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Foreword

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FOREWORD

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State medical boards (SMBs) are charged with protecting the public by ensuring that physicians uphold appropriate standards of care and ethical practice. Despite this clear purpose, egregious types of wrongdoing by physicians that directly harm patients—such as sexual abuse, wrongful prescribing of controlled substances, and unnecessary surgeries—are alarmingly frequent. In fact, shortly after the conference hosted by the Center for Health Law Studies at Saint Louis University School of Law to present the papers in this issue, the University of Southern California agreed to pay a record-breaking $1.1 billion to settle the claims of hundreds of patients seen by George Tyndall, a gynecologist in the student health clinic.[1] Two more major settlements hit the headlines as this issue went to press in early 2022. The University of Michigan agreed to pay $490 million to settle the claims of more than 1000 patients who reported abuse by Robert E. Anderson, a doctor who worked with student athletes and other students.[2] One month later, the University of California agreed to pay $243 million to settle the claims of over 200 women who alleged sexual misconduct by James Heaps, a doctor who was affiliated with the University of California, Los Angeles over a thirty-five-year period.[3] These and other high-profile cases highlight the need to improve institutional responses to reports of egregious wrongdoing by physicians. This symposium focuses on the critical role of SMBs to protect the public from the physicians who commit these wrongful acts and discusses expert-informed legal and policy tools that would make SMBs more effective at protecting patients in serious cases.

This symposium centers on legal recommendations from an innovative project designed to identify effective practices, resources, and statutory

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1. Shawn Hubler et al., *U.S.C. Agrees to $1.1 Billion Settlement in Gynecologist Abuse Case*, N.Y. TIMES (Mar. 21, 2021), https://www.nytimes.com/2021/03/25/us/usc-settlement-george-tyndall.html.

2. Alan Blinder, *University of Michigan Will Pay $490 Million To Settle Abuse Cases*, N.Y. TIMES, https://www.nytimes.com/2022/01/19/sports/ncaafootball/michigan-abuse-settlement-robert-anderson.html (last updated Jan. 20, 2022).

3. Vimal Patel, *University of California to Pay $243 Million To Settle Sexual Abuse Claims*, N.Y. TIMES (Feb. 8, 2022), https://www.nytimes.com/2022/02/08/us/james-heaps-ucla-abuse-settlement.html.

provisions that SMBs and policymakers can adopt to better protect patients from egregious wrongdoing by physicians. Working directly with a panel of SMB members and other experts, we developed a consensus on the most important tools and practices needed to protect the public when physicians are accused of egregious wrongdoing, as well as barriers to adopting those tools and practices. We presented the full findings of the consensus panel in a separate article, *Protecting Patients from Egregious Wrongdoing by Physicians: Consensus Recommendations from State Medical Board Members and Staff*, published in the Journal of Medical Regulation.[4] Policy recommendations that SMBs may be able to adopt without the need for legislation or external government action will also be published separately.[5]

The lead article in this symposium, *Protecting Patients from Physicians Who Inflict Harm: New Legal Resources for State Medical Boards*, by research team members Elizabeth Pendo, Tristan McIntosh, Heidi A. Walsh, Kari Baldwin, and James M. DuBois, focuses on legal solutions and offers model language with commentary for five high-impact statutory provisions that address improved board composition and function, increased reporting to the board, and consistent adjudication of disciplinary matters.[6] Specifically, we offer model statutory language with commentary for statutory provisions that: mandate gender diversity in SMB membership; mandate racial and ethnic diversity in SMB membership; authorize penalties against hospitals and other entities for failure to report egregious wrongdoing by physicians; require criminal background check requirements upon renewal of a license; and establish a standard of evidence in disciplinary actions. The article brings together the expert-informed findings of the project, analysis of existing approaches, and original legal and policy analysis. The model provisions and commentary are intended to serve as a new resource for SMBs, state legislatures, and other policymakers to encourage and support examination of existing medical practice acts in order to improve SMB function and better protect patients from harmful physicians.

