

ADVOCACY BEFORE THE BOARD OF MEDICAL PRACTICE, BOARD OF NURSING, AND OTHER PROFESSIONAL LICENSING BOARDS

V. John Ella, Attorney at Law
TREPANIER MACGILLIS BATTINA P.A.

8000 Flour Exchange Building
310 Fourth Avenue South
Minneapolis, MN 55415

Phone: 612.455.0501
jella@trepanierlaw.com
www.trepanierlaw.com

Sarah MacGillis, Attorney at Law
MACGILLIS LAW P.A.

333 South 7th Street, Ste. 2350
Minneapolis, MN 55402

Phone: 612.455.1034
sarah#@macgillislaw.com
www.macgillislaw.com



Health Licensing Boards in Minnesota

- Minnesota Board of Barber Examiners
- Minnesota Board of Behavioral Health Examiners
- Minnesota Board of Chiropractic Examiners
- Minnesota Board of Cosmetologist Examiners
- Minnesota Board of Dentistry
- Minnesota Board of Dietetics and Nutrition Practice
- Emergency Medical Services Regulatory Board (EMSRB)
- Health Professionals Service Program (HSSP)
- Minnesota Board of Marriage and Family Therapy
- Minnesota Board of Medical Practice
- Minnesota Board of Nursing
- Minnesota Board of Examiners for Nursing Home Administrators

Health Licensing Boards in Minnesota, Cont'd

- Minnesota Board of Optometry
- Minnesota Board of Pharmacy
- Minnesota State Board of Physical Therapy
- Minnesota Board of Podiatric Medicine
- Minnesota Board of Psychology
- Minnesota Board of Social Work
- Minnesota Board of Veterinary Medicine

Other Professional Licensing Boards in Minnesota

- **Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geo-science, and Interior Design**
- **Minnesota Board of Private Detectives and Protective Agent Services**
- **Minnesota State Board of Accountancy**
- **Lawyers Professional Responsibility Board**
- **Minnesota Professional Education Licensing and Standards Board (formerly Minnesota Board of Teaching)**
- **Minnesota State Board of Assessors**
- **Minnesota Department of Commerce (Insurance)**

Professional Licensing Board Challenged at U.S. Supreme Court

- *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015)
- Not likely to be an issue in Minnesota

Advocacy Before the Minnesota Board of Medical Practice

- The Complaint Review Process
- Potential Forms of Discipline
- Strategies to Achieve the Best Outcome for your Client

Minnesota Medical Practice Act

- Chapter 147 of Minnesota Statutes
- Amended in 2017
- <https://trepanierlaw.com/minnesota-amends-its-medical-practice-act/>

Minnesota Board of Medical Practice

- 16 members appointed by the governor for four-year terms
 - 10 must be licensed to practice medicine in Minnesota
 - 1 or more must hold a doctor of osteopathy degree
 - 5 must be public (non-physician) members.
- Approximately 30 full-time employees on staff
- Medical experts working on a contract basis
- The Board is represented by attorneys from the Minnesota Attorney General's Office
- The Board's offices are located on the fifth floor of University Park Plaza at 2829 University Avenue SE, Minneapolis, MN 55414.

Minnesota Board of Medical Practice

- Issues licenses to qualified physicians to practice medicine in Minnesota
- Disciplines physicians and other professionals licensed under its jurisdiction
- In addition to physicians, the Board regulates:
 - acupuncturists
 - athletic trainers
 - genetic counselors
 - naturopathic doctors
 - physician assistants
 - respiratory therapists
 - traditional midwives



Sources of Complaints

- Average of about 800 - 900 complaints each year
 - Most originate from patients or family members of patients
 - May also come from employers, health care providers and medical institutions who are obligated to report information that might indicate a basis for disciplinary action
 - Physicians are obligated to self-report information that could lead to disciplinary action
 - In some cases, other physicians report colleagues to the Board
 - Pharmacists are also a source of complaints about prescribing practices

Sources of Complaints (Cont'd)

