

**NEVADA STATE BOARD OF DENTAL EXAMINERS**  
**6010 S. Rainbow Boulevard, Suite A-1**  
**Las Vegas, Nevada 89118**  
**Thursday, June 28, 2012 at 6:15 pm**

**MINUTES**

**LEGAL AND DISCIPLINARY ACTION RESOURCE GROUP**

(Chair: Dr. Kinard; Dr. Sill; Dr. Soltani; Dr. Blasco; Mrs. Villigan; Mr. McKernan; Mrs. Wark)

**Videoconferencing was available at the Board office, 6010 S Rainbow Boulevard, Suite A-1, in Las Vegas and at the Nevada State Board of Nursing, 5011 Meadowood Mall Way, Suite 300, Reno, Nevada 89502.**

**Please Note:** The Nevada State Board of Dental Examiners may 1) address agenda items out of sequence to accommodate persons appearing before the Board or to aid the efficiency or effectiveness of the meeting; 2) combine items for consideration by the public body; 3) pull or remove items from the agenda at any time. The Board may convene in closed session to consider the character, alleged misconduct, professional competence or physical or mental health of a person. *See NRS 241.030.* Prior to the commencement and conclusion of a contested case or a quasi judicial proceeding that may affect the due process rights of an individual the board may refuse to consider public comment. *See NRS 233B.126.*

Public comment is welcomed by the Board, but at the discretion of the Chair, may be limited to five minutes per person. A public comment time will be available before any action items are heard by the public body and then once again prior to adjournment of the meeting. The Chair may allow additional time to be given a speaker as time allows and in his/her sole discretion. Once all items on the agenda are completed the meeting will adjourn. Prior to the commencement and conclusions of a contested case or a quasi judicial proceeding that may affect the due process rights of an individual the board may refuse to consider public comment.

**Call to Order**

**1. Roll call and Establish a Quorum:**

Dr. Kinard called the meeting to order and Ms. Kelly conducted the following roll call:

Dr. J Gordon Kinard-----PRESENT  
Dr. M Masih Soltani-----PRESENT  
Dr. Byron Blasco-----PRESENT  
Dr. J Stephen Sill-----PRESENT  
Mr. James "Tuko" McKernan-----PRESENT  
Mrs. Leslea Villigan-----PRESENT  
Mrs. Lisa Wark-----PRESENT

Others Present: John Hunt, Board Legal Counsel; Lee Drizin, Board Special Counsel; Kathleen Kelly, Executive Director; Debra Shaffer, Deputy Executive Director; Henna Rasul, Senior Deputy Attorney General.

Public Attendees: Bert Wuester, Raleigh & Hunt; Heather Rogers, NDHA; Kelly Taylor, RDH; Kimberly Johnson, Esq., Lauria Tokunaga Gates & Linn; Brent Vogel, Esq., Lewis Brusbois Bisgaard & Smith; Rick Thiriote, DSO Coordinator; Andie Thorsteinsson, Alverson Taylor Mortensen & Sanders; Luke Kobzer, Alverson Taylor Mortensen & Sanders.

**2. Public Comment:** No public comment.

**Note: No vote may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken. (NRS 241.020)**

**\*3. New Business: (For Possible Action)**

**\*b. Review and Discuss Code of Federal Regulations Pertaining to Both the National Practitioners Data Bank and Health Care Integrity Protection Data Banks Including Section 1921 Provisions: Reporting Requirements. (For Possible Action)**

Ms. Kelly commented that she provided the committee members with a copy of NRS 622 for their review. She indicated that in NRS 622, terms were defined and that the reporting requirements were listed. She briefly went over the different sections and their topics. She commented that one of the purposes for requiring the regulatory board to report to the LCB is so that the LCB may utilize the information to see if maintaining certain regulatory boards is necessary. She continued to briefly describe the different sections and their topics. Dr. Kinard inquired of Ms. Kelly who had the privilege to report to the LCB. Ms. Kelly indicated that Ms. Shaffer is the one who is able to login and create a report, however, that any interested individual may go onto the website to review any reports available on the legislatures' website. Mr. Hunt indicated that Mr. Wuester from the office of Raleigh & Hunt reviewed all information and conducted his own analysis of what the Board is able to do and not do. He commented that he had Mr. Wuester produce a memo.