Our first two legal recommendations, mandatory gender diversity in SMB membership and mandatory racial diversity in SMB membership, point to the importance of identifying and addressing implicit bias throughout the disciplinary process. The 2020 Federation of State Medical Board (FSMB) Report on Physician Sexual Misconduct highlights the impact of implicit bias on SMB review and adjudication of cases of physician sexual misconduct, and

4. Tristan McIntosh et al., *Protecting Patients from Egregious Wrongdoing by Physicians: Consensus Recommendations from State Medical Board Members and Staff*, J. MED. REGUL., Oct. 2021, at 5, 5–18 (2021).

5. Tristan McIntosh et al., *What Can State Medical Boards Do To Effectively Address Serious Ethical Violations?* (unpublished manuscript) (on file with author).

6. Elizabeth Pendo et al., *Protecting Patients from Physicians Who Inflict Harm: New Legal Resources for State Medical Boards*, 15 ST. LOUIS U. J. HEALTH L. & POL'Y 7–54 (2022).

states that "[d]iverse representation on state medical boards in terms of gender, age, and ethnicity is important for ensuring balanced discussion and decisions."[7] In the article *Contextualizing and Strengthening State Medical Board Responses to Physician Sexual Misconduct*, Patricia A. King, Emily Gerard, Mark Staz, and Eric M. Fish, provide a historical examination of the problem of physician sexual misconduct.[8] They examine the contemporary developments leading to the formation of the FSMB Workgroup on Physician Sexual Misconduct (chaired by Dr. King) and summarize the 2020 FSMB Report on Physician Sexual Misconduct, which was ultimately adopted as FSMB policy. The authors also outline barriers to systemic change and discuss solutions that may help state boards implement the key principles of the Workgroup Report and FSMB sexual misconduct policy.

The project also benefits from other research documenting the impact of implicit bias in cases involving allegations of improper prescribing. In her remarks at the in-person conference, Professor Kelly Dineen outlined how implicit biases distort efforts to identify and address harmful forms of mis-prescribing or dispensing opioids.[9] Similarly, Professor Jennifer D. Oliva spoke to the risks of reliance on the Prescription Drug Monitoring Program (PDMP) to identify suspicious patterns of prescribing or dispensing opioids, based on her data science critique of PDMP risk scoring methodology and evaluation of its impact on marginalized patients.[10]

In the article *Diversity from the Perspective of Corporate Boards and Lawyer Disciplinary Boards*, Professors Lissa L. Broome and John M. Conley offer insights from discussions of board diversity from two different contexts—corporate boards and state lawyer disciplinary boards—that inform our

7. Fed'n of State Med. Bds., *Report and Recommendations of the FSMB Workgroup on Physician Sexual Misconduct*, J. MED. REGUL., July 2020, at 17, 25.

8. Patricia A. King et al., *Contextualizing and Strengthening State Medical Board Responses to Physician Sexual Misconduct: Recommendations from the Federation of State Medical Boards*, 15 ST. LOUIS U. J. HEALTH L. & POL'Y 151–82 (2022).

9. Kelly K. Dineen, Assistant Professor of L., Creighton Univ. Sch. of L., Saint Louis University 33rd Annual Health Law Symposium: Defining Egregious Prescribing Misconduct (Mar. 5, 2021); *see also* Kelly K. Dineen, *Definitions Matter: A Taxonomy of Inappropriate Prescribing to Shape Effective Opioid Policy and Reduce Patient Harm*, 67 U. KAN. L. REV. 961–1011 (2018) (discussing opioid prescribing policy—specifically the lack of shared definitions for inappropriate prescribing—and offering guidance for this issue by proposing a taxonomy for inappropriate opioid prescribing).