- Complaints are anonymous and confidential unless the patient provides a release
- Those complaining have statutory protection against claims of defamation
- Any settlement or verdict from a claim of medical malpractice must be reported to the Board
 - Note: most reports of medical malpractice settlements do not result in discipline by the Board, but some do
- If another state imposes discipline on a Minnesota licensee, that discipline must be reported to the Board
 - The Board may take further action

Types of Complaints

- Common grounds for discipline:
 - (1) inability to practice medicine with reasonable skill and safety to patients, including issues related to chemical dependency, physical or mental incapacity, or incompetence;
 - (2) concerns about prescribing or over-prescribing, often, in today's environment, related to pain medication, especially opioids;
 - (3) unethical or unprofessional conduct (a broad, catch all category);
 - (4) "boundary" issues including sexual conduct or improper communications with a patient;
 - (5) failure to provide sufficient documentation in response to an audit of continuing medical education (CME) credits;

Types of Complaints (Cont'd)

- Common grounds for discipline:
 - (6) improper management of medical records;
 - (7) unlawfully revealing privileged communications from or about a patient;
 - (8) false or misleading advertising;
 - (9) conviction of a felony reasonably related to the practice of medicine;
 - (10) disciplinary action in another jurisdiction; and
 - (11) abusive or fraudulent billing practices.

The Board's Mission

- The Board's primary responsibility and obligation is to *protect the public* from the unprofessional, improper, incompetent or unlawful practice of medicine.
- The Board's mission is not to punish, shame, or extract monetary damages or compensation for victims.

Forms of Discipline

- The Board is empowered to enact the following forms of discipline:
 - Revoke or suspend a license;
 - Revoke or suspend registration to perform interstate telemedicine;
 - Impose limitations or conditions on the scope and use of a license;
 - Impose a civil penalty;
 - Order a physician to provide unremunerated professional service (rarely invoked); and
 - Reprimand or censure the licensed physician

Triage

- All complaints are reviewed by one of two Complaint Review Committees (“CRC”)
 - Two physicians and one public member, meets monthly
- “Triage” process:
 - Board may obtain patient records by subpoena or an authorized release
 - Once the staff has collected necessary documents and received the licensee’s response, the information is presented to the CRC on the record for consideration
 - The vast majority of complaints are dismissed at the triage stage.

The Initial Letter

- Before the complaint is presented to the CRC, Board Staff may ask the physician or licensee to respond in writing.
- The first notice that a doctor may receive about a complaint is therefore a letter notifying them that a complaint has been filed and asking for more information. It is therefore very important (and required) for physicians to keep their address on file with the Board current so as not to default in responding to a complaint.
- Physicians may retain counsel at this point. The physician may respond in writing, the lawyer may respond on behalf of the physician, or an attorney might ghost-write or review a letter sent by the physician. Attorneys can assist the client in understanding the complaint, organizing information, formulating an argument, removing unhelpful emotional responses and reviewing for professional tone.

Triage Con'td

- If the CRC determines that further investigation is necessary, it may send the file back to staff and the AG's office to obtain more records or interview witnesses
- If the CRC decides that discipline is not warranted but that the doctor or licensee would benefit from discussing the complaint in person, it can require the physician to meet with a "medical coordinator" for a medical coordinator conference
 - Medical coordinator: a licensed physician on contract with the board to assist in reviewing complaints
- Medical coordinator conferences usually do not take longer than a half hour or hour and the complaint is usually closed and dismissed once the meeting is completed
- The medical coordinator could send the complaint back to the CRC due to concerns raised in the meeting

Notice of Conference

- If the CRC determines that discipline may be warranted, the Board will send a notice compelling the licensee to appear before the CRC for a conference.
 - The date, time and location of the conference will be set forth in the notice. Rescheduling is only available for good cause.
 - The conference is typically scheduled for a one-hour block of time.
 - Typically, the meeting takes place around a large conference room table at the Board's office building on University Avenue. The conference is not open to the public.

