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December 27, 2013

OPINION NO. 2013-08

MEDICAL EXAMINERS; CONFIDENTIALITY; JUDGMENTS: Reports submitted pursuant to NRS 630.3067, 630.3068, and 690B.250, are public records within the meaning of NRS 239.010 and must be open to public inspection. The report submitted pursuant to NRS 630.260, is a public record within the meaning of NRS 239.010, and the Commissioner of Insurance is prohibited from making the information contained in that report confidential pursuant to NRS 679B.190 due to the plain reading of NRS 690B.260. The reports received from the National Practitioner Data Bank are deemed confidential by federal law and are not public records within the meaning of NRS 239.010.

Edward O. Cousineau, Esq.
Deputy Executive Director
Nevada State Board of Medical Examiners
1105 Terminal Way, Suite 301
Reno, Nevada 89502

Dear Mr. Cousineau:

You have asked this office for its opinion on the following question.

QUESTION

May the Board of Medical Examiners (Board) publicize confidential civil malpractice settlement amounts, which are provided to the Board pursuant to various state and federal statutes governing reporting of malpractice settlements?

ANALYSIS

Actions for medical malpractice are often settled before or during a trial. Some of the settlements render the amount of the settlement confidential. However, practitioners and insurers are required to report settlements to the Board and the Commissioner of Insurance (Commissioner) pursuant to both state and federal law. The question thus arises whether settlement amounts are public records or, alternatively, whether they may be kept confidential.

Reports Required by the Board's Governing Statutes

The Board is created by statute to enforce the provisions of Chapter 630 of Nevada Revised Statute (NRS) and the regulations adopted pursuant thereto. NRS 630.050, 630.130. It receives information regarding settlement agreements in actions for malpractice pursuant to NRS 630.3067 and 630.3068. The former requires an insurer of a physician licensed in this State to report to the Board "[a]ny settlement, award, judgment or other disposition of any action or claim [for malpractice] not later than 45 days after the settlement, award, judgment or other disposition" The language of the statute is clear: an insurer must provide a report to the Board indicating that settlement has occurred.¹ The statute, however, does not specifically require that the insurer report the amount of any settlement, award, judgment, or other disposition.

In addition to the insurer's report, the Board also receives a report from the physician regarding any settlement agreement in a malpractice action. NRS 630.3068 requires a physician to report to the Board "[a]ny settlement, award, judgment or other disposition of any action or claim [for malpractice] not later than 45 days after the settlement, award, judgment or other disposition" NRS 630.3068(1)(c). Such reports are expressly made public records. NRS 630.3068(3). However, as with NRS 630.3067, NRS 630.3068 does not specifically require that the amount of any settlement, award, judgment, or other disposition be included in the report.

It should be noted, however, that the Board has not adopted any regulations that set forth the information that must be provided in such reports. Pursuant to NRS 630.130 the Board is authorized to "[a]dopt such regulations as are necessary or desirable to enable it to carry out the provisions of this chapter." As such, the Board is within its authority to adopt a regulation, which sets forth the information an insurer of a physician or a physician is required to include in the reports submitted pursuant to NRS 630.3067 and 630.3068, respectively, that includes the amount of the settlement, award, judgment, or other disposition of any action or claim for malpractice.

¹ Generally, when the words of a statute have a "definite and ordinary meaning," it is not necessary to "look beyond the plain language of the statute, unless it is clear that this meaning was not intended." *Harris Associates v. Clark County School Dist.*, 119 Nev. 638, 641-42, 1 P.3d 532, 534 (2003).

Reports Required by the Commissioner of Insurance Statutes

Title 57 of the Nevada Revised Statutes governs the insurance industry. Within Title 57, Chapter 690B controls casualty insurance, which includes medical malpractice insurance. Two relevant reporting requirements exist in this Chapter.

NRS 690B.250 requires an insurer's report to the Board; NRS 690B.260 requires an insurer's report to the Commissioner of Insurance. The required report to the Board is of "each settlement or award made or judgment rendered by reason of a claim, if the settlement, award, or judgment is for more than \$5,000" NRS 690B.250(1). This report is expressly made a public record and must be made available for public inspection. NRS 690B.250(3). As with previously discussed reporting requirements, however, the amount of the settlement is not a specific requirement of the report.

