



January 4, 2007

Ann E. Mowery, PhD  
Executive Director  
Iowa Board of Medical Examiners  
400 SW Eighth Street Suite C  
Des Moines, Iowa 50319-4686

**RE: Screened Complaints Deemed to be Investigations**

Dear Ann:

This letter is written in follow-up to several discussions that we have had with both the staff and Board of the Iowa Board of Medical Examiners (“IBME” or “Board”) regarding the IBME’s treatment of screened complaints as investigations. The Iowa Medical Society (“IMS”) disagrees with the IBME’s direction to physicians against whom complaints have been filed but screened and administratively closed that they must answer “yes” if ever asked if they have been “investigated” by a licensing authority. Further, IMS believes that the IBME exceeds its statutory authority in releasing information about screened complaints upon request from other state licensing authorities. IMS requests that the IBME reverse its current practices on both of these accounts. Our analysis in support of this request follows.

**The Facts**

The IBME processes each complaint received by it. Upon receipt of a complaint, staff opens an investigation file. Ia. Admin. Code r. 653-24.2(1). The IBME does not keep separate complaint and investigation files but, rather, files complaint and investigative information together in the investigative file. Even if the complaint is closed, the file remains an investigative file. IMS believes the file name assigned by the IBME is not dispositive of the issue of whether a screened and closed complaint remains a complaint or morphs into an investigation.

The complaint is first reviewed by the Complaint Review Committee. Ia. Admin. Code r. 24.2(2). Following screening, the complaint is assigned one of two paths. If the complaint involves serious public safety issues, the Committee assigns the complaint for investigation. Ia. Admin. Code r. 24.2(2)(a)(1). At this juncture, IMS believes an investigation within the meaning and intent of Iowa law begins.

In instances where the complaint involves less serious public safety issues, does not fall within the jurisdiction of the IBME, or otherwise meets the IBME's screening criteria, the Committee may close the case administratively without investigation or review by the Board. Ia. Admin. Code r. 24.2(2)(a)(2)-(5). IMS believes the screening process does not rise to the level of an investigation within the meaning and intent of Iowa law. Screened and closed complaints remain complaints.

IBME staff sends a letter to each physician against whom a complaint has been filed, screened, and closed administratively. This "notice" letter informs the physician that a complaint was received and closed. Generally this notice letter from the IBME is the first time the physician is aware that a complaint was filed. Unlike an actual investigation, the physician ordinarily is not contacted by the IBME regarding the complaint prior to screening review and administrative closure. The notice letter the physician receives generally contains little to no information regarding the nature of the complaint and, as required by Iowa law, the complainant is not identified.

The IBME changed its notice letter to physicians several months ago to now include the following admonition or mandate:

While this complaint and investigation are confidential under Iowa law, you are reminded that you must provide truthful and accurate answers if asked about this investigation by another licensing authority, insurer, or health care organization. Therefore, if you are asked whether you have ever been the subject of an investigation by a licensing authority you should answer affirmatively.

Physicians receiving this letter are stunned by this admonition. They fairly ask several questions. Why should a complaint that was screened and closed follow me around and raise red flags for me for the remaining years of my practice? Why must I be called upon each time I seek licensure, credentialing or recredentialing to defend against a screened and closed complaint that I have not seen, was not contacted about, and that is confidential and cannot be accessed by me or by others? Most relevant to this letter, the doctors strongly believe that the screening process – a very good initiative – does not rise to the level of an "investigation." So again they ask: Why must I respond that I have been investigated when I have not been investigated?

IMS agrees with its member physicians. Screened complaints that are administratively closed remain "complaints" and do not rise to the level of an "investigation." Physicians should not be penalized for the remainder of their practice lives by having to defend a "yes" answer to the question of whether they have ever been investigated by a licensing authority due to a complaint that was administratively closed and not referred for investigation. Further, the IBME's notice letter with the admonition language creates a different standard for those physicians that are now admonished to answer "yes" from those physicians who received such letters in the past absent such admonition and who in

good faith and reasonable belief do not respond “yes” when asked if they have ever been investigated by a licensing authority, believing reasonably and in all honesty that they had not been “investigated” by the IBME.

