

PHYSICIAN'S BILL OF RIGHTS ACT

To enact , relative to the Physician's Bill of Rights; to provide for physician rights against improper investigations; to provide for prohibited acts by the Oregon Medical Board (OMB); to provide for physician due process; to provide for retroactive application; to obey the landmark North Carolina Dental Board of Examiners v FTC (2015) United States Supreme Court decision; to implement and enact Midcal Rules as delineated in NCDB decision; to retroactively reevaluate any physicians disciplined by OMB prior to enactment of this Act upon request by licensee, and to provide for related matters.

BACKGROUND

The State of Oregon has 270 boards and commissions. Positions on these boards are processed by the Director of Executive Appointments in the Office of the Governor who “recommends” candidates for the Governor’s selection and “guides” appointments through the Senate confirmation process. There are only two individuals employed in this department - Mary Moller, Director of Executive Appointments and Kristina Rice-Whitlow, Executive Appointments Manager. Neither individual performs any board oversight duties; they are involved only with board and commission appointments.

The OMB has never had “meaningful oversight” of its proceedings which has resulted in their unconstitutional and anticompetitive conduct for decades. The OMB completely disregards Federal and State law, disregards and mocks physician licensee due process rights and constitutional rights, holds sham hearings with predetermined outcomes, abuses the administrative hearing process and has and continues to destroy countless physician and physician assistant life’s, along with their families’ and patient’s life’s, The

OMB covertly and quietly remove competitors, foreign medical graduates, Integrative Medicine physicians, any physician licensees an OMB member dislikes, licensees who refuse to incriminate themselves for something they didn't do, licensees who believe as they should that they have due process rights and constitutional rights, solo or small group practitioners, etc. The OMB has caused economic and psychological destruction of licensees and their families resulting in broken families, economic instability and suicides. Licensees are unable to find work as a result of being blacklisted on the National Practitioner Data Bank (NPDB) and Federation of State Medical Boards (FSMB) Data Bank.

The OMB has used, and continues to use, outrageous pretenses and tactics prior to the licensee being restrained professionally and economically including:

- compelling and intimidating their licensees to acquiesce to wave their rights to a “hearing” and any appeal therefrom;
- allowing licensee’s attorney to be present at OMB interrogations, but prohibiting them from counselling their client during these interrogations;
- denying the licensee the ability to defend themselves by written evidence, or otherwise, bona fide evidence in their possession, such as records and Sixth Amendment material, as well as any exculpatory materials;
- employing secret complaints and record keeping that cannot be subpoenaed,
- denying discovery (sixth Amendment material);
- denying access to case related medical records or other documents;
- denying expert witnesses the ability to testify on behalf of the licensee;
- intimidating licensee’s witnesses;

- denying depositions and interrogatories as part of the Sixth Amendment;
- allowing and encouraging perjured testimony;
- allowing and encouraging the use of hearsay;
- denying cross examination of witnesses;
- and more.

Lawyers who routinely deal with the OMB tell their physician licensee clients:

- to simply acquiesce and take full responsibility for all charges and accusations the OMB levels against them;
- not to stand up for their Constitutional and Due Process rights;
- not to attempt to “explain” themselves or their medical care to the OMB private doctors or actors;
- not to question or resist any “remedies” the OMB concocts for the licensee;

otherwise, the victim doctor will be labeled as “arrogant” or “disruptive” by OMB private doctors and actors and “attacked” even more aggressively culminating in license revocation.

The OMB and other healthcare licensing boards have colluded with the Oregon Department of Justice for decades to disregard all licensees rights and privileges.

SUPREME COURT RULINGS AND PRECEDENT

As Parker v Brown teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." 317 U.S., at 351 . The OMB and all other licensing boards are not cloaked with Parker immunity because they are a nonsovereign actor, nothing more than a trade organization controlled by active market participants without State oversight or supervision. Beginning with Parker v. Brown, 317 U. S. 341, the U.S. Supreme Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. “The Board’s actions are not cloaked with Parker immunity. A nonsovereign actor controlled by active market participants—such as the Board—enjoys Parker immunity only if ‘the challenged restraint . . . [is] clearly

articulated and affirmatively expressed as state policy,’ and . . . ‘the policy . . . [is] actively supervised by the State.’ *FTC v. Phoebe Putney Health System, Inc.*, 568 U. S. ____ (2013) (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U. S. 97, 105)” *North Carolina State Bd. of Dental Examiners v. FTC* 574 U. S. ____ (2015)

‘The active supervision prong of the Midcal test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.’” *Patrick v Burget* 486 U.S. 94 (1988). *Patrick v Burget*, a homegrown Oregon case, is a textbook example of OMB tyranny and abuses as feared by the Supreme Court of the United States that have gone on for 40 plus years unchecked by Oregon government.

