



Board of Physicians

Larry Hogan, Governor · Boyd K. Rutherford, Lt. Governor · Damean W.E. Freas, D.O., Chair

2022 SESSION POSITION PAPER

BILL NO.: SB 77 – Health Occupations Boards – Investigations – Right to Counsel
COMMITTEE: Health and Government Operations
POSITION: Letter of Opposition

TITLE: Health Occupations Boards – Investigations – Right to Counsel

POSITION & RATIONALE:

The Maryland Board of Physicians and the Maryland Board of Nursing (the Boards) are respectfully submitting this letter of opposition for Senate Bill (SB) 77 – Health Occupations Boards – Investigations – Right to Counsel. As amended, SB 77 permits licensees or certificate holders to have counsel present at and participate in any interview of the licensee or certificate holder conducted by a health occupations board during an investigation. This participation explicitly includes, but is not limited to, the ability to ask questions, ask for clarification, provide advice and “provide information relevant to the investigation.” Counsel may only be excluded if the Boards are able to demonstrate evidence that counsel is both substantially interfering with the investigation and violating the Rules of Professional Conduct or otherwise acting in a manner that is prejudicial to the administration of justice.

Constitutional due process rights, such as the right to an attorney, do not apply unless and until a health occupations board issues charges against a licensee or certificate holder. SB 77 would prematurely create a legal right to counsel during the investigative stage, prior to any charges being considered, let alone issued. Even though it is not constitutionally or legally required, the Boards already 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 represented by counsel during interviews. However, the Boards are strongly opposed to SB 77 in its current form. As written, SB 77 is overly broad and has the extreme potential to effectively hamper the Boards from accomplishing their core duty of protecting the health, safety, and welfare of the public by adequately regulating health occupations, as required by Health Occupations Article § 1-102, and especially by 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." 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.

According to Public Citizen, a non-profit consumer advocacy group with over 15,000 Maryland members, "to ensure the health and safety of Maryland residents and others who seek health services in the state, the ability of the Board[s] to conduct investigations must not be impeded." (See Attachment.) However, SB 77 would do just that, by significantly hindering the ability for the Boards to deal with disruptive counsel during investigations.

The Boards do encounter situations where counsel actively seeks to delay or impede investigations using tactics such as forcing frequent last-minute rescheduling, consistently disrupting the logical flow of interviews by interrupting the investigator and the counsel's client during the interview process and even refusing to allow a Board agent to perform unannounced inspections³ if counsel is not present. In one such case, a licensee's counsel advised their client to actively bar an inspector from performing an unannounced inspection until they arrived, forcing the inspector to contact law enforcement to gain entry. While waiting for law enforcement to arrive, the inspector was able to observe staff shredding documents and cleaning the office. It is precisely these types of obstructive activities that not only frustrate and prolong the truth-seeking nature of the Boards' investigative process, but compromise the Boards' ability to protect public health and safety.

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

¹ Code of Maryland Regulations 10.32.02.03F(1).

² Code of Maryland Regulations 10.27.02.02.

³ The Medical Practice Act authorizes such inspections by the Board of Physicians. Health Occ. § 14-206(d).

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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.

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. Board staff conduct investigations and interviews consistent with the authorizing provisions of the various practice acts, which do not permit licensees being investigated to dictate the timing, scope and manner of an investigation or an investigative interview. Otherwise, the Boards' authority to properly conduct its investigative proceedings and interviews could be essentially derailed.

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. This is especially concerning now with the amendments that would allow counsel to both be present at and participate in the interview. 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 with no recourse. SB 77 includes language that an agent of the Boards can exclude counsel under certain circumstances, but the bar for doing so is unreasonably high. Board agents would be required to demonstrate evidence both of substantial interference and that counsel was violating the Rules of Professional Conduct. Board investigators are not attorneys and are not experts in the Rules of Professional Conduct, and the Boards are unclear what would constitute evidence of substantial interference, or to whom such evidence would be presented. With no clear way to meet the standards for exclusion presented in SB 77, counsel would be empowered to disrupt or interfere with the investigative process without recourse, all before charges are ever filed or a hearing is ever held.