The position of the IBME in denominating screened and administratively closed complaints as “investigations” is unreasonable and lacking in statutory support. Further, to the extent that the IBME’s admonition to the physicians constitutes state direction or mandate, the IBME acts contrary to Iowa law in requiring physicians to release otherwise confidential information to outside entities that the IBME, itself, cannot release such information to.

### **The Law**

Iowa statutory law acknowledges steps in processing a complaint. At no time does Iowa law lump all steps taken in receiving and reviewing a complaint as an “investigation.” Language is important to this analysis. Screened complaints more appropriately fall within a “complaint file” as anticipated by Iowa law and do not rise to the level of Iowa law’s meaning and intent of an “investigation.”

Iowa Code section 272C.3(1)(c) addresses the authority of the IBME to “review *or* investigate *or* both” those written complaints received by the Board. [Emphases added] This section recognizes distinct processing steps upon Board receipt of a complaint. The statutory language clearly anticipates both “reviews” and/or “investigations.” Screening is a “review,” not an investigation.

Iowa Code section 272C.3(1)(d) says in part that the IBME shall have the power to determine whether an investigation is warranted. Screening is an important but separate step in making that determination. By definition, “screening” is a separation process while “investigation” takes a matter of public safety concern forward by digging further. “Review” or “screening” is a distinct process. Screening is not an investigation as that term ordinarily is used even if questions are asked in the course of that screening.

Iowa Code section 272C.4(1) directs the IBME to “establish procedures by which complaints which relate to licensure or to licensee discipline shall be received *and reviewed* by the Board. Again, the statutory language anticipates complaint reviews that have not yet ripened into investigations. A screened complaint has been subject to review, not investigation.

Iowa Code section 272C.6(4) addresses confidentiality of “all complaint files, investigation files, other investigation reports, and other investigative information” in the possession of a licensing board. This statutory provision clearly distinguishes between “complaint files” and “investigation files.” Not everything that the IBME does to review a complaint falls under the statutory rubric of “investigation.”

Iowa Code section 272C.6(4) goes on to address release of confidential information to another state licensing board. This section is careful to specifically authorize *only* release of “investigative information” and clearly does **not** authorize release of the complaint file to another licensing authority. “[I]nvestigative information in the possession of a licensing board *which relates to licensee discipline* may be disclosed” to appropriate licensing authorities within this state as well as to the appropriate licensing authority in another state and to other entities listed in this section.” [Emphasis added]

The IBME tethers its admonition to physicians to report screened and closed complaints as investigations from this section. *Please note:* IMS formally took issue with the IBME regarding interpretation of this above-cited provision by letter dated August 8, 2000 wherein IMS maintained that this statutory provision authorizes release of investigative information by the IBME to another licensing authority *only* if charges have been filed against a licensee; otherwise the investigative files remain confidential. The IBME disagreed with IMS. This matter is now under review in the Iowa appellate courts.

Even if the appellate courts agree that the IBME has the authority to release investigative information to another state licensing board during the investigation and prior to the filing of formal disciplinary charges against a licensee, such determination would neither address nor authorize the IBME to release complaint information to such licensing authorities. The Iowa Code specifically authorizes release of “investigative information which relates to licensee discipline.” Iowa law does **not** say that any and all complaints received by the IBME may be released to another state licensing authority. By their very nature, screened complaints have **not** ripened to become “investigative information relating to licensee discipline.” Rather the complaint is closed and disciplinary action is not anticipated.

Iowa law does not intend that complaints filed with the IBME and screened and closed be subject to repeated review by other licensing authorities. Release of any and all complaints to other licensing authorities renders the limiting language of Iowa Code section 272C.6(4) meaningless. The IBME exceeds its statutory authority in releasing screened and closed compliant information to other licensing authorities. Further, the IBME acts contrary to law and in excess of its statutory authority in directing physicians to reveal confidential information regarding a complaint that has not been investigated to outside entities any time the physician is asked if the physician has ever been “investigated” by a state licensing authority.

IMS recognizes that sometimes there are close calls involved in screening and closing a complaint. Nonetheless, once a decision is made to administratively close the complaint, that complaint information remains confidential and is not accessible to either physician subjects of the complaint *or* other state licensing authorities unless the matter is later investigated for disciplinary purposes. Examination of the bases for administratively closing a complaint supports this IMS conclusion.