The lesson is clear: Midcal’s active supervision test is an essential prerequisite of Parker immunity for any nonsovereign entity—public or private—controlled by active market participants.

“The Board’s argument that entities designated by the States as agencies are exempt from Midcal’s second requirement cannot be reconciled with the Court’s repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants pose the very risk of self-dealing Midcal’s supervision requirement was created to address. See *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 791.” *North Carolina State Bd. of Dental Examiners v. FTC* 574 U. S. ____ (2015).

“The question is whether the State’s review mechanisms provide “realistic assurance” that a nonsovereign actor’s anticompetitive conduct “promotes state policy, rather than merely the party’s individual interests.” *Patrick*, 486 U. S., 100–101.” *North Carolina State Bd. of Dental Examiners v. FTC* 574 U. S. (2015).

“Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.” See *Midcal*, *supra*, at 106.

“When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. See, *Areeda & Hovencamp* 227, at 226. The Court holds today that a state board on which a controlling number of decision makers are active market participants in the occupation the board regulates must satisfy Midcal’s active supervision requirement in order to invoke state-action antitrust immunity.” *North Carolina Board of Dental Examiners v.*

Federal Trade Commission, 574 US ___, p.14 (Feb. 2015); N.C. State Bd. Of Dental Exam's v. FTC, 717 F.3d 359 (4th Cir., 2013).

PURPOSE OF THIS ACT

The rules and oversight in this Act are necessary to remedy the private trade association OMB's four decades plus unconstitutional and abusive behaviors. This Act is necessary to preclude the OMB's continued stealth ploys to remove whistleblowers, foreign medical school graduates, Integrative Medicine physicians, physicians who believe they are endowed with Constitutional and Due Process rights, Alternative Medicine practitioners and many other reasons all of which frequently result in the physician licensee losing forever their ability to practice their profession and participate in the free market economy of the United States,

Be it enacted by the Legislature of Oregon:

Section 1..... is hereby enacted to read as follows:

NCDB DECISION, MIDCAL RULES and OREGON MEDICAL BOARD STRUCTURE

The Oregon Medical Board ("OMB" or "board), Governor, Attorney General and Secretary of State are commanded by the Oregon Legislature to structure the OMB in accordance with the Supreme Court of the United States 2015 decision in North Carolina Dental Board of Examiners v FTC (NCDB decision) as noted prior. The State of Oregon is to follow the "Midcal" rules in their direct and plain language reading regarding meaningful oversight over the OMB and for that matter all other State licensing boards.

"Midcal's "two-part test provides a proper analytical framework to resolve the

ultimate question whether an anticompetitive policy is indeed the policy of a State.

- The first requirement—**clear articulation**—rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State’s considered definition of the public good and engage in private self-dealing.
- The second Midcal requirement—**active supervision**—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity. **More detail** of what needs to be instituted.

The clear lesson of precedent is that Midcal’s active supervision test is an essential prerequisite of Parker immunity for any nonsovereign entity—public or private—controlled by active market participants...”

Section 2..... is hereby enacted to read as follows:

§1293. Physician's Bill of Rights

Each licensed physician in Oregon shall be afforded the protections and rights set forth in this Section against infringement on their due process and fair hearing rights by the Oregon Medical Board ("OMB" or "board"). This Section and the rights herein enumerated shall be referred to as the "Physician's Bill of Rights".