Preparing for the Conference

- Don't wait until the day of the conference to meet with the client. Before meeting with the physician, look up their profile and history of discipline on the Board of Medical Practice website. Print a copy and review it with them.
- Review the medical records. If your client no longer has access, you can arrange to review them at the Board office.
- Prepare a written response to the Notice of Conference. Be mindful of deadlines. Address all issues.
- Submit any evidence or documentation you or your client will want to reference or rely on ahead of time.
- Call Board staff or the AG if you have questions about what is in the record or the process.
- Consider pro-active steps for your client, such as taking a CME course or changing their practice before the conference.

Thanks to Sarah Evenson, JD, MBA, former Public Board Member for Use of her Tips.

Improper Assumptions

- Complaints are anonymous.
- Don't assume you know who filed a complaint or the motive.

Complaint Review Conference

- In addition to the three members of the CRC, the Board will usually have two to five staff members in the room along with an attorney from the Minnesota Attorney General's office.
- The assistant AG will read the physician his or her rights.
- The CRC chair will typically ask if the physician wants to make an opening statement. The CRC members will then ask questions.
- The physician will then be asked if he or she wants to make any closing statements. The physician and his or her attorney is then asked to leave the room while the CRC deliberates.
- After ten minutes or so, the physician will be asked to return the room.
- The CRC will then announce its decision.

Complaint Review Conference

- If the CRC decides to dismiss the complaint, the process is over
 - There are no appeal rights for the person making the complaint
- If the CRC decides that discipline is appropriate, it will almost always in the form of a *proposed stipulation and order*
 - This is the equivalent of a plea bargain or settlement agreement.
 - The official written proposal will be sent by mail after the conference to the licensee or their representative.
 - The physician can either
 - (1) agree to the discipline and sign the agreement;
 - (2) refuse and go to a contested case hearing; or
 - (3) negotiate the specific terms of the stipulation.

Is a Lawyer Necessary at the Conference?

- Not required, but common
- In the conference itself, the attorney usually says very little. The doctor should do most of the talking.
- Insurance might cover fees for counsel in a licensing action
- An attorney can provide value by:
 - (1) explaining the process;
 - (2) preparing the physician beforehand as to what to say, and how;
 - (3) serving as a source of comfort and support during a stressful time;
 - (4) in rare circumstances, jumping in to assist a physician whose responses are not helping her position;
 - (5) being present so that if the case goes beyond the conference (i.e. to a contested case hearing) the lawyer is up to speed on what occurred, and what was said at the conference stage; and
 - (6) assisting to review and potentially negotiate the terms of a proposed stipulation and order.

“Public”

- A complaint itself is not public and will not be accessible on the internet or through the Minnesota Data Practices Act
- If a complaint is dismissed, the public will not have access to its existence
 - The Board, however, keeps a record of all complaints, including those that are dismissed
- If discipline is imposed, the terms of the discipline are public
 - The Board issues a press release and the discipline is noted on the physician’s profile on the Board’s website. <https://mn.gov/boards/medical-practice/>

Corrective Actions and “Discipline”

- If the Board issues an agreement for “corrective action” and the doctor agrees, the corrective action is noted on the Board’s website. Corrective action is therefore “public.”
- Corrective action is **not** considered “discipline”
- Many specialist certification bodies will not renew a certification if the physician is under “discipline.” Corrective action is therefore better than “discipline.”
 - Failure to re-certify may disqualify a licensee from being able to bill to certain insurance programs, which in turn may cause them to be unemployable
 - The Board is aware of these ramifications. If a physician is restricted from applying for an unrestricted license before a certain time, and has otherwise fulfilled the requirements to remove the discipline, the Board will often be flexible in allowing a doctor to petition for an un-restricted license early

Conditions on Licensure

- Completion of coursework, possibly a “boundaries” course or CMEs
- Writing a report on a topic
- Compliance with HPSP (typically drug testing) and maintained sobriety
- Evaluation by an outside entity such as CPAP
- Mental or physical evaluation
- Regular meetings with a designated board member
- Payment of civil penalty
- Audit of patient records

Restrictions

- Restrictions on scope of practice or procedures
- Restrictions on prescribing
- Pre-approval of work setting
- Requirement of preceptor
- Requirement of chaperone

Petitions for Unrestricted License

- Once conditions have been met and time period has run, the physician may submit a petition for unrestricted licensure.
- This is done in writing. In rare cases, upon good cause shown, the physician may submit a petition before the set time period has elapsed.