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 or the Nurse Practice Act in a timely manner. As such, the Boards cannot support any legislation that could potentially impede the investigative process. For the reasons stated, the Boards must respectfully oppose SB 77.

For more information, please contact Matthew Dudzic, Manager of Policy and Legislation, Maryland Board of Physicians, 410-764-5042 and Iman Farid, Health Policy Analyst, Maryland Board of Nursing, 410-585-1536.

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January 26, 2022

The Honorable Paul G. Pinsky, Chair
The Honorable Cheryl C. Kagan, Vice Chair
Senate Education, Health, and Environmental Affairs Committee
Maryland General Assembly
2 West Miller Senate Office Building
Annapolis, MD 21401

RE: Opposition to Senate Bill 77 — Health Occupations Boards – Investigations – Right to Counsel

Dear Chairperson Pinsky and Vice Chairperson Kagan:

Public Citizen, a nonprofit consumer advocacy group with more than 15,000 members and supporters in Maryland and more than 500,000 members and supporters nationwide, strongly urges the Maryland Senate’s Education, Health, and Environmental Affairs Committee to soundly reject Senate Bill 77 (SB 77) as written and give it an unfavorable report.

Public Citizen does not oppose due process and the right to counsel, but we do oppose SB 77. Although SB 77 appears innocuous on its surface, it would seriously impede the ability of the Maryland Board of Physicians (the “Board”) to properly investigate and discipline physicians. Board interviews are not depositions, and unlike in criminal cases, a physician is required by the Maryland Medical Practice Act to cooperate with any lawful investigation by the Board. We understand that the Board always permits counsel to sit in on and participate in interviews of licensees, but counsel are advised that if they become disruptive, they may be asked to leave. We are concerned that SB 77 would seriously impede the Board’s ability to deal with disruptive counsel and would make it impossible for the Board to enforce “failure to cooperate” as a disciplinary ground in cases where a physician’s attorney disrupts the investigative process during interviews of licensees.

We also are concerned that the term “interview” is not defined in SB 77 even though the bill says a licensee may “have counsel present at **any interview** of the licensee...” If “interview” is interpreted to mean any communication between the Board and a licensee during an investigation (including, for example, during unscheduled inspections), it would be impossible as a practical matter for the Board to conduct reasonable investigations and unscheduled inspections, which are a necessary part of its activities to protect the public.

We believe that to ensure the health and safety of Maryland residents and others who seek health services in the state, the ability of the Board to conduct investigations must not be impeded. The fact that the Maryland Board ranks only 27th in our rankings of state medical boards, based on the rate of serious disciplinary actions taken against licensees from 2017 to 2019,¹ demonstrates

¹ Public Citizen. Ranking of the Rate of State Medical Boards’ Serious Disciplinary Actions, 2017-2019. March 31, 2021. <https://www.citizen.org/wp-content/uploads/2574.pdf>. Accessed January 25, 2022.

that it is unlikely the Board is running roughshod over the due process rights of Maryland physicians during the conduct of investigations into quality of care or physician conduct and related disciplinary proceedings and that the Board actually should be more diligent in pursuing investigations and disciplinary actions. The legislature should not make it more difficult for the Board to do what is necessary to protect the public from the relatively few physicians who are incompetent or engage in professional misconduct.

The Maryland General Assembly must not support legislation that would endanger the safety of patients in Maryland by making it more difficult for the Board to do its job. The job of any state medical board is to protect the public's health, safety, and welfare through the proper licensing, disciplining, and regulation of physicians. The apparently innocuous SB 77, as written, would provide unwarranted protections to physicians and undermine the Board's ability to fulfill its mission. The legislation would protect potentially dangerous doctors who practice in Maryland while harming the public.

In closing, Public Citizen urges the Maryland Senate's Education, Health, and Environmental Affairs Committee to place the health interests of Maryland patients above the protection of incompetent and unprofessional physicians by giving SB 77 an unfavorable report.

Thank you for considering our views on these important patient rights and safety issues.

Sincerely,



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cc: Members of the Senate Education, Health, and Environmental Affairs Committee