



Board of Physicians

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2022 SESSION POSITION PAPER

BILL NO.: SB 77 – Health Occupations Boards – Investigations – Right to Counsel
COMMITTEE: Education, Health, and Environmental Affairs
POSITION: Letter of Opposition

TITLE: Health Occupations Boards – Investigations – Right to Counsel

BILL ANALYSIS: Provides that licensees or certificate holders under investigation by a health occupations board may be represented by counsel during the investigation, and have counsel present at any interview of the licensee or certificate holder by or on behalf of the health occupations board during the investigation.

POSITION & RATIONALE:

The Maryland Board of Physicians, the Maryland Board of Nursing and the Maryland Board of Occupational Therapy Practice (the Boards) are respectfully submitting this letter of opposition for Senate Bill 77 – Health Occupations Boards – Investigations – Right to Counsel. SB 77 permits licensees or certificate holders to have counsel present at any interview of the licensee or certificate holder conducted by a health occupations board during an investigation. The Boards support the ability of their licensees and certificate holders to use private counsel during an investigation and have always permitted licensees and certificate holders to be accompanied by counsel during interviews. However, SB 77 is overly broad and has the potential to hamper the Boards from completing their core duty of protecting the public through lawful investigation of complaints, in a timely fashion.

Investigation of complaints is the primary means by which the Boards safeguard public health. The Boards' licensees and certificate holders are statutorily required to cooperate with these investigations pursuant to the Maryland Annotated Code's Health Occupations Article § 14-404(a)(33), § 8-316(a)(20), § 8-6A-10(a)(24), § 8-6B-18(a)(27), § 8-6C-20(a)(18), and § 8-6D-10(a)(18). Throughout this process, licensees and certificate holders are provided numerous opportunities to participate in the investigative process, and licensees and certificate holders have always been allowed to be represented by counsel at every stage of this process, including during interviews.

SB 77 allows licensees and certificate holders to be represented by counsel during any investigation that “may result in charges or sanctions against the licensee,” but provides no clarification regarding what that representation would entail. Every complaint filed with the Boards could potentially result in charges, but the vast majority of complaints are closed during the preliminary investigation and do not reach the interview stage. There is no prohibition on consulting with counsel when responding to the Boards’ subpoenas or other inquiries, and many licensees and certificate holders choose to retain counsel during these preliminary stages. The Maryland Board of Physicians has also promulgated regulations that state that a respondent may be represented by counsel in any matter before a disciplinary panel and during any stage of the disciplinary proceedings¹. Meanwhile, the Maryland Board of Nursing’s regulations provide that a party appearing at a formal hearing before the Board of Nursing has the right to be accompanied, represented, and advised by counsel, so long as they are authorized to practice law in the State of Maryland². The Boards are unclear as to how this legislation will change the Boards’ current investigative process and why this change is necessary.

Furthermore, SB 77 contains no provision for addressing counsel who become disruptive or who otherwise interfere with the investigative process. Board staff’s investigative interviews support the Boards’ fact-finding missions and allow the Boards to properly investigate complaints and determine whether further action by the Boards is necessary. Interviews occur prior to any charges being filed, and in the majority of cases, no charges are filed as a result of these investigations. However, these interviews are a vital part of the Boards’ investigative process, and therefore cannot be impeded without jeopardizing the health of Maryland’s citizens. The Boards have shared concerns that retained counsel will use the language in SB 77 to dictate when and how the Boards can conduct their interviews. The Boards’ investigative interviews are not depositions and there is no legal process for a court to rule on objections in an interview, as in a deposition. While the Boards have always allowed counsel to be present during these interviews, this cannot come at the cost of allowing these interviews to be disrupted without recourse.

Finally, SB 77 includes no definition or clarification as to what constitutes an interview of the licensee or certificate holder. During the course of an investigation, the Boards’ investigators typically communicate with a licensee or certificate holder on numerous occasions, from providing initial notice that a complaint has been filed to performing unscheduled site inspections. If SB 77 passes, the Boards are concerned that some licensees or certificate holders will attempt to delay or halt the investigative process by claiming that any such communication constitutes an interview and refuse to talk to the Boards without the presence of counsel.

The Boards support efforts to ensure that the investigative process is fair and allows for all licensees and certificate holders to consult with private counsel, and the Boards would be happy to work with bill sponsors and advocates to this end. However, the Boards’ primary duty is to protect the public, and they do so by thoroughly investigating any complaints that allege a licensee or certificate holder violated the Medical Practice Act, Nurse Practice Act or Occupational Therapy Practice Act in a timely manner. As such, the Boards cannot support any

¹ Code of Maryland Regulations 10.32.02.03F(1).

² Code of Maryland Regulations 10.27.02.02.

legislation that could potentially impede the investigative process. For the reasons stated, the Boards must respectfully oppose SB 77.

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The opinion of the Boards expressed in this document does not necessarily reflect that of the Maryland Department of Health or the Administration.