

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO  1437 Bannock Street Denver, CO 80202	DATE FILED: February 13, 2020 2:18 PM FILING ID: B21D189A87F55 CASE NUMBER: 2020CV30318
JANE DOE, M.D.,  Plaintiff,  v.  COLORADO MEDICAL BOARD and PAULA MARTINEZ, in her official capacity as Program Director.  Defendants.	<p style="text-align: center;"><b>^ COURT USE ONLY ^</b></p>
<i>Attorneys for Defendants:</i> Philip J. Weiser, Attorney General Sierra R. Ward, Senior Assistant Attorney General* Brian L. Williams, Assistant Attorney General Ralph L. Carr Colorado Judicial Center 1300 Broadway, 8 <sup>th</sup> Floor Denver, CO 80203 Telephone: 720-508-6430(SW); 720-508-6750 (BW) FAX: 720-508-6037 E-Mail: <a href="mailto:sierra.ward@coag.gov">sierra.ward@coag.gov</a> ; <a href="mailto:brian.williams@coag.gov">brian.williams@coag.gov</a> Registration Numbers: 43568 (SW); 51317 (BW) *Counsel of Record	Case No. 2020CV030318  Div.: 424
<p style="text-align: center;"><b>COLORADO MEDICAL BOARD AND PAULA MARTINEZ'S          MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5)</b></p>	

The Colorado Medical Board ("Medical Board") and Paula Martinez, in her official capacity as Program Director ("Ms. Martinez"), through the Office of the

Colorado Attorney General, hereby move to dismiss the Complaint in the above-captioned matter pursuant to C.R.C.P. 12(b)(5).

### **CERTIFICATE OF CONFERRAL**

The undersigned attorney conferred with counsel for Plaintiff regarding this motion. Plaintiff opposes the requested relief.

### **INTRODUCTION**

Plaintiff<sup>1</sup> is a licensed Colorado physician. Within a three-month period in 2018, the Medical Board received three separate complaints alleging unprofessional conduct by Plaintiff in connection with her treatment of three different patients. The Medical Board investigated each complaint and concluded that Plaintiff's care and treatment of all patients fell below generally accepted standards of medical practice. Accordingly, the Medical Board voted to impose discipline against Plaintiff's license by referring each of the cases to the Office of the Colorado Attorney General for preparation and filing of a public Formal Complaint at the Office of Administrative Courts ("OAC"). Prior to the filing of the Formal Complaint, Plaintiff initiated the present action in Denver District Court seeking to enjoin the Medical Board from publicly filing its formal complaint at the OAC. Plaintiff claims that the entirety of Medical Board proceedings, with the sole exception of final disciplinary action, must

---

<sup>1</sup> Defendants oppose Plaintiff's request to proceed by pseudonym. *See* Opp'n, filed Jan. 29, 2020. Defendants therefore use the plaintiff's procedural referent rather than a pseudonym in this motion. Such usage should not be deemed to be a waiver of Defendants' opposition to the request to proceed by pseudonym.

remain strictly confidential.<sup>2</sup> Plaintiff is attempting to expand a limited confidentiality provision beyond the clear meaning of the statute. Although the peer review statute does contain a provision stating that professional review committee proceedings are confidential, the Colorado Legislature did not apply this portion of the statute to the Medical Board. The statute only requires that Medical Board records, not the actual proceedings, remain confidential. Further, the definition of records explicitly excludes all written, electronic, or oral communications that would otherwise be available from a source outside the peer review process. The confidentiality of records applies only to records of the peer review entity and not to independent source documents. Finally, Plaintiff's position runs directly contrary to patient safety and the public interest.

### LEGAL STANDARD

Courts may dismiss complaints if the plaintiff fails "to state a claim on which relief can be granted." C.R.C.P. 12(b)(5). "A motion to dismiss pursuant to C.R.C.P. 12(b)(5) tests the sufficiency of the complaint." *Lobato v. State*, 218 P.3d 358, 367 (Colo. 2009) (citing *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 385 (Colo. 2001)).