Mr. Wuester stepped forward and discussed the documents he provided to the Board. He indicated that he would briefly discuss the exhibits (attached for the record). He went into exhibit one and briefly discussed the letters of correspondence enclosed therein. He indicated that since 2000, the Board has had a policy where corrective actions have been used. He went over a chart that Ms. Shaffer drafted that outlined common actions the Board has taken that were not reported. He read threads of communication to see if the reporting requirements have been properly understood and complied with. The individual with NPDB responded to the messages responded affirmatively and indicated that the Board is reporting within the Data Banks requirements. Mr. Wuester continued to go through the exhibits. He went on to discuss the definitions of "any other negative action" listed in exhibit 4. In going through exhibit 5, he gave analogies of scenarios from a PowerPoint presentation on items that are reportable and non-reportable. He went on to briefly discuss exhibit 6. Mrs. Villigan commented that she recalled instances where there were standard-of-care issues, where the Board has restricted a practitioner's license where they were unable to practice certain areas until a determined number of continuing education has been completed, and inquired if such restrictions are reported to the data bank. Mr. Hunt replied that the Board does report such restrictions of practice. Mr. Wuester clarified for Dr. Sill the definitions for 'Board' and 'State' and whom the reporting pertains to.

Ms. Kelly indicated that she sent the Board members books of the Federal Regulations and Guidebooks from the NPDB and HIPDB, and the Codes of Federal Regulations that accompany the guidelines booklets. She indicated that she spoke with the assigned specialist from NPDB, Margarita Morales, whom indicated that what is considered discipline is determined by State law. She indicated that she particularly inquired of Ms. Morales if settlements and monitoring of settlements would not be considered discipline. Ms. Morales responded affirmatively. She added that Ms. Morales indicated that an exception to that would be if the monitoring was in conjunction with another action, such as a fine or a suspension by the Board, or anything considered discipline in accordance to NRS 631.350. Ms. Kelly inquired on what those would be. Ms. Morales indicates it would be whatever the State Law determined regarding discipline. She briefly went over the HIPDB and NPDB reporting requirements and how they slightly differ. She explained their different use of language and what determines which actions taken by the Board are considered reportable. She indicated that the NPDB and HIPDB are being combined and language is being created that will elucidate what information will be reported to the NPDB and which information to the HIPDB. She indicated they created an online portal that allows entities to report to both agencies at one time. Ms. Kelly commented that she could ask the NPDB how the Board should be reporting. Dr. Kinard commented that, perhaps, the Board could notify them how the Board is currently reporting actions and inquire if they are abiding by their reporting requirements.

Ms. Shaffer inquired that if a licensee agreed to enter into a settlement agreement, reimburse a patient, complete continuing education, and it is done so not pursuant to NRS 631.350; or if the licensee agrees to a settlement voluntarily and without admission to the opinion of the disciplinary screening officer, if it would then be considered discipline as set forth in NRS 631.350. Mr. Hunt indicated it would not be. Dr. Sill commented that any publicly available report is to be reported to the NPDB. Mr. Hunt disagreed and asked Mr. Wuester to go over the section Dr. Sill is referring to. Dr. Sill read the last page in exhibit 6 that indicates "Some states consider a Letter of Concern to be a publicly available negative action or finding, thereby making it reportable. States that do not consider a Letter of Concern to be a publicly available negative action or finding are not required to report the action." He stated that stipulations adopted by the Board are public documents. Mr. Hunt stated that they are not a negative action. Mr. Wuester indicated any corrective action is not considered to be negative action, therefore making it not reportable. Mr. Wuester stated that even if a statute is referenced, it does not denote that it is the basis for the corrective action stipulation. Further, licensees can agree to enter into corrective action which is not reportable. He referenced page three of exhibit 3, and indicated that it lists which entities are to report negative actions or findings, with the Board not being one of them. Dr. Sill inquired if the Board does not have to report negative actions, if the Board should even be adopting and making them available to the public. Mr. Hunt indicated that the public is better served if they are made aware of a licensee entering into a stipulation agreement of corrective action. Dr. Sill suggested creating another category to the current options of action (remand, stipulation agreement, and full-Board hearing), and add a corrective action category. Mr. Drizin, however, indicated that the statute requires that all actions must be made public records, with the exceptions of remands. He approached the Board and indicated that he reviewed the guide books from the HIPDB and NPDB. He indicated that with regards to the HIPDB, they clearly explain what is reportable and what is not. Mr. Drizin went into further discussion of the reasons behind corrective action and how it does not declare that a licensee admits any fault. Ms. Kelly commented that when writing in a stipulation agreement "pursuant to..." referring to the disciplinary action statute, if it implies that it is not a reportable action. He indicated that if a stipulation agreement refers to a disciplinary action statute, if it states it is corrective action it is not reportable.

