Fahey Schultz Burzych Rhodes

ATTORNEYS AT LAW
4151 OKEMOS ROAD
OKEMOS, MI 48864 USA

FSBRLAW.COM
TEL: 517.381.0100
FAX: 517.381.5051

September 17, 2021

Via Electronic Mail

Department of Licensing and Regulatory Affairs
Bureau of Professional Licensing
Attn: Policy Analyst
P.O. Box 30670
Lansing, MI 48909

Dear Policy Analyst:

Re: Public Comments on Proposed Rule 2021-37 LR

We are writing to submit comments regarding proposed amendment 2021-37 LR to the Public Health Code Disciplinary Rules. In particular, we would like to make comment regarding proposed Rules 338.1607a(4) and 338.1604(1), which would allow: 1) administrative complaints to be amended at any time; and 2) the department to conduct a review of all allegations or historical records as necessary. See Mich Admin Code, R 338.1607a(4); See also R 338.1604(1).

As explained in greater detail below, the proposed amendment to R 338.1607a(4) violates the notice requirements of the Procedural Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 17 of the Michigan Constitution. US Const, Am XIV; see also Const 1963, art I, § 17. Also, the proposed amendment to R 338.1604(1) violates the reasonable search and seizure requirements of the Fourth Amendment of the United States Constitution and Michigan Constitution. US Const, Am IV; see also Const 1963, art 1, § 11.

Accordingly, we respectfully request that the proposed amendments to these rules be amended to maintain consistency with applicable constitutional standards. We address the proposed rules in turn below.

PROPOSED R 338.1607A(4) VIOLATES THE DUE PROCESS CLAUSES OF U.S. CONSTITUTION AND THE MICHIGAN CONSTITUTION.

Proposed amendment 2021-37 LR would amend R 338.1607(A)(4) as follows:

(4) An ~~amended~~ administrative complaint may be **amended at any time.** ~~filed 31 or more days before the hearing or at any time with leave from the administrative law judge.~~ A respondent must be given a reasonable time to file an amended answer and to prepare a defense before hearing if the allegations in the administrative complaint are substantially amended.

Amended R 338.1607a(4) would allow the Bureau of Professional Licensing (the "Bureau") to amend disciplinary complaints in a manner inconsistent with the notice requirements of both the Federal and Michigan Constitutions' Due Process Clause. Both clauses prohibit state deprivation of "life, liberty, or property" without due process of law. See US Const, Am XIV; see also Const 1963, art I, § 17. State-issued licenses are a recognized property interest, and state deprivation of them requires due process. See *Wilkerson v Johnson*, 699 F2d 325, 328 (6th Cir 1983) ("This circuit has recognized that the freedom to pursue a career is a protected liberty interest and that state regulation of occupations through a licensing process gives rise to protected property interests") (emphasis added). Courts have explained that the touchstones of due process are adequate notice and an opportunity to be heard. *Warren v Athens*, 411 F3d 697, 708 (6th Cir 2005). In this case, R 338.1607a(4) would allow the Bureau to freely amend disciplinary complaints "at any time," which is inconsistent with the Due Process Clauses' protections, as doing so would often result in insufficient notice to licensees.

Michigan courts have explained a state licensee must be afforded "rudimentary due process" in licensing matters. *Bundo v Walled Lake*, 238 NW2d 154 (1976) (citation omitted); see also *Dation v Ford Motor Co*, 314 Mich 152, 167 (1946); *Napuche v Liquor Control Comm*, 336 Mich 398, 402-03 (1953) ("Respondent had a right to procedural due process, i.e., a right to 'adequate notice' and an 'opportunity to be heard'") (internal citations omitted). "Rudimentary due process" in licensing matters consists of 1) "timely written notice detailing the reasons for proposed administrative action"; and 2) "an effective opportunity to defend by confronting any adverse witnesses and by being allowed to present in person witnesses, evidence, and arguments." *Bundo*, 395 Mich at 696–97 (quotation marks and citations omitted). ***Importantly, "adequate notice" requires being "fairly advised" of the allegations asserted by the state***. *Viculin v Dept of Civil Serv,* 386 Mich 375, 399 (1971) (citation omitted) (emphasis added); see also *Dation*, 314 Mich at 165-66 (stating the party must be "apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence"); *Traverse Oil Co v Chairman, Nat Res Com'n*, 153 Mich App 679, 688 (1986) (the party must be provided "adequate notice detailing the reasons for the proposed administrative action") (citation omitted); *Napuche*, 336 Mich at 404 (requiring a concise and definite statement of the charge against the licensee to be served upon him or her prior to the hearing).