---

<sup>2</sup> The Medical Board issues disciplinary action in the form of a final board order which, in some instances, is not issued until years after receipt of the initial complaint. The time that elapses between the Medical Board's receipt of a complaint alleging unprofessional conduct and the issuance of a final board order is a function of several factors, many of which the Medical Board cannot control. For example, the Medical Board cannot control courtroom or judge availability at the OAC, whether respondents are willing to resolve complaints without a hearing, or whether respondents will obtain continuances over the Medical Board's objections. In some cases, the process can take several years to complete.

All facts must be accepted as true and viewed in the light most favorable to the plaintiff. *Id.* (citing *Pub. Serv. Co. of Colo.*, 27 P.3d at 385-86). A motion to dismiss under C.R.C.P. 12(b)(5) can only be granted if no set of facts could entitle the plaintiff to relief. *Id.* (citing *Pub. Serv. Co. of Colo.*, 27 P.3d at 385-86; *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992)). The complaint should be dismissed if no theory of law supports the plaintiff's claim. *Colorado Medical Soc. V. Hickenlooper*, 353 P.3d 396, 401 (Colo. App. 2012) (citing *Pub. Serv. Co. of Colo.*, 27 P.3d at 385-86)).

## ARGUMENT

### **I. The statutory provision requiring that peer review proceedings remain confidential does not apply to the Medical Board.**

At the outset, Plaintiff acknowledges that the issue in this case is purely legal in nature. The only material fact—that the Medical Board intends to file a public Formal Complaint against Plaintiff at the OAC charging violations of the Medical Practice Act—is undisputed. The sole issue is whether the Medical Practice Act and the professional review committee statute, when considered collectively, permit the Medical Board to file public Formal Complaints and conduct subsequent proceedings publicly.

With respect to Plaintiff's legal position, the Medical Practice Act contains two key provisions related to confidentiality and public access. The first provision, §12-240-125(9)(a), C.R.S., states:



Investigations, examinations, hearings, meetings, or any other proceedings of the board conducted pursuant to this section shall be exempt from any law requiring that proceedings of the board be conducted publicly or that the minutes or records of the board with respect to action of the board taken pursuant to this section be open to public inspection. This subsection (9) shall not apply to investigations, examinations, hearings, meetings, or any other proceedings or records of the licensing panel created pursuant to section 12-240-116 related to the unlicensed practice of medicine.

This provision provides that Medical Board “investigations, examinations, hearings, meetings, or any other proceedings” are exempt from any law requiring that they be conducted publicly. It further provides that records of such proceedings need not be open to public inspection. In effect, this provision makes clear that Colorado’s Open Meetings Law and Open Records Act do not apply to Medical Board disciplinary matters. Importantly, however, this provision does not impose any requirement stating that proceedings or records must remain confidential; it merely states that proceedings need not be public.

The second relevant provision states: “For purposes of the records related to a complaint filed pursuant to this section against a licensee, the board is considered a professional review committee, the records related to the complaint include all records described in section 12-30-202(8), and section 12-30-204(12) applies to those records.” §12-240-125(9)(b), C.R.S. This provision, by its very terms, limits the

purposes for which the Medical Board is treated as a professional review committee to records related to a complaint.<sup>3</sup>

The professional review committee statute does provide that “all proceedings, recommendations, records, and reports” of professional review committees are confidential; however, neither the Medical Practice Act nor the professional review committee statute apply this provision to the Medical Board. *See* § 12-30-204(16), C.R.S. Plaintiff cites no other statute, regulation, or court decision requiring that Medical Board proceedings, as opposed to records, remain confidential. Had the Colorado Legislature intended to require the Medical Board to maintain the confidentiality of all proceedings, it could have done so by making §12-30-204(16) applicable. However, the fact that only a portion of the professional review committee statute applies to the Medical Board, and then only for purposes of certain records, is a clear indication that the Colorado General Assembly did not intend for peer review confidentiality to apply to the entirety of all Medical Board proceedings

When these provisions are considered collectively, it is clear that  
1) certain Medical Board records cannot be made public, 2) not all Medical

---

<sup>3</sup>§ 12-240-125, C.R.S. makes reference to two different types of complaints. The first type of complaint, which is the complaint contemplated by the referenced provision, is the initial written complaint filed with the Medical Board alleging unprofessional conduct. This first type of complaint causes the Medical Board to initiate an investigation into whether a violation of the Medical Practice Act occurred. The second type of a complaint is a “Formal Complaint,” which refers to the formal charging document filed at the OAC by the Office of the Attorney General.