Mr. Drizin commented that years prior the Board did not utilize the terms 'corrective action' in a stipulation agreement until recently. Dr. Blasco recommended that DSO's should seek Board legal counsel's advice when determining disciplinary action and corrective action so that the most appropriate course of action is sought, rather than seeking assistance from other arbitrary sources. Ms. Kelly commented to Mr. Drizin that there is some corrective action language for boards in other states, though not in Nevada. Mr. Hunt commented that if a stipulation agreement states that it is reportable, than it cannot be disputed otherwise. They further discussed that certain stipulation agreements may have not used the terms 'corrective action' however, indeed, are.

Ms. Shaffer commented to the Board that when Mr. Hunt sent correspondence back to NPDB auditor he asked that they affirm or correct his understanding of what is not considered reportable. The correspondence that returned affirmed that Mr. Hunt's interpretation was correct. Ms. Thorsteinsson commented that when dealing with a licensee, the Board's position is to protect the public and not necessarily punish the licensee. Therefore, there are many situations where reporting some issues to the Data Bank is not warranted. She cited some of the issues that licensees face when actions are reported to the Data Banks and how it hinders their ability to practice and maintain provider status. She added that by having a mechanism where the Board is not required to punish the licensee when the issues are not egregious, under certain circumstances, are not issues that fall under the criteria of matters that are considered reportable. She indicated that she, for example, would not permit her client to enter into a stipulation agreement that would produce a quandary for the licensee. She commented that it is not the Board to determine if an action is reportable; but, rather, it is determined by the guidelines and what it considers to be reportable. She added how the language in a stipulation agreement may reference the disciplinary action regulations, though the stipulation agreement, itself, is considered to be a corrective action stipulation agreement.

Mrs. Johnson commented that the Board has now heard from three different legal counsels of what

authority the Board has in determining what actions are reportable and which actions are not. She added that all actions should be dealt with on an individual basis. Dr. Sill inquired if the Board were to name the stipulation agreements, 'corrective action', would it be easier for the defense attorney and credentialing company to differentiate between stipulation agreements and corrective actions. Mrs. Johnson and Ms. Thorsteinsson both agreed that naming non-reportable action agreements 'corrective action agreements' would be better to use. Ms. Thorsteinsson added that the Medical Board uses either a stipulated agreement or a remedial agreement.

Mrs. Villigan inquired where the "letter of Concern" falls into play in the three current investigation proceedings of remands, stipulation agreements, and Board hearings. Mr. Hunt indicated that when the Board issues a remand in a case, they are including in the letter areas of concern of the investigator; additionally, the inclusion of areas of concern in a remand letter assist the DSO's in any future complaint matters regarding the same licensee. Mr. Drizin commented that having periodic calibration of DSO's so that the investigators are current in how to handle certain situations.

**\*a. Review and Discuss NRS 622 Including Settlements, Disciplinary Action Reporting, Board Actions, and Public Records. (For Possible Action)**

**\*(1) Comments and Discussion with Henna Rasul, Senior Deputy Attorney General, Regarding Other Regulatory Boards and Reporting Requirements Pursuant to NRS 622, National Practitioners Data Bank (NPDB) and Healthcare Integrity Protection Data Bank (HIPDB). (For possible Action)**