The Contested Case

- If a CRC recommends discipline but the physician refuses to sign a stipulation and order, the complaint proceeds as a “contested case in the Minnesota administrative law system.
- Fewer than five percent of complaints go to this point; most are either dismissed or settled with a stipulation and order.

The Contested Case

- A contested case starts with a notice of hearing which sets forth the allegations
 - Parties go through a “discovery” process;
 - Often, each side hires one or more experts which must be disclosed;
 - Parties are likely to meet at least once for a mediation;
 - If the mediation is not successful, the case goes to a hearing before an administrative law judge (“ALJ”);
 - The ALJ makes factual findings and recommendations; parties can then file “exceptions” to the report;
 - The case then proceeds to the full Board (not just a committee) for brief oral argument and a final decision.
- The Board reviews any recommended discipline *de novo* and is not constrained by the recommendation of the ALJ, although findings must be based on the evidentiary findings. The Board then issues a final order for discipline
- That Order may be challenged only at the Minnesota Court of Appeals for abuse of discretion.

Health Professionals Services Program

- The HPSP is a diversionary program that allows physicians and members of over a dozen other health-related professions to seek treatment for substance abuse and mental health disorders in a safe and monitored fashion that is not reported to the public.

Advocacy Pointers

- In many cases, zealous or aggressive lawyering can backfire.
- Often the ability of the licensee to show *contrition*, *candor* and *insight* is the key to escaping or minimizing discipline.

Advocacy in Front of the Minnesota Board of Nursing



Sarah M. MacGillis
MacGillis Law PA
333 S. 7th St., Suite 2350
Minneapolis, MN 55402
(612)455-1034
sarah@macgillislaw.com



First Contact with the Board or its Representative

- ▶ Most frequently, your licensee will receive a Notice of Conference before the Minnesota Board of Nursing.
- ▶ The Notice of Conference sets forth:
 - ▶ Jurisdictional basis for the Board's authority
 - ▶ Factual allegations about the licensee
 - ▶ Allegations of alleged violations of the Minnesota Nurse Practice Act (MNPA)
 - ▶ A list of possible outcomes
 - ▶ A date and time during which the conference will be held.
 - ▶ The name of the practice specialist and the assistant attorney general representing the Board.



Complaint Review Process

- ▶ https://mn.gov/boards/assets/Informal_Complaint_Handling_Process.pdf_tcm21-37265.pdf



Minnesota Nurse Practices Act

[148.171](#)

Definitions; title.

[148.181](#)

Board of nursing membership, vacancies, disclosure.

[148.191](#)

Officers; staff; powers.

[148.211](#)

Licensing.

[148.212](#)

Temporary permit.

[148.231](#)

Registration; failure to register; reregistration; verification.

[148.233](#)

Identification of certified registered nurses.

[148.234](#)

State boundaries consideration.

[148.235](#)

Prescribing drugs and therapeutic devices.

[148.241](#)

Expenses.

[148.242](#)

Fees.

[148.243](#)

Fee Amounts.

[148.251](#)

Nursing program.

[148.261](#)

Grounds for disciplinary action.

[148.262](#)

Forms of disciplinary action; automatic suspension; temporary suspension; reissuance.

[148.263](#)

Reporting obligations.

[148.264](#)

Immunity.

[148.265](#)

Nurse cooperation.

[148.266](#)

Disciplinary record on judicial review.

[148.267](#)

Reports to the commissioner of health.

[148.271](#)

Exemptions.

[148.281](#)

Violations; penalty.