Board proceedings are confidential, and 3) the records and proceedings of the Medical Board not explicitly addressed by statute need not be open to the public, but no statutory prohibition exists preventing the Medical Board from permitting public access.<sup>4</sup> In short, other than the records required by statute to remain confidential, the Medical Board may, but need not, make public any other records or proceedings.

## **II. The confidentiality of Medical Board records does not prevent the filing of a public Formal Complaint.**

The term “records” is defined in the professional review statute to include:

[A]ny and all written, electronic, or oral communications by any person arising from any activities of a professional review committee, including a governing board, established by an authorized entity under this part 2 or by the agent or staff thereof, including any:

- (I) Letters of reference;
- (II) Complaint, response, or correspondence related to the complaint or response;
- (III) Interviews or statements, reports, memoranda, assessments, and progress reports developed to assist in professional review activities;
- (IV) Assessments and progress reports to assist in professional review activities, including reports and assessments developed by independent consultants in connection with professional review activities; and
- (V) Recordings or transcripts of proceedings, minutes, formal recommendations, decisions, exhibits, and other similar items or

---

<sup>4</sup> Of course, other statutory and common law privileges and protections require the confidentiality of specific subsets of information. Examples include patient identity and protected health information.

documents related to professional review activities and typically constituting the records of administrative proceedings.

§ 12-30-202(8)(a), C.R.S.

Although broad, the definition of records only includes records arising from professional review activities, such as reports created by the professional review committee to aid in the professional review process. Underlying facts that exist independent of the professional review activities, information available outside of the professional review process, and original source documents are not included in the definition of “records.” See § 12-30-202(8)(b), C.R.S. Specifically, “records” does not include:

any written, electronic, or oral communications by any person that are otherwise available from a source outside the scope of professional review activities, including medical records and other health information, incident reports prepared in the ordinary course of business, and relevant hospital or facility policies, procedures, and protocols, or other original source documents.

*Id.*

Certainly, the professional review statute prevents the Medical Board from publicizing certain records that it creates or obtains as part of a peer review process. However, the Medical Board is not prohibited from disclosing facts that exist independent of peer review activities, even if those facts are also contained in a peer review record. An independent fact does not become confidential simply because it is also contained in a professional review committee record.

A Formal Complaint filed by the Office of the Attorney General represents the culmination of the Medical Board's internal review. It is the official document that initiates formal disciplinary proceedings against a licensee and concludes the informal investigatory and decision-making phase. It is based on independent facts that exist outside of the peer review process, and the charges reflect the statutory violations that the Medical Board's disciplinary panel,<sup>5</sup> with the aid of counsel, believes the licensee violated. Filing a Formal Complaint marks the end of the Medical Board's internal review and the beginning of formal, and public,<sup>6</sup> legal proceedings, as the Medical Board has completed its investigation and made a determination as to an appropriate sanction.

To the extent any confidential records exist that will be relied on at hearing, those issues can be addressed in the context of the OAC proceedings. Any protected records that are attached to the Formal Complaint can be filed under seal. If counsel

---

<sup>5</sup> The Medical Board is divided into three Panels: Licensing Panel, Panel A, and Panel B. Panel A and Panel B are the Medical Board's disciplinary panels. When the Medical Board receives an initial complaint alleging unprofessional conduct by a licensee, Medical Board staff assigns the complaint to either Panel A or Panel B for investigation and determination. If a disciplinary panel decides to initiate formal disciplinary proceedings following the conclusion of its investigation, the panel refers the matter to the Office of the Attorney General for the filing of a Formal Complaint. Absent resolution, an administrative law judge at the OAC will conduct a hearing and issue an Initial Decision. Final determination as to discipline is made by the other disciplinary panel. For example, if Panel A investigates and decides to proceed with formal disciplinary action against a licensee, the final determination of discipline will be made by Panel B sitting as a hearings panel.

