

BOARD OF MEDICAL EXAMINERS

Special Follow-Up Review

October 2001

The Honorable Jane Dee Hull, Governor

The Honorable Randall Gnant, President
Arizona State Senate

The Honorable Jim Weiers, Speaker
Arizona House of Representatives

Ms. Claudia Foutz, Executive Director
Arizona Board of Medical Examiners

The Auditor General has conducted a special follow-up review of the Arizona Board of Medical Examiners (Board). This report was conducted in response to the provisions of Laws 2001, Chapter 270, which require this Office to report on the progress the Board has made in implementing the recommendations the Auditor General made in a 1998 performance audit (see Report No. 98-16).

Summary

The Board has taken steps to resolve a majority of the problems identified in the 1998 audit; however, some continued efforts are needed to improve the timeliness of investigations, establish disciplinary guidelines, and ensure advisory letters are issued consistently and appropriately.

Background

The Board of Medical Examiners is a 12-person board that regulates the practice of

allopathic medicine in Arizona through licensure. The Board is composed of eight licensed Arizona physicians and four public members, one of whom is a registered nurse. The Board employs an executive director and a staff of 58 full-time employees to license physicians, investigate consumer complaints, and provide information to the public. As of August 29, 2001, the Board was responsible for regulating 16,018 actively licensed physicians. The Board collected more than \$6 million in revenues in fiscal year 2001, approximately \$5.9 million of which came from

licensing fees. At the end of fiscal year 2001, the Board had a fund balance of approximately \$3.7 million.

Since 1994, the Office of the Auditor General has conducted five audits of the Board, which have identified a number of ongoing concerns. The 1994 audit (see Report No. 94-10) found that the Board faced several major issues, including a large complaint backlog, slow complaint resolutions, weak discipline, and incomplete investigations. Although a 1996 audit (see Report No. 96-L1) found that the Board appeared to be making progress in these areas, similar problems were again cited in 1998 (see Report No. 98-16). Specifically, the 1998 audit found:

- **Slow resolution for some complaints**— Although timeliness had improved for most complaints, some complaints still took up to 6 years to resolve. In addition, the Board unnecessarily delayed investigating malpractice complaints.
- **Lax discipline**— The Board frequently chose to issue nondisciplinary letters of concern, now known as advisory letters, rather than impose discipline. In addition, it had not used disciplinary guidelines to help ensure appropriate and consistent decisions.
- **Inadequate complaint investigations**— Necessary medical records were not obtained consistently, and complainants and witnesses were not typically interviewed.
- **Insufficient compliance monitoring**— When the Board did impose discipline, it did not always ensure that doctors complied with its orders.

The Board's progress toward resolving the problems identified in the 1998 audit was assessed in 1999 (see Report No. 99-F) and again

in this review. The 1999 audit found that the Board had developed and implemented policies related to complaint investigations and complainant interviews; however, the policies were so new that auditors were unable to extensively test for compliance at that time.

Investigation Timeliness

The Board has taken several steps that should enable it to resolve complaints more quickly, but some additional work is needed to eliminate lengthy investigation delays. The Board has concentrated on resolving its oldest complaints. Although this has actually increased the average resolution time for non-malpractice complaints, eliminating these old complaints, coupled with increased staffing and improved management information, should reduce the time to resolve complaints in the future. The Board needs to make other efforts to correct timeliness problems associated with malpractice complaints.

Improvements have been made to resolve non-malpractice complaints in a more timely manner— While the Board has historically had problems resolving consumer complaints in a timely manner, it has taken a number of steps during the past 2 years to resolve timeliness problems. For instance, the Board has focused its attention on resolving its oldest complaints. In fiscal year 2001, the Board acted on a total of 1,214 complaints, 281 of which were received before 1999. Currently, the Board has only two unresolved complaints that were received before 1999.¹ Re-

¹ Another 28 complaints received prior to 1999 have been referred to the Attorney General's Office to undergo a formal hearing. A total of 92 complaints are currently awaiting action by the Attorney General's Office.

solving these older complaints increased the average resolution time from 200 days, as reported in 1998, to 542 days in fiscal year 2001.² However, future timeliness should improve now that the Board can concentrate on more recent complaints.

To help resolve long-standing complaints, the Board hired additional investigators and support staff. In early 1999, heavy staff turnover left the Board with as few as three investigators. The Board has since reduced turnover and has added staff so that it currently has nine investigators and three investigative aides. As a result, complaint caseloads have decreased from approximately 230 complaints per investigator in fiscal year 1999 to 85 as of August 2001, according to Board management. The additional staff helped the Board to resolve approximately 475 more complaints in fiscal year 2001 than in fiscal year 1999.

In addition, the Board implemented numerous management reports to track the overall status and age of complaints; however, auditors determined that these reports did not prevent individual complaint investigations from languishing. Auditors reviewed a random sample of 61 complaints resolved in fiscal year 2001 and found unexplained gaps in 49 of the investigations ranging from 63 to 847 days. Some investigations experienced as many as four such gaps which, when combined, delayed resolutions by as long as 1,050 days. After auditors raised this concern, management developed additional reports to identify complaint investigations that are inactive for 30 days. Management indicates that it now plans to follow up with the assigned investigator when such delays are identified.