Ms. Rasul indicated that she was able to answer any questions the Board may have regarding reporting requirements. Ms. Kelly inquired on the types of actions that the Board's she oversees report under NRS 622, and what types of actions are reportable to the NPDB and the HIPDB. Ms. Rasul replied that the other two Boards she oversees utilize one single form, a consent decree, which is what they use when they will pursue a matter; and dismiss any matters they decide not to pursue. She added that they do not have official investigators. She explained that when an informal complaint is received from the public, or in some instances, investigations are initiated by a Board member; or usually it is the Executive Director, as one of their authorized duties, that submits an administrative complaint. She indicated that if they do not go to an informal hearing they usually enter into a decree agreement, which is public record and is reported to the both data banks and the LCB. Ms. Kelly further inquired if they had disciplinary statutes, which Ms. Rasul replied affirmatively; she added they are not authorized to use corrective actions as they apply the law rather strictly. She explained that when a complaint is dismissed, the complaint number with a brief summary is placed on the next Board agenda so that the complaint has to be placed before and approved by the board; which is not reported to the Data Banks.

Mr. Hunt inquired if Ms. Rasul has previously spoken with any of the committee members prior to this meeting and if it was Ms. Kelly whom requested comments. Ms. Rasul replied that she has not spoken with any of the committee members and that it was Ms. Kelly that requested for her comments. Mr. Drizin inquired of Ms. Rasul on the number of complaints received by the Social Board in a year. She responded that in the past year approximately 100 complaints were received.

Recess: 8:15 pm

Returned from recess: 8:25pm

**\*c. Review Board Motion from 1998 Giving Authority to the Executive Director Regarding Complaint Review Process Implemented at the Board Office and Discuss Any Proposed Changes or Revisions. (For Possible Action)**

**and**

**\*d. Review, Discuss, and Consider Recommendations or Proposed Changes to**

Disciplinary Action Powers of the Board Including Non-Disciplinary Action  
Authority, Corrective Action Authority and Remediation Programs—NRS 631.350  
(For Possible Action)

Ms. Kelly commented that the statutes that have been referenced for discussion on the agenda and pointed out that there is a regulation that indicates what the Executive Director's duties are. She added that a motion was taken in 1998 to further describe what the Board's disciplinary process included in terms of reviewing complaints received, which relates to the statute on how the Board investigates either by a verified complaint or by an authorization by the Board's own motion. Mr. Hunt in anticipation of this he sent a package to the Board members. He indicated that the proposed motion by Dr. Pick in 1998 at that time there was no deputy director. Mr. Hunt explained that in 2002, two years prior to the date of employment of Ms. Kelly, Ms. Shaffer was approved for hire by the Board at a regularly scheduled Board meeting. Further, that Ms. Shaffer was to handle the administration of complaints and the disciplinary process. Mr. Hunt went over the regulation on the duties of the Executive Director and he went over the duties listed in NAC 631.023. Mr. Hunt went on to discuss the duties outlined as of August 29, 2011 and noted that the duties listed under Ms. Shaffer indicate that her duties are primarily looking over the disciplinary process, with the exception of CE stipulation approvals, which was assigned to Ms. Kelly. Ms. Kelly commented to Mr. Hunt that as the Executive Director she sets all the duties for the staff, which Mr. Hunt responded that she does not have that authority in accordance to NAC 631.023. Mr. Hunt commented that Ms. Shaffer is the most appropriate individual to oversee the disciplinary process and that she is the one that should be assigning the DSO's because she is most knowledgeable of their expertise in the field of dentistry. He added, further, that Ms. Shaffer should also be the one who handles the authorized investigations, and offered the Board some history on the creation of the authorized investigations. He indicated that the Board passed over the assignment of authorizing investigations to Ms. Kelly after a concern was raised from an opposing legal firm that he, Board legal counsel, should not oversee the authorization of investigation and also be the ones to prosecute. He added that Ms. Kelly was to discuss and review the authorized investigations with him, which has not been the case for several years now. Mr. Hunt asked that these concerns have been brought before the committee so that they can reaffirm the duties as presented and allow Ms. Shaffer to be the one whom assigns the disciplinary screening officers (DSO) and authorizes complaints. Ms. Shaffer clarifies that Dr. Thiriot directs certain cases to certain DSO's and gives his input where appropriate when assigning complaints. Dr. Sill inquired on the process of the authorized investigation, how they arise, and how they differ from patient complaints. Mr. Hunt indicated that the criticality of the authorized investigations is that they should be used very sparingly. He indicated that the Board must be very apprehensive when someone is not willing to sign a complaint, the Board must have the: who, what, where, and when, so as to not be a victim of hearsay. Dr. Blasco inquired of Mr. Hunt on how the system was running a few years back, and he replied that up to a few years ago it was running fine, and that there are many states that have consulted with him about how they can emulate the Board's disciplinary system. Ms. Kelly indicated that as the Executive Director, she oversees all of the operations at the office, sets the duties for the staff, and that while Ms. Shaffer may have been hired by Dr. Busch in 2002 and hired for an office administrator position, it was when she was hired and promoted to be the Executive Director that she promoted Ms. Shaffer to the position Deputy Executive Director and continued with making assignments for all of the staff for their duties. She indicated that just because she gives an assignment does not indicate that she is not involved or participating in the complaint process. She added that she has spoken with Mr. Hunt about authorized investigations. She indicated that at times they received information from the Health Division for authorized investigations. She indicated that they receive information from many resources. She commented that the purpose of her including this item on the agenda item is so that the committees would become aware of the relationship of authorized investigations, complaints and how they are handled by the Executive Director at the time, but since the staff has changed and needs have changed and, therefore, have been delegated. Ms. Kelly commented that regarding the last couple of years regarding cases where she has had absolute reason to raise questions with activities of how the disciplinary process has been handled with DSO's, which such conversation of this concern was