NRS 690B.260 requires an insurer's report to the Commissioner every calendar quarter. Here exists a specific requirement for the amount of settlement. The report must identify each claim that was closed during that calendar quarter, and "any change during that calendar quarter to any claim under such a policy of insurance issued by the insurer that was closed during a previous calendar quarter." NRS 690B.260(1). The legislature has expressly required inclusion of "[i]nformation indicating whether any payment was made on a claim *and the amount of the payment, if any.*" NRS 690B.260(1)(c) (emphasis added).

This report in the hands of the Commissioner is a public record. Except for certain exceptions, the papers and records of the Division of Insurance must be open to public inspection. NRS 679B.190(2). One exception found in NRS 679B.190 authorizes the Commissioner to classify as confidential "[d]ocuments obtained or received from other sources upon the express condition that they remain confidential." NRS 679B.190(5)(b). It is then within the Commissioner's discretion whether to classify the documents as confidential. *Id.*

We do not read this provision to permit confidential classification of settlement amounts. The reference in NRS 679B.190(5)(b), is to documents received *upon the express condition* that they remain confidential. The statute requiring settlement amounts to be reported to the Commissioner, NRS 690B.260(1)(c), does not admit any limitations, *i.e.*, conditions. Reporting is mandatory. The Commissioner's discretionary authority to classify documents as confidential does not extend to settlement amounts.

Provision is made in NRS 690B.310, that certain information in a medical malpractice settlement cannot be made confidential: (1) the names of the parties; (2) the date of the incident or event giving rise to the claim or action; (3) the nature of the claim as set forth in the complaint and answer that is filed in district court; and (4) the effective date of the agreement. Since the amount of a settlement is not included in this list, and based upon the maxim *expressio unius est exclusio alterius*, an argument could be posited that the Legislature intended that parties may classify the amount of

settlement as confidential information. However, we believe that our conclusion is more in line with the Legislature's intent as expressed in the Public Records Act, NRS Chapter 239, that "[a]ny exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly" NRS 239.001(3).

Reports From the National Practitioner Data Bank

In addition to the reports submitted pursuant to the previously mentioned state statutes, insurance companies are also required to submit reports to the National Practitioner Data Bank regarding the medical malpractice payments pursuant to 42 U.S.C. § 11131. Insurance companies are required to report the following information: (1) the name of the physician or licensed health care practitioner for whose benefit the payment was made; (2) the amount of the payment; (3) the name of any hospital with which the physician or health care practitioner is affiliated with; (4) a description of the circumstances upon which the action or claim was based; and (5) any other information required. 42 U.S.C. § 11131.

The information reported to the National Practitioner Data Bank is confidential and may only be disclosed in certain circumstances. The information, if received, must be used solely for the purpose for which it was provided. 42 U.S.C. § 11137, 45 C.F.R. § 60.20. Thus, if the Board receives a report from the National Practitioner Data Bank regarding an applicant for licensure or a physician licensed by the Board, the Board may only use the information contained in the report for the purpose of determining the applicant's eligibility for licensure or for investigating a licensee to determine if disciplinary action is warranted. The information contained in such a report would not be considered to be a public record within the meaning of NRS 239.010 since pursuant to 42 U.S.C. § 11137 it is declared by law to be confidential.

CONCLUSION

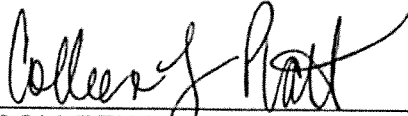
In conclusion, it is the opinion of this Office that the reports submitted pursuant to NRS 630.3067, 630.3068, and 690B.250, which do not specifically require the amount of any settlement, award, judgment or other disposition to be reported, are public records within the meaning of NRS 239.010 and must be open to public inspection. It is also the opinion of this Office that the report submitted pursuant to NRS 630.260, which requires the amount of the settlement be included in the report submitted to the Commissioner of Insurance, is a public record within the meaning of NRS 239.010. The Commissioner is prohibited from making the information contained in the report confidential pursuant to NRS 679B.190 due to the plain reading of NRS 690B.260, which makes reporting mandatory and provides no limitations or conditions regarding that reporting. Lastly, it is the opinion of this Office that the reports received from the

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National Practitioner Data Bank are deemed confidential by federal law and are not public records within the meaning of NRS 239.010, thus the Board is prohibited from making information contained in the reports public.

Sincerely,

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Attorney General

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CLP:SLG