1. Notice of all complaints against a physician shall be provided to the physician in writing within ten days of receipt of the complaint by the OMB and shall include the name of the person who made the complaint against the physician and a detailed description of the complaint sufficient that the physician has a clear understanding of the accusation being made against them.
2. In the course of an investigation the physician shall have the right to be fairly investigated. If an investigator is alleged to be biased, hostile, or

unfair to the physician, the physician shall have the right to request that the OMB Executive Director remove and disqualify the investigator from further participation in any investigation involving the physician. If the Executive Director declines to recuse the investigator, the physician shall have a right to make a written motion for recusal and an evidentiary hearing thereon.

3. A board investigator shall have no communication regarding the investigation with the OMB Executive Director, Medical Director, OR DOJ AAG legal counsel, any other OMB private actors or any private physician or public members of the OMB unless the physician that is the subject of the complaint and/or their legal counsel is also present. Such interactions are to be recorded by the OMB and may be recorded by the physician licensee under investigation.
4. When an investigator believes there is a basis for prosecution or disciplinary action(s) against the licensee, their conclusion shall be issued in writing, along with supporting evidence, as a recommendation(s) to the OMB Executive Director. The investigator's recommendation(s) shall be made immediately available to the physician licensee under investigation and their legal counsel, but may not be provided to any member of the board, other OMB actors nor the Oregon DOJ and their AAG legal counsel to the OMB.
5. The decision to proceed with prosecution or disciplinary action shall be that of the OMB Executive Director alone.

6. Board members shall take an oath to refrain from any and all communication with the OMB investigator, witnesses, prosecutors, the Executive Director, the Medical Director or any other OMB private actor regarding a complaint. It shall be cause for dismissal of a case against a physician if there are ex parte communications by any board member regarding the facts of an investigation prior to or during a hearing or other judicial venue on the matter.
7. If the board utilizes an independent judge or adjudicator for any legal process, they shall be independently selected and shall have no prior information regarding the nature of the complaint nor economic bias to rule for or against the physician or the board.
8. Any written communication between the investigator, executive director, medical director, other OMB private actors and AAG DOJ prosecutor of the case shall be immediately furnished in written form to the physician and their legal counsel contemporaneously along with any information provided to the executive director.
9. All files of the board regarding a complaint, investigation, and disciplinary action shall be made available to the physician through full discovery and shall be disclosed within ten days to the physician upon request. The physician may issue interrogatories or discovery requests to the investigator, executive director, or any board member, who shall be compelled to respond or face fines, jail time and/or personal liability. The physician shall also have the right to depose these same individuals. Any

potentially exculpatory evidence shall be disclosed to the physician whether or not requested or whether or not reduced to recorded or documentary form.

10. All relevant facts gathered in an investigation of a physician shall be noted in the record or file of the case and no separate file shall be maintained. Any violation of this Paragraph by an investigator shall be grounds for dismissal, reversal of any adverse findings made and may be grounds for an investigation and possible termination, fines and/or criminal charges of the investigator.
11. No anonymous hearsay testimony shall be allowed in any judicial or nonjudicial setting. The physician who is the subject of any OMB action shall have the right to confront their accuser(s) and witness(s).
12. No order of suspension or termination of license shall be entered by the board without at least ten days notice before the effective date of the order and with the opportunity for the physician licensee to be heard by the OMB oversight entity (as summarized in NCDB v FTC 2015 SCOTUS decision) prior to the implementation of the OMB order, and if need be, heard by the County Circuit Court of the licensee's choice prior to implementation. OMB ex parte communication with any judge shall be prohibited and subject to fines and/or prison time.
13. If the **board** believes that the requirement of ten days notice set forth in Paragraph (12) of this Section will endanger the public, the board must first seek justification for their decision from the OMB oversight entity. The

OMB must then file an injunction for a temporary restraining order with a post-restraining order hearing to be set immediately thereafter and to be held within ten days. If the licensee sees the hearing as unsatisfactory then the case must be heard in the County Circuit court of licensees choice within 30 days.

