Specialist	3:00pm-4:00pm

Friday, May 15, 2020

Rebecca Marshall, Chief Enforcement Attorney	12:00pm-1:00pm
Kim Anderson, Chief Legal Officer	1:00pm-2:00pm
Lunch Break	2:00pm-3:00pm
Stephanie Loucka, Executive Director	3:00pm-4:00pm

Tuesday, May 19, 2020

Michael Schottenstein, MD, Board President	1:00pm-2:00pm
Kim Rothermel, MD, Board Secretary	2:00pm-3:00pm

Thursday, June 4, 2020

Michael Roever, Investigator	11:00am-12:00pm
Chad Yoakam, Investigator	12:00pm-1:00pm
David McAfferty, Investigative Supervisor	1:00pm-2:00pm
Lunch Break	2:00pm-3:00pm
Mark Blackmer, Enforcement Attorney	3:00pm-4:00pm
Rebecca Marshall, Chief Enforcement Attorney	4:00pm-5:00pm

Friday, June 5, 2020

Melinda Snyder, JD, Assistant Attorney General	11:00am-12:00pm
Betty Montgomery, Public Board Member	12:00pm-1:00pm
Lunch Break	1:00pm-2:00pm
Bruce Saferin, MD, Supervising Member	2:00pm-3:00pm
Stephanie Loucka, Executive Director	3:00pm-4:00pm