Agencies' complaints must therefore give adequate notice of their claims before a hearing. See *Bureau of Health Care Services v Pol*, unpublished opinion of the Court of Appeals, issued June 23, 2016 (Docket No. 327346), 2016 WL 3452174, p *1 (holding a licensee's due process rights were violated when the hearing officer considered allegations outside the scope of the complaint); see also *Hardges v Dept of Soc Services*, 177 Mich App 698 (1989) (reversing a decision involving the termination of an individual's food stamp assistance because the referee considered information that had not been cited prior to the hearing).

Unfortunately, proposed R 338.1607a(4) runs afoul of the notice principle inherent to due process, as it would allow the Bureau to amend complaints on a whim, which would too often fail to afford respondents adequate notice of all the evidence upon which a factual adjudication rests. See *Dation*, 314 Mich at 165-66. Proposed R 338.1607a(4) would allow the Bureau to amend its complaint "at any time," including immediately before a hearing or even during a hearing. If the Bureau amended a complaint the day before a hearing, it would be not only be unfair, but also likely unconstitutional to expect a respondent to be prepared to defend their position in connection with the amended complaint.

Even absent the proposed language, the status quo of R 338.1607a(4) raises significant due process concerns. The rule as it is currently written only provides a respondent with "reasonable time" to respond if the Bureau's amendment to the complaint is "substantial." It is entirely unclear from the rule what would constitute a "substantial" amendment. It is also unclear who would decide what does or does not constitute a "substantial" amendment, and the added ambiguity only places another burden on licensees to ensure the Bureau does not trample on their due process rights.

A respondent should simply be granted a reasonable time to respond to an amended complaint. An administrative law judge is capable of ordering what would constitute a "reasonable time" based on the amendment offered. If, for example, a typographical amendment is made to correct the spelling of a respondent's name, a "reasonable time" to respond may be minimal, or even perhaps zero. Rejecting the proposed language and eliminating the ambiguity in R 338.1607a(4) would ensure that a party has time to adequately respond and would prevent arbitrary amendments to pleadings. There is also no burden on the Bureau to provide a respondent with a reasonable time to respond to an amended complaint.

For these reasons, we respectfully request the reconsideration and rejection of the proposed amendments to R 338.1607a(4). We further request the Bureau consider amending R 338.1607a(4) as follows:

(4) An amended administrative complaint may be filed 31 or more days before the hearing or at any time with leave from the administrative law judge. A respondent must be given a reasonable time to file an amended answer and to prepare a defense before hearing ~~if the allegations in the administrative complaint are substantially amended~~.

PROPOSED R 338.1604(1) VIOLATES THE REASONABLE SEARCH AND SEIZURE REQUIREMENTS OF THE FOURTH AMENDMENT AND THE MICHIGAN CONSTITUTION.

Proposed amendment 2021-37 LR would amend R 338.1604(1) as follows:

> Rule 4. **(1) The department may conduct a review of all allegations or historical records as necessary to determine if reasonable grounds for an investigation exists.**
>
> (2) The department's investigation conducted as required or permitted by ~~section 16221 of~~ the code~~, MCL 333.16221,~~ may encompass possible violations other than those specifically identified when the investigation was initiated ~~if the possible violations arise from the same conduct or incident described when the investigation was initiated~~.

The proposed revisions to R 338.1604(1) may be deemed unconstitutional depending on how they are applied. R 338.1604(1) grants the Bureau the authority to conduct a pre-investigation investigation into a licensee's records even if no allegation of misconduct has been made against the licensee. To do so, the Bureau would utilize its investigation and subpoena power under the Public Health Code, PA 368 of 1978, to require the disclosure of records or information from licensees. On its face and as written, this scheme violates the Fourth Amendment and the Michigan Constitution.

> The Fourth Amendment itself protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . Under the plain terms of the amendment, when the Government obtains information by physically intruding on persons, houses, papers or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred. . . . In addition, the government needs a warrant (assuming no exception applies) before searching something in which the person has a reasonable expectation of privacy. [*People v Gingrich*, 307 Mich App 656, 662 (2014) (internal citations and quotations omitted).]

The Michigan Constitution's prohibition against unreasonable searches and seizures is construed as protecting the same interests as the Fourth Amendment of the United States Constitution. *Id.;* see also US Const, Am IV; see also Const 1963, art 1, § 11.

We do recognize that the Fourth Amendment's warrant requirement is nonetheless subject to the administrative-search exception. *MS Rentals, LLC v City of Detroi*t, 362 F Supp 3d 404, 414 (ED Mich, 2019); see also *Taylor v City of Saginaw*, No. 20-1538, 2021 WL 3745345, at *2 (CA 6, August 25, 2021). "Under this administrative-search exception to the warrant requirement, some procedural demands are relaxed," but "the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decision maker." *MS Rentals*, 362 F Supp 3d at 414 and 416. "Otherwise, without the opportunity for precompliance review, there exists an 'intolerable risk' that searches authorized by an ordinance will exceed statutory limits or be used as pretext to harass individuals." *Id*. at 416.