14. No inquiry or investigation of a physician may continue for more than thirty days without notice issued to the physician to advise them that they are still under investigation. If this notification does not occur, the case against the licensee will be dismissed.
15. Once an investigation or inquiry, preliminary or not, is initiated, unless the case is closed, the physician shall have an absolute right to meet with the investigator and the chief investigator who shall receive any rebuttal information provided by the physician. Any rebuttal evidence so received shall be noted by investigators and made available to the executive director prior to any further action being taken. Any meeting between the physician and investigator for the board shall be recorded. If the physician objects to the outcome of the meeting, they shall have the right to meet with the executive director and OMB DOJ AAG legal counsel.
16. The physician may be accompanied by an attorney at any meeting with the investigator, chief investigator, executive director, AAG DOJ legal counsel to the OMB or board member(s). None of these individuals noted shall refuse to meet with a physician because their attorney is present. The physician may

be represented and given legal counsel by an attorney at any meeting or hearing before the board.

17. Individual OMB private actors and private physicians, including involved Oregon DOJ members, will be fined in their person(s) and/or jailed, as outlined below, if they threaten in any manner either the licensee or their attorney, or attack the licensee's attorney through the Oregon State Bar (OSB). The physician licensee and attorney may sue these individuals in their person, including the OSB, if involved in such corrupt behavior, with no immunity afforded to them.
18. Physicians shall have the right to a prompt hearing on any issue regarding the OMB – not more than thirty days.
19. Once a hearing or other judicial decision is completed the OMB may deliberate the case and make recommendations but they will not be able to overturn any part of a judicial and/or jury decision. OMB may appeal the decision to the Oregon Court of Appeals..
20. Physicians shall have the right to a de novo review within **sixty days** in the Oregon County Circuit Court of their choice with a jury regarding any action taken by the board. Being that the Oregon Court of Appeals (OCA) has been found of no value after an OMB hearing, and in fact have been found detrimental to the licensee in regard to time, financial and psychological costs, family and patient destruction, and the fact that OCA does not rehear the licensee case de novo, but instead review only process. Even if a

physician licensee should win an Appeal, which has gone from being never to now rarely, they are reprimanded back to the OMB for further financial and psychological abuse. Also, the OCA simply gives the OMB the “blueprint” to fix the “process” of the hearing for license revocation and further fines .

21. No provision in any physician contract with the OMB shall require a physician to waive any legal or constitutional rights to have access to the courts, due process, discovery, evidence, or any right established pursuant to this Section.
22. A physician subject to a hearing before the OMB shall have the right to have their case transferred immediately to the Oregon County Circuit Court of their choice and have their case tried before an independent judge and jury.
23. All 13 members of the OMB must be present at any legal proceeding involving a licensee for its entirety. The 13 members are to receive no information prior to these proceedings and are to hear them de novo.
24. OMB investigators currently operate with no oversight other than the OMB executive director. This Act mandates the formation of the “Board of Investigators” of which OMB investigators will be licensed and where public and licensee complaints may go to be investigated regarding investigators for the State of Oregon.
25. OMB will be audited by a private agency located outside of Oregon each year

for five years and then biyearly thereafter. The audit will be paid for by the OMB and will include interviews of public members who have had interactions with the OMB and with licensees who have been investigated and/or “disciplined” by the OMB.

26. Any investigative process desired by a hospital, association or any other institution must be referred to the OMB for investigation. The OMB and/or Courts will be solely responsible for any “disciplinary” actions taken against the licensee. These institutions are already mandated by the Oregon Medical Practice Act to notify the OMB of any investigative process that these institutions have initiated; so now, OMB will initiate all investigations upon complaint received from aforementioned institutions. These institutions will no longer be involved in any physician licensee process other than as a “complainant” and “witness”. Hospitals and other institutions will “contribute” on a case by case basis to help facilitate financially this process while also enabling OMB to hire additional investigators and staff to deal with the increased workload. OMB is highly encouraged to hire full time board members, but that would necessitate a change to the Oregon Medical Practice Act.

Section 2. The provisions of this Act shall apply to any investigation that has commenced prior to the effective date of the Act, continues after the effective date of the Act, and to any hearing conducted after the date of the Act based on an

investigation that concluded prior to the effective date of the Act, affording any physician subject to regulation by the OMB retroactive application. Any current or previously licensed OMB licensee whose case occurred prior to this Act, whether supposedly closed and adjudicated by the OMB or not, may request that the case be reopened and heard in the Oregon County Circuit Court of their choice with no charges or fines implemented by the OMB.

Proposed law enacts the Physician's Bill of Rights to provide for notice of complaints within 10 days of receipt by the Oregon Medical Board (OMB), including the name of the person making the complaint and their original complaint itself.

