



Approved by the Board on October 3, 2024.

OREGON MEDICAL BOARD
Meeting of the OMB Guideline Workgroup • August 19, 2024 • Held via Video Conference

PUBLIC SESSION

Welcome **POULSEN**

Christoffer Poulsen, DO, Workgroup Chair, called the meeting to order at 5:00pm and called the roll.

The following Workgroup members were present:

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| Tim Beals, DO, OPSO Representative | Connie McKelvey, Attorney Representative |
| Mark Bonanno, OMA Representative | Chere Pereira, Public Representative |
| Troy Bundy, Attorney Representative | Jill Shaw, DO, OMB Member |
| Valerie Harmon (OPSC), Systems Representative | Christoffer Poulsen, DO OMB Member |
| Molly Marcum, Attorney Representative | |

OMB Staff present:

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| Nicole Krishnaswami, JD, Executive Director | Gretchen Kingham, Executive Assistant (5:15) |
| Elizabeth Ross, JD, Legislative & Policy Analyst | |

Dr. Poulsen welcomed Workgroup members and discussed ground rules for the meeting, provided an overview of the agenda, and invited members of the public to participate by providing comment during the public comment period or by submitting written comments via email to Board staff.

Workgroup Member Introductions

Dr. Poulsen invited members of the Workgroup to introduce themselves.

- Tim Beals, DO, Osteopathic Physicians and Surgeons of Oregon (OPSO) Representative
- Mark Bonanno, Oregon Medical Association (OMA) Representative
- Troy Bundy, Attorney Representative
- Valerie Harmon, Oregon Patient Safety Commission, (OPSC), Systems Representative
- Molly Marcum, Attorney Representative
- Connie McKelvey, Attorney Representative
- Chere Pereira, Public Representative
- Jill Shaw, DO, Oregon Medical Board (OMB) Member
- Christoffer Poulsen, DO Oregon Medical Board (OMB) Member, Workgroup Chair

Workgroup Charter

Workgroup members acknowledged the Guideline Workgroup Charter.

OMB Audit Recommendations and Other Board/State Guidelines

Nicole Krishnaswami, JD, Executive Director, gave a brief overview of the 2023 Secretary of State audit and noted the Workgroup was convened to address the first audit recommendation: Implement sanctioning Guidelines and/or a sanction matrix to help reduce the risk of inconsistent and inequitable case decisions.

Elizabeth Ross, Legislative & Policy Analyst, discussed the efforts staff made to develop the draft Oregon Medical Board Investigation Guidelines, including researching what guidance other state boards and health care originations have implemented regarding discipline. Additionally, the Board hired a data analysis intern, studying for his masters in biostatistics, who conducted a retrospective analysis on 5 years of data regarding case outcomes. This was the same data provided to the Secretary of State.

Draft Guideline Discussion

Workgroup members discussed the following topic prompts:

Criteria for the Board issuing a remedial action, known as a Corrective Action Agreement (CAA), versus a disciplinary action, known as a Stipulated Order (SO).