[148.283](#)

Unauthorized practice of professional, advanced practice registered, and practical nursing.

[148.2841](#)

Advanced Practice Nursing Advisory Council.

[148.285](#)

Transfer of assets.



148.261 GROUNDS FOR DISCIPLINARY ACTION.

Subdivision 1. Grounds listed. The board may **deny**, **revoke**, **suspend**, **limit**, or **condition** the license and registration of any person to practice advanced practice, professional, or practical nursing undersections 148.171 to 148.285, or to otherwise discipline a licensee or applicant as described in section 148.262.



(2) Employing fraud or deceit in procuring or attempting to procure a permit, license, or registration certificate to practice advanced practice, professional, or practical nursing or attempting to subvert the licensing examination process.

(3) Conviction of a felony or gross misdemeanor reasonably related to the practice of professional, advanced practice registered, or practical nursing. Conviction as used in this subdivision includes a conviction of an offense that if committed in this state would be considered a felony or gross misdemeanor without regard to its designation elsewhere, or a criminal proceeding where a finding or verdict of guilt is made or returned but the adjudication of guilt is either withheld or not entered.



(4) Revocation, suspension, limitation, conditioning, or other disciplinary action against the person's professional or practical nursing license or advanced practice registered nursing credential, in another state, territory, or country; failure to report to the board that charges regarding the person's nursing license or other credential are pending in another state, territory, or country; or having been refused a license or other credential by another state, territory, or country.

(5) Failure to or inability to perform professional or practical nursing as defined in section 148.171, subdivision 14 or 15, with reasonable skill and safety, including failure of a registered nurse to supervise or a licensed practical nurse to monitor adequately the performance of acts by any person working at the nurse's direction



(6) Engaging in unprofessional conduct, including, but not limited to, a departure from or failure to conform to board rules of professional or practical nursing practice that interpret the statutory definition of professional or practical nursing as well as provide criteria for violations of the statutes, or, if no rule exists, to the minimal standards of acceptable and prevailing professional or practical nursing practice, or any nursing practice that may create unnecessary danger to a patient's life, health, or safety. Actual injury to a patient need not be established under this clause.



Responding to the Notice of Conference in five easy steps

- ▶ **Step One:** *The licensee interview:* A thorough interview of the licensee is the most important step in the process.
- ▶ Know his or her background and training.
- ▶ Know his or her strengths.
- ▶ Know the practice setting because you may have to educate the panel about your nurse's facility and practices. E.g. Nurses in greater MN have much broader responsibility than in the metro area.
- ▶ Get the full story from your licensee and hopefully from others.



Step Two: Obtain relevant records

- ▶ Ask your licensee to immediately request his or her personnel file from the facility at issue and from past employers if helpful. Sometimes it contains all the investigative data you need.
- ▶ Obtain any facility policies that speak to the issue.
- ▶ Obtain all performance evaluations from the past 5-7 years. Carefully review evaluations for strengths relative to the practice issue being evaluated.
- ▶ Obtain strong character letters on behalf of your licensee that speak to the specific issue being evaluated.



Step Three: Plan for retraining if applicable.

- Benefits of relevant retraining.
 - 1. Improved skillset.
 - 2. Better interviewee during conference.
 - 3. Avoiding an ACA or discipline by being proactive.



Possible helpful coursework is at your licensee's fingertips.

- ▶ Professional Accountability and Legal Liability for Nurses.
<https://www.ncsbn.org/11067.htm>
 - ▶ Professional Boundaries in Nursing.
https://learningext.com/nurses/p/ethics_professionalism
 - ▶ Sharpening Critical Thinking Skills. <https://www.ncsbn.org/5126.htm>
 - ▶ Documentation: A Critical Aspect of Client Care.
<https://www.ncsbn.org/5121.htm>
 - ▶ Righting a Wrong: Ethics and Professionalism in Nursing.
https://learningext.com/nurses/p/ethics_professionalism
- 



Step Four: Draft written response to Notice of Conference

- ▶ Divide your responses into logical sections.
- ▶ 1. Background information about your licensee. Personalize. Quote from character letters, cite to past performance evaluations.
- ▶ 2. Control the narrative as you respond to the allegations.
- ▶ 3. Discuss any remediation your licensee may have done.
- ▶ 4. Discuss your client's present work situation and use it to your advantage. (E.g., client remains in her position with retraining, client has moved to a clinical setting where controlled substances are no longer available; client has moved to a smaller facility where patient numbers are significantly lower, etc...)