10. Jennifer D. Oliva, Associate Professor, Seton Hall Univ. Sch. of L., Saint Louis University 33rd Annual Health Law Symposium: Issues of Bias (Mar. 5, 2021); *see also* Jennifer D. Oliva, *Dosing Discrimination: Regulating PDMP Risk Scores*, 110 CALI. L. REV. 47, 50–51, 85–107 (2022) (offering a data science critique of PDMP risk scoring methodology and evaluation of its impact on marginalized patients).

recommendations.[11] Specifically, Professors Broome and Conley draw on their qualitative study of corporate board diversity and their experience in teaching professional responsibility in law school. They review the different approaches to increasing the diversity of boards of directors of for-profit corporations, and efforts to increase diversity on state lawyer disciplinary boards. They conclude with some observations from these two contexts that may be helpful in informing SMB diversity efforts.

Nearly all states require hospitals and other health care organizations within the state to report physician misconduct to medical boards.[12] These legal requirements reflect the critical importance of information about physician misconduct to SMBs and their ability to take action and protect the public. The requirements also reflect the fact that hospitals and other health care organizations have access to critical information, such as hospital disciplinary actions and peer review actions that are often unavailable to SMBs unless reported. Despite these laws, under-reporting is very common. We recommend model statutory language authorizing penalties against hospitals and other entities for failure to report egregious wrongdoing by physicians.

Professor Nadia N. Sawicki recommends another mechanism to encourage reporting in her article, *State Peer Review Laws as a Tool To Incentivize Reporting to Medical Boards*.[13] After outlining an existing model in the federal Health Care Quality Improvement Act, she suggests how states could remedy the flaws of the federal model. This can be done by linking state medical practice act reporting requirements with state laws establishing an evidentiary privilege for peer review activities in civil suits by injured patients. In Professor Sawicki's view, this linkage would motivate hospitals seeking to protect their peer review materials from discovery in malpractice actions to report physician misconduct to SMBs when that misconduct poses a litigation risk.

Finally, Professor Elizabeth Chiarello offers a cultural and organizational framework for explaining why SMBs so often fail to discipline physicians in her article, *Barriers to Medical Board Discipline: Cultural and Organizational Constraints.*[14] Professor Chiarello's framework highlights three types of barriers that interact to impede board action: input barriers that prevent hospitals and other facilities from reporting harm to SMBs; processing barriers that prevent SMBs from taking appropriate action against physicians who do harm; and

11. Lissa L. Broome & John M. Conley, *Diversity from the Perspective of Corporate Boards and Lawyer Disciplinary Boards*, 15 ST. LOUIS U. J. HEALTH L. & POL'Y 121–50 (2022).

12. Elizabeth Pendo et al., *supra* note 6, at 28 (citing to FED'N OF STATE MED. BDS., U.S. MEDICAL REGULATORY TRENDS AND ACTIONS 8, 61 (2018), https://www.fsmb.org/siteassets/advocacy/publications/us-medical-regulatory-trends-actions.pdf).

13. Nadia N. Sawicki, *State Peer Review Laws as a Tool To Incentivize Reporting to Medical Boards*, 15 ST. LOUIS U. J. HEALTH L. & POL'Y 97–120 (2022).

14. Elizabeth Chiarello, *Barriers to Medical Board Discipline: Cultural and Organizational Constraints*, 15 ST. LOUIS U. J. HEALTH L. & POL'Y 55–96 (2022).

output barriers that prevent SMBs from sharing information about physicians who do harm with other SMBs and law enforcement. Professor Chiarello concludes with a set of solutions for overcoming each type of barrier and explains why an organizational and cultural perspective is essential for identifying gaps between boards' stated goals and their actions, as well as for developing effective solutions.

SMBs play an important role in protecting the public from harmful physicians. More public, professional, and scholarly attention is needed to identify and assess legal policy tools that would make SMBs more effective at protecting patients in egregious cases. This symposium offers model language with commentary for five high-impact statutory provisions that address board composition and function, reporting to the board, and adjudication of disciplinary matters, along with insights and analysis from expert authors. Together, the 2022 symposium articles are intended to serve as a new resource for SMBs, state legislatures, and other policymakers to encourage and support examination of existing medical practice acts in order to improve SMB function and better protect patients from harmful physicians.