<sup>6</sup> The OAC's proceedings are public. Indeed, an ALJ at the OAC denied a request last month in another case brought by the Medical Board where the respondent sought to proceed by pseudonym. *See Order Denying Respondent's Emergency Motion for Protective Order and Suppression of all Filings as Confidential, Colorado Medical Board, Inquiry Panel B v. Terry S. Dunn, M.D.*, OAC Case Number ME 20190007, attached hereto as **Exhibit A**.



for the Medical Board seeks to introduce as evidence any records or facts that the licensee believes should be privileged or otherwise protected, the licensee is able to object or request that the record at issue be sealed at that time.<sup>7</sup>

The Formal Complaint is not itself a professional review committee record. It is a legal document, drafted by an attorney, that serves to initiate a formal process and put the licensee and the public on notice. Formal Complaints contain independent facts obtained from medical records, witness interviews, and other original sources. While the Formal Complaint does reflect indirectly the determinations made by the Medical Board through its internal review process, the professional review activities at that point have ceased, and no records created as part of that process are made public. Unlike records, the Medical Board's proceedings—such as a Panel's vote to take disciplinary action—are not required to remain confidential, as the Medical Board is only treated as a professional review committee for the limited purposes of certain of its records. *See* § 12-240-125(9)(b); *see also* § 12-30-204(16), C.R.S. (specifying which activities of professional review committees are confidential, and which are not made applicable to the Medical Board through the Medical Practice Act). It is contrary to reason that proceedings may be

---

<sup>7</sup> To the extent Plaintiff is seeking to enjoin the Medical Board from relying on professional review records as evidence in OAC hearings without protecting confidentiality, such a request is both speculative and premature. Defendants have not threatened to take such action, and Plaintiff must, in the first instance, raise such an objection in the context of the OAC hearing.

conducted publicly, such as the OAC's hearings, while the formal document initiating those proceedings must be suppressed.

Plaintiff's reliance on *Colorado Medical Board v. Office of Administrative Courts*, 333 P.3d 70 (Colo. 2014) is inapt. The Colorado Supreme Court did conclude that the Medical Board functions as a professional review committee, but the decision only went so far as to apply to certain records. *Colorado Medical Board*, 333 P.3d at 73. The Court concluded that letters of concern—which are explicitly made confidential by statute—were records of a professional review committee. *Id.*; § 12-240-125(4)(c)(III), C.R.S., formerly codified at § 12-36-118(4)(c)(II.5), C.R.S. Confidential letters of concern are distinct from Formal Complaints in that they are correspondence from a disciplinary panel of the Medical Board communicating a concern, but dismissing the case without formal action. *See* § 12-240-125(4)(c)(III), C.R.S., formerly codified at § 12-36-118(4)(c)(II.5), C.R.S.; *see also* § 12-30-202(8)(a)(II), C.R.S. On the other hand, Formal Complaints are pleadings drafted by the Colorado Attorney General's Office and filed at the OAC. The definition of records specifically includes correspondence, but it does not include a Formal Complaint. *See* § 12-30-202(8)(a)(II), C.R.S. A formal legal document bringing charges and initiating a proceeding is not the equivalent of a confidential letter. Notably, the OAC case at



issue in *Colorado Medical Board v. Office of Administrative Courts* was filed and conducted publicly, an action to which the respondent evidently did not object.<sup>8</sup>

**III. Conducting all Medical Board proceedings confidentially would be detrimental to patient safety and contrary to the public's interest in public proceedings.**

The Medical Board exists to regulate the practice of the healing arts in Colorado so that the public “shall be properly protected against unauthorized, unqualified, and improper practice of the healing arts in this state....” § 12-240-102, C.R.S. The Medical Board cannot fulfill its function of public protection if the public is unaware of the vast majority of its actions and decisions. The time between the filing of a written complaint alleging unprofessional conduct and the final action of a review panel of the Medical Board, which Plaintiff does not dispute is public, is often years. Complicated cases may require extensive discovery, and the disciplinary panels often consult with subject matter experts who can take months to complete their reviews of relevant materials. The OAC has finite courtroom and personnel availability, and given the complexity of some Medical Board cases, hearings may be set out a year or more. Receipt of Initial Decisions and the exceptions process can add several more months to the timeline. If Plaintiff's position is accepted, licensees will have a strong incentive to delay the administrative process as long as possible to maintain confidentiality. Colorado patients, as well as the regulated community,

---

<sup>8</sup> Counsel for the respondent in *Colorado Medical Board v. Office of Administrative Courts* also represents Plaintiff in this case.

could go months or years without knowing that the Medical Board is pursuing disciplinary sanctions against a licensee.

