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JUDICIARY COMMITTEE  
MARCH 12, 2025

TESTIMONY OF  
NORTH DAKOTA BOARD OF MEDICINE  
SENATE BILL NO. 2285

Chair Klemin, members of the Committee, I'm Sandra DePountis, Executive Director of the North Dakota Board of Medicine, appearing on behalf of the Board to provide opposition testimony on Senate Bill 2285.

The Legislature tasks the North Dakota Board of Medicine to license and discipline certain health care providers in the State of North Dakota. In doing so, the Board is responsible for verifying that only qualified and competent practitioners are providing health care services to the citizens of North Dakota. The Board does not take this responsibility lightly. When reviewing a potential disciplinary action, the Board first obtains significant evidence that may include subpoenaing comprehensive and voluminous medical records; obtaining outside experts; requiring the licensee to obtain independent physical, psychiatric, or competency evaluations; etc. Once all evidence is obtained, an Investigatory Panel of the Board does a thorough and comprehensive review of the file to determine whether disciplinary action is warranted, and, if so, whether it can meet the required preponderance of the evidence burden of proof. In fulfilling due process requirements, the Board utilizes the Administrative Agencies Practice Act (28-32) to obtain recommended findings of facts, conclusions of law, and order from an Administrative Law Judge (ALJ). Disciplinary cases can be nuanced and technical, requiring Board member expertise, training, and education to make informed decisions, which may require deviation from the ALJ's recommendations.

Mission Statement

The Board's mission is to protect the public's health, safety and welfare by regulating the practice of medicine, thereby ensuring quality health care for the citizens of this state.

The ALJs in North Dakota are skilled judges and although well versed in the law, are not medical practitioners able to render expertise about highly technical matters that come before them. If the Board does not accept the ALJ's recommendation, the Board must adequately explain its rationale for deviating, which still must be supported by evidence. A reviewing court may also lack this technical knowledge, making it logical for the court to be able to defer to the agency's expertise.

The Administrative Agencies Practice Act and reviewing courts have long recognized that administrative agencies possessing specialized knowledge and experience on technical matters are in the best position to make the final determination, especially with an agency like the Board of Medicine. As recognized by the Supreme Court, practicing health care members of the Board provide the expertise and experience that is necessary to make decisions due to the "technical" nature of its disciplinary cases. As an example, NDBOM v. Hsu, 2007 ND 9, the Supreme Court ultimately found the ALJ's recommendations to be "unworkable" and affirmed the Board's departure from the recommendations based on the evidence. To support such a decision, the Court provides:

¶42 "The legislature has vested the Board with authority to discipline physicians. Generally, the determination of the appropriate sanction to be imposed by the Board is a matter of discretion. **In technical matters involving agency expertise, an agency decision is entitled to appreciable deference.** The determination of a physician's standard of care and the requirements for appropriate documentation of that care involve technical matters. The Board is comprised mostly of practicing physicians, and the Board's determination is entitled to appreciable deference. Moreover, it is not the court's function to act as a super board when reviewing decisions by an administrative agency, and courts do not reweigh the evidence or substitute their judgment for a duly authorized agency." (internal citations omitted, emphasis added)

Deference ensures that those with the greatest subject matter expertise inform the substance of the decision. Medical cases hinge on the specialty area and applicable standards of care involved in the case, which a court may miss or lack the ability to provide and thus courts should be allowed to defer to the Board's interpretation and findings.

Finally, taking away deference will have a fiscal impact on the Board. Full ramifications of this bill are unknown at this time. For example, it is unknown if taking away deference will make licensees less willing to settle by stipulation and instead result in more cases being brought before an ALJ, resulting in more time and expenses. In any event, if a reviewing court cannot rely on the Board's expertise, the Board would need to employ outside experts for every case, which are very expensive. Currently, if the Board does not have a member with expertise in the specialty area at issue in a case before it, the Board obtains an independent expert to provide such a review and opinion. Depending on the expert and specialty area – the Board has received quotes of \$650/hour to just review medical records for an initial expert opinion, which increase to \$2,910/hour for court testimony along with a \$4,000 "appearance fee." To now require this for all cases would have a fiscal effect that may need to be offset by fee increases of licensees.

The Board would therefore be supportive of the amendment upholding the intent of this bill by allowing courts to be the ultimate decision-maker for statutory construction of ambiguous statutes, while still being able to defer to agency expertise on technical subject matters.

Thank you for your time and attention and I would be happy to answer any questions.