Malpractice complaint investigations delayed— Malpractice complaint investigations are also subject to delays. Although the Board has become more proactive in its attempts to obtain the information it needs to begin investigating malpractice complaints, it often has difficulty obtaining the information it needs from plaintiffs' attorneys, and does not always assign cases to investigators in a timely manner.

Statutes require the doctor's insurance company and the plaintiff's attorney to notify the Board when a malpractice case is settled against a doctor. The Board then initiates its own investigation to determine whether the doctor should be disciplined. In 1998, we found the Board waited to receive notification from both insurers and plaintiffs' attorneys before initiating investigations, which delayed the start of investigations by as long as 80 days. Now, if the Board obtains any information indicating that a settlement has occurred, it proactively contacts attorneys and requests copies of the settlement notice. However, it still takes the Board as long as 318 days to obtain all of the needed information.³ Delays occur for several reasons. For example:

- Some plaintiffs' attorneys have refused to send copies of settlement agreements to the Board, as required by statute, because the agreements contain clauses making the information they contain confidential. To limit unnecessary delays, the Legislature should consider clarifying A.R.S. §12-570 to require that settlement agreements be submitted without regard to confidentiality clauses.
- In addition to statutorily required information, the Board asks attorneys to provide additional information to enable the Board to

² Based on auditors' review of a random sample of 61 complaints resolved in fiscal year 2001.

³ Based on auditors' review of a random sample of 35 malpractice complaint investigations initiated in fiscal year 2001.

obtain necessary medical records and to gain a clear understanding of the case. However, some plaintiffs' attorneys have refused to provide the requested information because the law does not require them to do so. To facilitate malpractice investigations, the Legislature should consider modifying A.R.S. §12-570 to also require plaintiffs' attorneys to submit current address and telephone number information for the plaintiff and/or patients involved; patients' birth dates and social security numbers; and depositions and statements made by all parties.

- The Board has not always followed up in a timely manner with attorneys who have not responded to its requests. For example, the Board took approximately 1 year to obtain all of the information it needed to initiate one investigation. The attorney was unresponsive, and although the Board did follow up periodically until it received necessary documents, it allowed up to 3 months to pass between follow-up requests.

According to its management, the Board is working to expand its formal complaint-tracking system, so that it can be used to track efforts to obtain the information necessary to begin an active investigation. The planned expansion is expected to be complete in mid-2002.

Finally, the Board needs to eliminate delays in assigning these cases to investigators. Currently, the Board has a policy of initiating an investigation within 5 days of receiving a complaint. However, it does not initiate malpractice complaint investigations within 5 days of receiving complete information. Auditors reviewed a random sample of 35 malpractice complaints initiated in fiscal year 2001 and found that once complete information was received, the Board took between 9 and 175 days to assign these

complaints to investigators. To ensure malpractice complaints are resolved in a timely manner, the Board should assign them to investigators within 5 days of receiving complete information.

Investigation Comprehensiveness

The Board has made a number of improvements to its investigative process; however, some additional effort is needed to ensure that complainant interviews are conducted in accordance with Board policies and that they are adequately documented. In 1998, auditors found that the Board's investigative process did not ensure that complainants and witnesses were interviewed in every case, that all necessary records were obtained, and that all complainant allegations were addressed.

This review tested compliance with the Board's investigation policies and found that most of the problems associated with the quality of the Board's investigations have been addressed, but some concerns remain about complainant interviews. Auditors reviewed a random sample of 28 complaints filed since July 2000. The review found that in 18, or 64 percent, of the cases, complainant interviews were adequate and the results were documented. In the remaining 10 cases, the investigator or investigative aide did not interview the complainant, adequately interview the complainant, or adequately document the substance of the interview. According to Board management, investigators and aides are not necessarily expected to document the results of complainant interviews; however, without such documentation, decision makers do not have all of the pertinent information needed to resolve a complaint. In addition, if in-

vestigation staff turnover occurs, adequate documentation is important to ensure continuity of the investigation. Therefore, the Board should ensure all complainants are interviewed and that the interviews are appropriately documented.

Compliance Monitoring and Complaint Adjudication

Although the Board has significantly increased efforts to monitor compliance with its disciplinary orders, additional work is needed to improve complaint adjudications. The 1998 audit found that the Board did not ensure that doctors complied with disciplinary orders. In addition, the Board was not using disciplinary guidelines to help ensure that its complaint adjudications were consistent and appropriate. Finally, the Board was issuing letters of concern, now known as advisory letters, when disciplinary action could have been taken. Since 1998, the Board has begun monitoring compliance with its orders, but there are still some outstanding concerns relating to the Board's lack of disciplinary guidelines and its use of advisory letters to resolve complaints involving apparent statutory violations.