- Valerie Harmon, OPSC, noted there were instances referring to prior action and prior concerns. She questioned how the Board would look at prior actions, in a more equitable way, if the previous system had a potential to be biased. Christoffer Poulsen, DO, OMB Member, Workgroup Chair, noted that even if there were a finding in the past, the OMB would look at the core information and actual data/complexities of the current case.
- Connie McKelvey, Attorney Representative, noted that she is very happy to be a part of this Workgroup. While she had not had a lot of time to review the information, Ms. McKelvey liked seeing the detailed difference between an SO and CAA in writing. The description is consistent with what her understanding has been. Ms. McKelvey also noted that she likes having the mitigating and aggravating factors in writing, as it will be helpful when working with her clients about what the outcome might be. Ms. McKelvey would like more time to review the information provided to the Workgroup. Dr. Poulsen noted that there would be two more meetings prior to the Workgroup making a final recommendation to the Board.
- Troy Bundy, Attorney Representative, agreed that having this information in writing will help articulate a position to their clients and explain what is happening. He also asked if the criteria “The licensee has not been subject to a prior Board action for the same/similar concerns” include Letters of Concern (LOC) or actions taken by hospital committees or is the Board using the term “action” as described in Oregon Administrative Rules? Ms. Krishnaswami answered that LOCs and actions taken by other entities are not considered a prior Board action; it is specifically prior action taken by the Oregon Medical Board. She also noted it important to remember that the Board can deviate if the standards have changed. Additionally, Ms. Krishnaswami spoke about recidivism, as one of OMB’s key performance measures, noting that the Board is not seeing the same licensee performing the same bad actions over and over. The Board takes a progressive look at cases to ensure recidivism is not happening.
- Molly Marcum, Attorney Representative, agreed that she is excited to participate in the Workgroup, and she noted the Workgroup goals are admirable and the amount of work that has gone into preparing for the Workgroup is impressive. She agreed that it will be very helpful to have these Guidelines in writing to explain the investigative process and possible outcomes to clients. Ms. Marcum agrees with the written descriptions delineating CAAs and SOs. Additionally, she noted the first criteria in the draft guidelines for a CAA says, “The Board alleges only minor violation(s) of the Medical Practice Act;” and she asked what the Board considers minor violations. Ms. Krishnaswami answered that Ms. Marcum made an excellent point, noting there is nothing currently in writing regarding minor violations and the Board can do a better job defining what a minor violation is. Ms. Marcum thanked Ms. Krishnaswami and noted she realizes that not everything can be delineated due to specific circumstances.

Discussion regarding list of mitigating and aggravating factors based on sample guidelines from other states and boards.

- Dr. Poulsen discussed that there is quite a bit of variation from state-to-state and board-to-board, and the OMB will not necessarily want to mimic all the other organizations.
- Mr. Bundy noted the list of mitigating and aggravating factors look about right, as these are the things he tries to argue, however he understands that things will carry different weight depending on the specific situation.
- Ms. Harmon stated the list is very comprehensive, but noted there are some subjective terms that might need more definition/clarification in order to be applied more consistently over time.
- Ms. Marcum agreed the list is very comprehensive, but noted that some of the reference provided have personal circumstances such as length in practice, length of license time, work circumstances, etc. The current draft does mention environmental factors in the facility or workplace, but she suggested adding additional circumstances, similar to other states' guidelines. Additionally, Ms. Marcum mentioned that the Oregon State Board of Nursing (OSBN) has made efforts to be consistent regarding personal circumstances; they once posted their matrix on their website. Dr. Poulsen responded that changing factors for OMB licensees makes personal/environmental circumstances quite complex, but perhaps there may be some generic terms that could be utilized. He noted that there is such diversity in the stress on licensees, that it will be difficult to create specific definitions.
- Ms. Krishnaswami discussed that the Oregon State Bar utilizes length of time in the practice of law as an aggregating factor, not mitigating factor. She asked attorneys on the Workgroup if they thought experience should be an aggregating factor, a mitigating factor, or case by case. Ms. McKelvey and Mr. Bundy both stated it should be case by case. The current practice of looking at each case is helpful. It is all situational and is should just be a factor considered by the Board.

Discussion regarding proposed groupings of statutory references.

- Mr. Bundy noted the groupings seem comprehensive and easy to follow. He likes that the groupings split sexual misconduct into its own category.
- Ms. McKelvey likes that the draft Guideline is not using the phrase "unprofessional and dishonorable conduct," because "dishonorable" has been an issue for many of her clients. Ms. Krishnaswami stated that "dishonorable" not being on the draft guideline is staff shorthand; the statute does say "unprofessional and dishonorable conduct," which she acknowledged does arise as a negotiating point during case resolution.
- Ms. Marcum pointed out that the "negligence" category is not broken into separate gross negligence and repeated negligence categories, and she likes that for her clients.

Discussion regarding potential remedial or disciplinary outcomes in the draft Guidelines.