discussed with the previous Board President and Secretary/Treasurer. She further commented that if there is an effort to try to somehow excerpt her ability to be the Executive Director and have authority as the Executive Director, this is not the place or time, and is completely unprofessional and unwarranted. She added that the Board affirmed her position and duties in December 2009, which her duties included: hiring staff, setting duties, salaries, etc. Further, that if Mr. Hunt would like to proceed with how she may be remiss in her duties, or has involved herself improperly at the Board as the Executive Director, he can certainly try to do so with this committee and that it is up to the committee members, whether or not they would want to listen and contribute to it.

Dr. Sill expressed his concern for the process of the authorized investigation, as it is a rather powerful tool that the Board has, and that there is potential for abuse, but also a real need for this mechanism of investigations. Mr. Drizin stated that this may be an area that he is not too concerned about the process, but agreed that it can be somewhat troublesome on deciding who to assign to authorize the investigations, whether it should be an individual or a panel of members. Ms. Shaffer commented that what she may deem sufficient information for an authorized investigation; Board legal counsels may not find it to be sufficient reason to authorize an investigation. Mr. Drizin indicated that there is a reason why the statute requires that a complaint be verified, and that they should be prescreened so that they Mr. Hunt can determine if it warrants an authorized investigation. He indicated that if any abuse of the authorized investigation power, Mr. Hunt and he are there to notify the Board if they feel that an authorized investigation is inappropriate.

Dr. Kinard inquired of Mr. Hunt if there was a letter dated August 29, 2011 that outlined the responsibilities. Mr. Hunt indicated that Ms. Shaffer was hired in October of 2002 to handle the administration of complaints and disciplinary process, and with all-due-respect to Ms. Kelly, Ms. Kelly did not promote Ms. Shaffer, it was the Board who approved Ms. Shaffer's employment and her duties. Ms. Shaffer commented that at the annual retreat a Board member asked if the Board staff could briefly discuss their duties, so that Board members would know who to go to when needed. Ms. Kelly indicated that she had been doing a duties list for some time and posts them, and that she provided them to Angie to post in the front office, which she also provided the list of duties to the auditor. Dr. Blasco inquired if the list of duties listed were correct or incorrect. Ms. Kelly indicated that the listed presented was not the most current one. She indicated that there is a new duties roster out that is more current that reflects the changes she made for Angie who now holds a new position.

MOTION: Dr. Blasco made the motion to assign to the Deputy Executive Director the responsibilities of authorizing an investigation, be the executive over discipline, and the assignment of DSO's, as was outlined in the duties outline dated August 29, 2011. Seconded by Mrs. Wark. Discussion: Mrs. Villigan inquired if this would be limiting the authorizations only to one individual. Dr. Kinard responded that the motion would have Ms. Shaffer authorizing the investigations. He reiterated his motion and indicated that based on the August 2011 duties list, it indicates that Ms. Kelly is the one to approve CE courses required in the stipulations as drafted. Dr. Sill expressed his concern that only one individual is authorizing the investigations, and felt that it should be handled by a resource group and should be based on a group decision. Mr. Hunt indicated that the Board is not giving Ms. Shaffer the authority to authorize investigations without the Board's consent, but rather she will refer to Mr. Drizin or him, Dr. Thiriot and the Board, based on her knowledge of cases, and will be the one to place the item on the agenda. Dr. Blasco indicated that, therefore, there is a checks-and-balances process that Ms. Shaffer will be utilizing to determine which matters are to be placed on the agendas for investigation authorization, and that having a committee for such a purpose would be degenerating. Dr. Sill inquired if the decision is binding on the Board or if it is simply a recommendation to the Board. Mr. Hunt indicated that it is a recommendation to the Board. Roll call vote:

Dr. Byron Blasco-----yes  
Dr. J Gordon Kinard-----yes  
Dr. M Masih Soltani-----yes

Dr. J. Stephen Sill-----yes  
 Mrs. Leslea Villigan-----yes  
 Mr. James "Tuko" McKernan-----yes  
 Mrs. Lisa Wark-----yes

Motion is agreed to; recommendation will be made to the Board.

Ms. Kelly indicated that item (d) was placed on the agenda for discussion because there were other Boards that have corrective action and non-discipline, or if there would be desire to look at rule-making for these types of things in the Board's regulations, if necessary, in statute, since they will be able to go to the legislature next session.

Mr. Hunt commented that upon seeing this agenda item he contacted the LCB and was told that there are some Boards that do corrective action. He indicated that the Nursing Board's regulation state that they may restrict someone's practice and still not report it. He inquired how a state law could surpass a federal law. He added that the legislative session is approaching and the Board should try to put a bill through.

MOTION: Dr. Sill made the motion to recommend that the Board draft a BDR that asks permission for the Board to make corrective action stipulations. Second by Mrs. Wark. Roll call vote:

Dr. Byron Blasco-----yes  
 Dr. J Gordon Kinard-----yes  
 Dr. M Masih Soltani-----yes  
 Dr. J. Stephen Sill-----yes  
 Mrs. Leslea Villigan-----yes  
 Mr. James "Tuko" McKernan-----yes  
 Mrs. Lisa Wark-----yes

Motion is agreed to; a BDR is to be drafted for the next legislative session.

- \*e. Review and Discuss NRS 631.360 Regarding Investigations, Notice and Hearings; NRS 631.363 and the Investigations and Informal Hearing Process; NRS 631.368 Regarding Confidentiality of Investigations and Public Records of Disciplinary Actions by the Board. (For Possible Action)

Ms. Kelly indicated that she was bringing this item to the committee's attention, regarding NRS 631.368. Once there is an investigation any documentation utilized in the investigation is confidential. She indicated that the statute addresses discipline. Mr. Hunt explained the reason for the current statute. Mr. Drizin indicated that he interpreted the statute was that a complaint is an allegation and does not find information affirming the allegation it is not considered public record. He inquired why a response to a complaint is not considered public document. Ms. Kelly indicated that she placed this time on the agenda so that if any of the committee members had any questions, they may ask for clarifications. They further discussed how certain documents are not public record, and how the response to a complaint is considered public record.

**\*4. Possible recommendations to the Board based on Committee's review (For Possible Action)**

The first recommendation was that the duties delegated to the Deputy Executive Director, Ms. Shaffer, is to oversee discipline, such as, authorize investigations, be the executive over discipline, and assign and recommend the DSO's, as was outlined in outline of August 29, 2011 duties roster.

The second recommendation is that the Board draft a BDR that grants permission for the Board to make corrective action stipulations.

**5. Public Comment: No comments.**

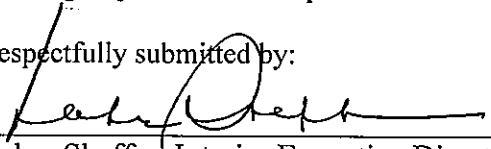
**Note: No vote may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken. (NRS 241.020)**

6. **Announcements:** No announcements.

\*7. **Adjournment** (For Possible Action): MOTION: Dr. Blasco made the motion to adjourn. Second by Dr. Sill. No public comment. All in favor.

Meeting Adjourned at 9:43 pm.

Respectfully submitted by:



\_\_\_\_\_

Debra Shaffer, Interim Executive Director