Prepare your licensee for the conference

- ▶ Practice the narrative, cross-examine your client. Preparation and comprehensive written responses make for a much better conference.
- ▶ Make sure your client reviews the written responses carefully. The panel WILL read them carefully.
- ▶ Make sure your client has reviewed their information from any relevant coursework and can demonstrate their understanding during the conference.



The Conference

- ▶ The Conference will take place in front of a panel of three individuals including as assistant attorney general (representing the Board), a nurse practice specialist and a third individual, often a public member of the Board.
- ▶ The Conference is recorded. Your licensee will receive a verbal notice prior to the start of the conference setting forth the jurisdictional basis for the conference, the status of data collected, and the licensee's obligation to cooperate with the Board.
- ▶ You will have the right to make an opening statement if you wish.
- ▶ The panel will ask questions of the licensee.
- ▶ You will have the opportunity to ask questions if you wish. You may wish to do so to draw favorable information out of the licensee or to make the record complete.
- ▶ Your client will be given an opportunity to say anything they wish to say prior to the panel deliberating.
- ▶ You will have the opportunity to make a closing statement.
- ▶ The Panel will deliberate while you wait in a separate room.
- ▶ They will bring you back in and tell you their proposal for resolution of the matter.



Possible dispositions

- **Dismissal:** best possible outcome.
- **Administrative agreement for corrective action:** The nurse agrees to take specific corrective measures. Upon successful completion of the corrective action, the complaint against the nurse is dismissed. Note: for your APRNs, this could cause credentialing problems. ACAs are public.
- **Reprimand:** The nurse is reprimanded for the particular conduct at issue. A reprimand may be combined with assessment of a CIVIL PENALTY (a monetary fine).
- **Limitations to licensure:** The nurse's scope of practice is restricted in some manner. The limitation is in place until the nurse fulfills specified requirements and may be combined with conditions.
- **Conditions to licensure:** The nurse can keep his or her license contingent upon meeting some specific requirement identified by the Board. Common condition might be supervision with reports, abstaining from alcohol, etc..., The Board also can ask the nurse to complete specified evaluations and follow the recommendations.



More significant discipline

- ▶ **Suspension:** The nurse's registration is suspended for a period of time, though their license is maintained. The suspension can also be stayed upon completion of any stated requirements as set forth in the stipulation. Conditions and means of reinstatement are set forth in the stipulation. *Temp suspend:* probable cause that the nurse presents an imminent risk of harm to the public. May be accompanied by a stipulation to cease practicing during investigation.
- ▶ **Revocation:** The Board rescinds the licensee's license and registration. Relicensing is not anticipated. This is the most stringent disciplinary action and is used only in extremely serious circumstances.



The Stipulation for Discipline

- ▶ The assistant attorney general will send a proposed stipulation. You can and should send back proposed changes.
- ▶ Everything is negotiable. You may wish to edit/limit/tweak the factual basis. You may wish to limit the statutory grounds for discipline.
- ▶ The stipulation is a public document and remains a public document.
- ▶ If your licensee cannot or will not agree to discipline and a non-disciplinary option is not available, you may proceed to a contested case hearing. That process is the same for the Board of Nursing as it is for the Board of Medical Practice.



Contested case hearing flow chart

- ▶ https://mn.gov/boards/assets/Administrative_Hearing_Process_hearing.pdf_tcm21-37290.pdf



Office of Administrative Hearing

<https://mn.gov/oah/>



QUESTIONS?

TREPANIER
MACGILLIS
BATTINA
ATTORNEYS AT LAW