The proposed revisions to R 338.1604(1) are unconstitutional on their face as contrary to the Fourth Amendment. R 338.1604(1), as amended, would permit the search and seizure of records and information to determine if "reasonable grounds for an investigation exists." "Historical records" is a broad phrase that encompasses a wide array of reports or information under R 338.1603. Neither R 338.1604(1), nor the remainder of the Disciplinary Rules or the Public Health Code provide the opportunity for precompliance review prior to the search and seizure of these reports or information from a licensee. The changes to R 338.1604(1) thereby enhance the risk that such "review" will exceed statutory limits or will be used to harass licensees.

Direct authority is provided by *Zadeh v Robinson*, 928 F3d 457 (CA 5, 2019). In *Zadeh*, a medical licensee was subject to an administrative proceeding for violations of the state board's administrative regulations. *Id.* at 462. As part of the state's investigation, a subpoena was issued for the production of the licensee's medical records. *Id.* The licensee argued, in part, that the subpoena violated the Fourth Amendment. *Id.* at 464. The *Zadeh* court found that the state board's demand was unconstitutional because there was not an opportunity for a precompliance review. *Id.* at 464 and 468. See also *MS Rentals, LLC,* 362 F Supp 3d at 416-17 (finding a city's inspection ordinance which required property owners to submit to inspections at reasonable times unconstitutional on its face because its scheme did not include the opportunity for precompliance review).

The same is true with the proposed changes to R 338.1604(1). If made effective, the statutory scheme would subject Michigan licensees to subpoenas for records pursuant to MCL 333.16221, MCL 333.16235, R 338.1603 and, naturally, R 338.1604(1). Like in *Zadeh*, the scheme here does not provide licensees with the opportunity for precompliance review.

The Department could attempt to argue that no opportunity for precompliance review is needed due to the regulated industries being "industries that 'have such a history of government oversight that no reasonable expectation of privacy' exists for individuals engaging in that industry," i.e., "closely regulated industries." *Id.* at 464; see also *MS Rentals, LLC*, 362 F Supp 3d at 416-17. This is problematic however, considering the rule applies to an extremely wide variety of industries, such as but not limited to, acupuncture, audiology, midwifery, sanitarians, and veterinary medicine. The *Zadeh* court declined to hold that the medical industry as a whole was a closely regulated industry. *Id.* at 466. Accordingly, the application of the rule to licensees of different industries regulated under the Public Health Code may violate the constitutional rights of some, but not others, or all.

But even if it was presumed that all of the industries regulated under the Public Health Code are "closely regulated industries," the Bureau's authority to issue subpoenas and inspect information and records is not a constitutionally adequate substitute for a warrant. "In order for a warrant substitute authorized by statute to be constitutionally adequate, 'the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.'" *Zadeh*, 928 F3d at 467, quoting *New York v Burger*, 482 US 691, 703 (1987); see also *MS Rentals, LLC*, 362 F Supp 3d at 417.

In *Zadeh*, the state argued that a statute that provided the state board with the authority to "issue a subpoena or a subpoena duces tecum to compel the attendance of a witness and the production of books, records, and documents" satisfied this criteria. *Zadeh*, 928 F3d at 467. Conversely, the *Zadeh* court held that the statutory scheme failed the criteria because it was purely discretionary as "there [was] no identifiable limit on whose records [could] properly be subpoenaed." *Id.* Again, the same is true here. The proposed changes to R 338.1604(1) would provide the Bureau with unfettered discretion to conduct reviews on any licensee. Neither MCL 333.16221 nor MCL 333.16235 contain any restraint on its subpoena power to do so. There is no identifiable limit on whose records or information could be subpoenaed to conduct this pre-investigation investigation.

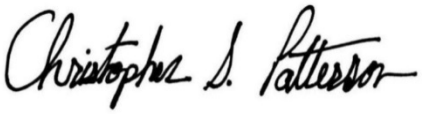
In frank terms, the proposed changes to R 338.1604(1) would permit the Bureau to engage in unchecked fishing expeditions. An intolerable risk would be created that searches authorized by the Public Health Code and R 338.1604(1) "***will exceed statutory limits or be used as pretext to harass individuals***." *MS Rentals*, 362 F Supp 3d at 416.