Proposed law requires notice to the physician to include any additional further detailed description of the complaint the OMB may have acquired.

Proposed law provides an opportunity for the OMB executive director to remove any investigator alleged to be biased, hostile, or unfair to the physician during an investigation upon request of the physician and/or their legal counsel. It also allows OMB licensee to request a hearing for removal of the investigator if the executive director declines to remove the individual.

Proposed law prohibits the OMB investigator from having communications with the board, executive director, DOJ legal counsel, any judge or other government figure and/or private individual unless the physician subject to the complaint and/or their legal counsel are present. These meetings must be recorded, and these recordings made available to the physician and their legal counsel within 7 days. Physician and their legal counsel have the right to record these meetings with their own equipment.

Proposed law requires the OMB investigator to make a written recommendation to the executive director and licensee and their legal counsel within 30 days regarding the outcome of the investigation. If the investigator is unable to accomplish the investigation within 30 days then the investigator and OMB executive director must make available in writing to the physician and their legal counsel by the 30th day of the investigation as to the reason(s) why.

Proposed law requires the investigators' recommendation(s) to be presented only to the executive director, OMB licensee and licensee's legal counsel, and not to any member of the OMB, other OMB staff, OR DOJ legal counsel for OMB or media.

Proposed law provides that a case against a physician shall be dismissed if the investigator, witness, prosecutor/OMB legal counsel, or executive director discuss the

case with any board member regarding the facts of the case prior to or during a hearing.

Proposed law provides that all files in OMB possession regarding the complaint and investigation shall be available to the physician that is subject to the complaint, and their legal counsel, through full discovery and that all relevant facts of the case shall be included in the record.

Proposed law prevents the use of anonymous hearsay testimony during a hearing, or any other judicial process, and grants the physician the right to confront all witnesses. The physician and their legal counsel will have ample opportunity for depositions and/or interrogatories of all “witnesses” and OMB personnel involved in the case prior to any hearing or County Circuit Court appearance.

Proposed law requires OMB to give ten days notice to any physician before suspending or terminating their license emergently. Licensees must be given the opportunity to be heard by the entity overseeing the OMB as outlined in *NCDB v FTC 2015 SCOTUS* decision, and if need be by County Circuit Court of licensees choice.

Proposed law allows OMB executive director to seek an injunction for a temporary restraining order to suspend or terminate the physician's license sooner than the ten days if OMB believes the ten days will be a threat to public safety. There is to be an immediate review of this decision by the state OMB oversight entity and if needed, a Circuit Court hearing within 30 days.

Proposed law requires OMB to conclude all investigations within 30 days or give notice to the physician that the investigation is ongoing.

Proposed law grants a physician the right to an attorney, right to a prompt hearing on the matter, and right to a de novo review in Oregon County Circuit Court of licensees choice of any action taken by the OMB.

Proposed law prohibits OMB from entering into any contract with a physician that requires the physician to waive any legal or constitutional rights.

Proposed law allows a physician to have access to the entirety of their file of their case, including tapes, transcripts, all correspondence with the complainant, witnesses or any other individual or entity within 10 days of being requested by the physician and/or their legal counsel at no cost to licensee.

Proposed law is retroactive to any investigation that commenced prior to the effective date of proposed law, any investigation that continues after the effective date of proposed law, and to any hearing that occurs after the effective date of proposed law based on an investigation that concluded prior to the effective date of proposed law.

Proposed law is retroactive in that it allows any licensee who has been restricted for any reason, or in any manner, by the OMB prior to the enactment of this Act, to be granted the legal right and means to have their case reviewed by the OMB oversight entity at no cost to licensee, and if need be the Oregon Circuit Court of the victim licensee's choice.

Proposed law establishes the formation of the "Board of Investigators" where OMB investigators will be licensed and all complaints regarding investigators will be submitted.

Proposed law establishes an audit schedule and two mandatory components to be included in each audit performed by a private agency hired from outside of Oregon and paid for by the OMB.

Proposed law requires that all investigations of physician licensees be conducted solely by the OMB and that institutions such as hospitals, associations, etc. be financially obliged to contribute to costs on a case by case basis.

Effective August ...