Ia. Admin. Code r. 653-24.2(a)(3) says that if the Board lacks jurisdiction over the complaint, the complaint can be closed administratively. Rule 24.2(a)(5) says that a case appropriate for referral to the Iowa Physician Health Program (IPHP) may be administratively closed upon referral to the IPHP, itself a confidential process. Rule 24.2(a)(2)(2) says that a complaint may be closed administratively in the case of a single incident involving a billing dispute. Such matters should remain confidential and should not be released to plague the physician for the remaining years of the physician's practice life nor should such information be available to another state licensing authority to hold up a physician's application for licensure in that state. Most importantly, Iowa law does not allow such release.

Statutory licensing processes and procedures seek a critical balance between protection of the public health and safety and protection of the individual rights and liberties of the licensed professional. Due process considerations are essential in matters involving state action against an individual licensee. The IBME's current posture of requiring licensees to say they have been "investigated" by the IBME based on screened and closed complaints and, further, of releasing screened and closed complaint information to other licensing authorities negatively impacts the physician both in seeking licensure from another state and in seeking credentialing from hospitals, insurers and others.

It is no small matter if a physician's application for licensure is held up while another state licensing authority embarks upon its own review of the merits of a complaint filed with and closed by the IBME, complaint information that the physician cannot access or defend against. Iowa law does not intend that *all* complaints to the IBME, regardless of merit or lack thereof, be available to other state licensing authorities and, further, that closed complaints be subject to repeated investigation by those licensing authorities. In most instances of closed complaints, such repetitive regulatory and private party scrutiny is overkill, plain and simple. Rather the law fairly and reasonably assumes that some complaints lack merit, or at least sufficient merit, and that the physician should not be repeatedly penalized or harmed by screened and closed complaints. . .

In the same way, state-mandated physician admission of an "investigation" when screening but no formal investigation occurred has potential significant repercussions in the hands of private credentialing authorities that may elect to "rate" the physician at a lower level or deny the physician "premium designation" for payment and/or network participation purposes because of a complaint that was administratively closed by the IBME upon screening. The world of private credentialing and physician "designation" lacks standards. Again, Iowa Code chapter 272C, through its language distinctions between complaints and investigations, does not anticipate use of screened and closed complaint information against a physician, particularly when the physician has little to no basis to know about or defend against that complaint.

IMS fully supports and applauds the excellent screening processes that the IBME has adopted. At the same time, the IMS strongly believes that a screened and closed complaint remains a complaint and cannot and should not be deployed by the IBME by

elevating that complaint to an “investigation relating to licensee discipline” to the professional detriment of the licensed physician. The current posture of the IBME in mandating physicians to say they have been investigated when they have not and in releasing screened and closed complaint information to other licensing authorities contrary to statutory distinctions is of notable and potentially negative consequence to the physician.

At a minimum, the IBME’s posture results in a “presumption” that a complaint means the physician has done something wrong. No such presumption is intended by Iowa law and is contrary to our system of jurisprudence that presumes the contrary: innocence until proven otherwise. Here, the physician can do little to defend against such presumption because the physician has no certain information regarding the complaint and has had no opportunity to respond to it. If the letter the physician receives is considered dispositive, then why require the physician to say anything at all to licensing and credentialing authorities and why release information to other state licensing authorities to the potential harm of the physician.

Iowa law does not intend such harsh results by virtue of the simple fact that a complaint is filed by a patient against a doctor. Due process and principles of fundamental fairness do not countenance such an unfair result. The public’s interests also are not well-served by a policy that raises a red flag about the competency of a physician potentially resulting in undue licensure and credentialing delays and possible loss of designation status simply because a patient filed a complaint. The public’s interests are very well served by a rule that allows the Board to reopen a case if additional information is received that merits such reopening.

### **Conclusion**

IMS respectfully requests a two-pronged change in current Board practice to assure 1) that the IBME no longer releases screened and administratively closed complaint information to other state licensing authorities and 2) that the IBME no longer mandates that physicians affirmatively respond that they have been “investigated” based solely on a screened and administratively closed complaint.

Thank you for your attention to this matter. I welcome further discussion regarding it.

Yours truly,

A handwritten signature in cursive script that reads "Jeanine Freeman".

Jeanine Freeman, JD  
Senior Vice President of Legal Affairs

cc: Michael Abrams