We do not dispute that the Bureau has a true and significant interest in ensuring health care licensees comply with the Public Health Code and that the inspection of a licensee's records would aid the Bureau in doing so. This interest however must be weighed against the rights afforded to licensees under the Fourth Amendment and the Michigan Constitution.

Finally, we would note that the minimal standards of acceptable and prevailing practices for health professionals licensed by the Bureau is also an ever-evolving issue. The reviewing of historical records and past allegations may create a new risk that past conduct is reviewed, investigated, or even prosecuted in light of current acceptable standards.

For these reasons, we respectfully request consideration of the proposed amendment to R 338.1604(1) or, at a minimum, insert language that such review be subject to state and federal law and constitutional requirements.

Sincerely,



CHRISTOPHER S. PATTERSON
MEMBER
Direct: 517.381.3205
cpatterson@fsbrlaw.com

CSP/kjm

MHA Michigan Health & Hospital Association | Leading Healthcare

Sept. 20, 2021

Department of Licensing and Regulatory Affairs
Bureau of Professional Licensing
Boards and Committees Section
Administrative Rules for Public Health Code – Disciplinary Rules
2021-37 LR

Attention: Policy Analyst
P.O. Box 30670
Lansing, MI 48909
BPL-BoardSupport@michigan.gov

Dear Policy Analyst:

On behalf of the Michigan Health & Hospital Association (MHA), we respectfully submit the following concern of R 338.1604 Rule 4. (1) in the Administrative Rules for Public Health Code – Disciplinary Rules and recommend the proposed language not be adopted.

The proposed language grants the department overreaching authority by allowing it to have unlimited review of "all allegations or historical records" of a licensee. However, this language does not consider current Michigan statue on at least two accounts. R 338.1604 Rule 4. (1) removes the Board's statutorily required review and authorization of investigations of allegations under MCL 333.16231 and that professional peer review organizations remain confidential are protected against disclosure.

In regard to peer review, the Supreme Court held that the department cannot obtain protected information for use in carrying out its responsibilities under Article 15 of the Public Health Code, which includes MCL 333.16211, the statute governing permanent historical records. The confidentiality protections for information collected for quality improvement enable providers to work to improve patient safety and reduce the incidence of adverse events. As the Michigan Supreme Court has frequently emphasized, the assurance of confidentiality provided by the peer review statutes is essential to the candid and conscientious assessment of clinical practice and patient safety. Disclosure of information collected and evaluated by professional peer review organizations would be a significant and undesirable threat to the confidentiality essential to effective peer review.

Please reach out with any questions.

Respectfully submitted,

Adam Carlson
Vice President, Advocacy
Michigan Health & Hospital Association
Desk: (517) 886-8245 | Cell: (269) 757-2479
acarlson@mha.org

MSMS
MICHIGAN STATE MEDICAL SOCIETY

120 West Saginaw Street | East Lansing, Michigan 48823
517-337-1351 | msms@msms.org | www.msms.org

September 20, 2021

Via email (BPL-BoardSupport@michigan.gov)
Michigan Department of Licensing and Regulatory Affairs
Bureau of Professional Licensing - - Boards and Committees Section
Attention: Policy Analyst
P.O. Box 30670
Lansing, MI 48909-8170

Re: Administrative Rules for Public Health Code – Disciplinary Rules - Rule Set 2021-37 LR

To Whom It May Concern:

I am writing on behalf of the Michigan State Medical Society (MSMS) regarding Rule Set 2021-37 LR (Public Health Code - Disciplinary Rules). MSMS represents approximately 15,000 Michigan physicians, residents and medical students of all specialties and practice settings.

MSMS opposes and has serious concerns regarding the intended and unintended consequences of the proposed change to Rule 4. Therefore, MSMS respectfully requests that Rule 4 be removed from the Rule Set to allow the current language in Rule 4 to remain intact.

> **Rationale:** As written, this proposed rule would circumvent the requirement for board authorization of investigations of allegations under MCL 333.16231 and effectively give the Department the unchecked authority to investigate potential violations of unlimited scope without a board's statutorily required review and authorization. The Public Health Code already has a process in place should the Department's investigation uncover new allegations or potential violations other than those specifically identified when the investigation was initiated. Under the Public Health Code, if the Department's investigation uncovers new allegations or potential violations other than those specifically identified when the investigation was initiated, the Public Health Code requires the allegation to be submitted to the Department in writing, and for an investigation of the allegation to be approved by a panel of at least three board members unless the licensee's historical record includes one substantiated investigation or two or more written investigated allegations from two or more different individuals or entities (see MCL 333.16231).

Thank you for the opportunity to comment. Your thoughtful consideration is appreciated.

Sincerely,

Julie L. Novak
Chief Executive Officer