Plaintiff asserts there is potential for reputational harm based on yet unproven allegations in a Formal Complaint. However, the General Assembly has delegated to the Medical Board the discretion to strike an appropriate balance between a licensee's and the public's interests. In the longstanding approach of the Medical Board, which has been ratified by years of concurrence from the General Assembly, this balance is tipped when the Medical Board determines that disciplinary sanctions should be pursued. The Medical Board keeps its investigative phase confidential and only discloses information publicly once it has determined that formal proceedings are warranted. Licensees are then afforded the full panoply of due process rights guaranteed them under relevant statutes and constitutional provisions. They are also afforded a public forum in which to contest the Medical Board's allegations, ensuring that the Medical Board's actions are open to public observation and scrutiny. This process is consistent with virtually all criminal, civil, and administrative proceedings throughout the state and nation.

Additionally, the regulated community has a substantial interest in knowing what actions have been undertaken by the Medical Board. Licensees undoubtedly wish to avoid investigation and discipline, and knowing what conduct might result in such action is critical in avoiding Medical Board review. Similarly, healthcare

facilities and entities also have an interest in obtaining information that may help improve training and education for their members.

Finally, Colorado law reflects a clear policy in favor of public access and openness. Colorado courts have concluded that both the state and federal constitutions provide for a public right of access to judicial proceedings. *See, e.g., People v. Owens*, 420 P.3d 257, 257-58 (Colo. 2018). In doing so, courts have drawn a distinction between the proceedings themselves and the records of those proceedings. *See id.* While proceedings are open, records may be kept confidential in certain circumstances. *Id.* Similarly, Colorado's Open Meetings Law and Colorado's Open Records Act reflect a clear policy preference for public access to government, except in instances in which other considerations outweigh the interests of openness.

The professional review committee process is one such situation in which the Legislature has determined that the interests of confidentiality are more substantial. Nonetheless, the privilege is not absolute, and its application is limited. The Colorado Supreme Court observed that the privilege exists to allow committee members to "openly, honestly, and objectively study and review the conduct of their peers." *Colorado Medical Board v. Office of Administrative Courts*, 333 P.3d at 73. However, that purpose is no longer served once the Medical Board votes to impose discipline. The "study and review" of the licensee has concluded, and the disciplinary panel has decided that it believes public sanctions are warranted. Once the disciplinary panel

has made this decision, the process becomes legal in nature. The need for open discourse among committee members no longer exists.

### CONCLUSION

Although the Medical Practice Act protects certain records from public disclosure, Medical Board proceedings are not required to be confidential. The Medical Board's Formal Complaint, which initiates the formal disciplinary proceedings and states facts that exist independent of the peer review process, is not itself a professional review committee record. Closing all Medical Board proceedings to the public would run contrary to patient safety and the public interest. Accordingly, Plaintiff's Complaint should be dismissed as she has failed to state a claim on which relief can be granted.

Respectfully submitted this 13<sup>th</sup> day of February, 2020.

PHILIP J. WEISER  
Attorney General

*/s/ Sierra R. Ward*

---

SIERRA R. WARD, #43568\*  
Senior Assistant Attorney General  
BRIAN L. WILLIAMS, #51317\*  
Assistant Attorney General  
Business & Licensing Section  
Attorneys for the Defendants  
\*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **COLORADO MEDICAL BOARD AND PAULA MARTINEZ'S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5)** upon all parties herein via Colorado Courts E-filing System, this 13<sup>th</sup> day of February, 2020 addressed as follows:

Carmen N. Decker  
Kaylyn Peister  
Hershey Decker Drake  
10463 Park Meadows Drive, Suite 209  
Lone Tree, Colorado 80124

/s/ Sierra R. Ward