Compliance monitoring implemented—The Board has fully implemented recommendations relating to compliance monitoring, and has established a compliance unit, which now consists of four employees. It has also standardized quarterly reporting deadlines to simplify tracking, and it works to facilitate compliance by ensuring that doctors are allowed a reasonable amount of time to complete Board-ordered education courses. The compliance unit also has a database

for tracking compliance and uses an alert, or tickler, system to inform staff when compliance is due and to track follow-up efforts.

Disciplinary guidelines proposed—In January 2001, the Board began efforts to establish disciplinary guidelines, and a proposed draft of the guidelines was made available for public comment on the Board's Web site. The Board's assistant attorney general has recently advised the Board that it cannot begin using the disciplinary guidelines to decide cases until they are promulgated as administrative rules, which should occur in early 2002.

Some advisory letters still appear inappropriate—The Board continues to issue advisory letters in some cases where apparent statutory violations exist, but it has not established and consistently used criteria to guide its decisions in these cases. Statute provides for the Board to issue advisory letters when it has concerns about what a doctor may be doing, but lacks sufficient evidence to support disciplinary action. The Board's proposed disciplinary guidelines further provide for advisory letters to be issued if a doctor has shown substantial rehabilitation or has committed a minor technical violation, regardless of whether a statutory violation has occurred. The proposed disciplinary guidelines, however, only include criteria to help assess whether a technical error has occurred. They do not address or define substantial rehabilitation or insufficient evidence. Without such criteria, some of the Board's decisions to issue advisory letters appear questionable. For example:

- A woman with swollen lymph nodes went to a physician asking that he rule out Hodgkin's disease, which is characterized by painless tumor growths in the neck lymph nodes and can result in death if left untreated. The physician performed a lymph

node biopsy on the woman, during which the spinal accessory nerve was damaged. The Board investigator, medical consultant, and the lead Board member for the case found that there was evidence that the physician had violated statutes relating to conduct that may harm a patient, and had fallen below the accepted standard of care. They recommended that the physician be disciplined.

The full Board, however, resolved the case in 2001 with a nondisciplinary advisory letter for “performing a lymph node biopsy without adequate knowledge of the surgical anatomy of the posterior neck, and causing damage to the spinal accessory nerve.” The letter stated that the Board lacked sufficient evidence to impose discipline. However, the Board appeared to arrive at this determination based mainly on the doctor’s statement that he no longer performed this procedure, which does not negate the evidence that the Board had before it.

- In another case, a doctor was under a disciplinary Board order to complete 20 hours of education in obstetrical care within 1 year. The doctor completed the required hours, but not until 2 months after the 1-year deadline had expired. The Board issued the doctor a nondisciplinary advisory letter for committing a minor technical violation. However, under the Board’s proposed disciplinary guidelines, violation of a Board order should result in disciplinary action.

The Board needs to ensure that its criteria for issuing advisory letters is comprehensive and appropriately established in administrative rule. Further, when it adjudicates complaints, the Board should first make a clear determination of whether a statutory violation occurred. If the

evidence indicates that a violation did occur, the Board should then use its established criteria to determine whether the seriousness of the violation puts it in a category requiring discipline. If, based on the criteria, the Board determines an advisory letter is an appropriate resolution for the case, it should include its reasoning in the letter to inform the public of any mitigating circumstances.

Public Information

As part of this review, auditors assessed the quality and quantity of information available to the public about doctors, and found that complaint-related information currently provided is accurate and meets statutory reporting requirements. Public information was not addressed in the 1998 report; however, since then the Board has developed an extensive Web site to provide consumers with information about physicians. The Web site allows consumers to search for information about physicians. The information provided to consumers includes physicians’ education and training; a summary of all disciplinary actions; a summary of advisory letters issued in the past 5 years; the number of complaints dismissed against the physician in the past 5 years; and the number of pending investigations.

Summary of Recommendations

1. To limit unnecessary delays and facilitate malpractice investigations, the Legislature should consider clarifying A.R.S. §12-570 to:

- a. Require that settlement agreements be submitted to the Board without regard to confidentiality clauses, and
- b. Require plaintiffs' attorneys to submit additional information to the Board, including current address and telephone number information for the plaintiff and/or patients involved; patients' birth dates and social security numbers; and depositions and statements made by all parties.
2. To ensure malpractice complaints are resolved in a timely manner, the Board should assign them to investigators within 5 days of receiving complete information.
3. The Board should ensure all complainants are interviewed and that the interviews are appropriately documented.
4. The Board should establish and consistently use comprehensive criteria for adjudicating complaints, including criteria for issuing advisory letters.
5. When adjudicating complaints, the Board should first make a clear determination of whether a statutory violation occurred.
6. If the evidence indicates that a violation did occur, the Board should then use its established criteria to determine whether the seriousness of the violation warrants discipline.
7. If the Board determines an advisory letter is an appropriate resolution for the case, based on the criteria, it should include its reasoning in the letter to inform the public of any mitigating circumstances.

We have reviewed the results of this work with Board officials. My staff and I will be pleased to discuss or clarify items in this report.

Sincerely,

Debbie Davenport
Auditor General

cc: Members—Joint Legislative Audit Committee
Members—Senate Health Committee
Members—House Health Committee