- Ms. Harmon asked how the Board will decide which outcome to choose, with so many options, and how will it be done consistently over time. Dr. Poulsen responded that it is often easy to narrow the outcomes based on the type of violation committed and the concern level of the Board. He gave an example of the decision to require an educational course v. practice limitation, depending on the violation and the Board's concern for patient safety.
- Ms. Harmon noted there is a history to how outcomes have been applied and asked how the Board would ensure consistency over time, as staff and member turnover occurs. Dr. Poulsen acknowledged this important point, and discussed how Board member terms overlap, with two 3-year terms, which staggers members, thereby creating a situation for consistency and sharing institutional knowledge.
- Mr. Bundy asked if the Board has a maximum suspension length, noting the most he has seen was 180 days. Ms. Krishnaswami answered that there are not many suspensions, but 180 days has been the maximum over the last few years. If a suspension needed to be longer than 180 days, the action would most likely be loss of licensure, as statute allows for reapplication two years after revocation.
- Ms. Krishnaswami addressed Ms. Harmon's question regarding how the Board decides which outcomes to choose. She noted that nearly all cases fall into more than one statute reference category, so the Board would discuss the mitigating and aggravating factors to help determine which outcomes are correct. Ms. Krishnaswami also discussed the ability to review previous cases, with similar violations, to assess possible outcomes, specifically noting that no two cases are ever exactly alike, so it is not possible to develop an exact formulary. At the conclusion

of this Workgroup, the Board hopes to have guidelines with the flexibility to customize appropriate outcomes for each specific situation.

- Jill Shaw, DO, OMB Member, asked the attorneys on the Workgroup what the impact of these outcomes would be on settlement negotiations? Mr. Bundy answered that it depends on the situation. He noted that he looks at a proposed reprimand as nothing to lose so he will ask for a hearing and then go through process of negotiating. Additionally, he noted one thing that continues to come up is that an SO with a practice limitation is a de facto revocation of licensure because licensees will lose their board certification and without board certification, it is difficult work. This is something he considers when deciding whether to negotiate when he receives a Notice of Proposed Disciplinary Action or ask for a hearing. The Board's choice and proposed penalty plays a huge role in how attorneys suggest they manage the case to their clients.

Additional Discussion.

- Mark Bonanno, OMA Representative, noted that the OMB's response to the audit has been most valued and, in particular, that some recommendations were being worked on prior to the audit, such as implementing a new database system. Additionally, he noted the last audit recommendation is to "develop and implement written policies and procedures for analyzing board disciplinary decisions for equity and consistency" and asked how the OMB is going to address potential internal issues with an investigator or Board member? Ms. Krishnaswami answered that the way the Board controls potential bias, conflict, or other issues, regarding Board members, is that members must declare a potential bias and/or conflict, recuse from case discussion, and not vote on the case. The Department of Justice (DOJ) provides regular ethics law training, which the OMB is happy to provide the OMA. Additionally, Ms. Krishnaswami noted that a DOJ representative is present to ensure sure the Board's desired outcomes are aligned with statute and rule and that with a 14-member Board, there will always be balanced decisions because of the diversity in thought. She stated that if everyone could observe an executive session discussion, it would be clear how thoughtful and balanced Board member perspectives are.
- Mr. Bundy noted he had a conflict with an investigator and raised his concern to the Investigations Manager, Walt Frazier, who immediately resolved the situation. He was very impressed with how the issue was handled. Ms. McKelvey also noted her appreciation for Mr. Frazier.
- Chere Pereira, Public Representative, stated how impressed she was with how all Board members worked together to find common ground, even when it meant they had very long meetings.
- Dr. Poulsen noted that the Board does excellent work but knows there are always opportunities to improve as the context of the work changes. This is a very valuable process.

Public Comment

No members of the public were present.

Closing Discussion

Ms. Marcum asked about the process moving forward.

Dr. Poulsen thanked Workgroup members for their time and noted the next step will be for the Board's Administrative Affairs Committee and full Board to review the draft Guidelines, as well as the Workgroup's discussion. Board staff will work on any areas identified before the Workgroup's next meeting, on November 18 at 5:00pm. Any written comments or questions should be directed to Elizabeth Ross at the email address provided in the meeting materials.

Dr. Poulsen adjourned the meeting at 5:56pm.