



# North Dakota State Board of Dental Examiners

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## House Industry, Business, and Labor Committee

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Testimony of the North Dakota State Board of Dental Examiners

HB 1512

### **I. Introduction and Background**

Chair Warrey and members of the House Industry, Business, and Labor Committee, my name is David Schaibley, and I'm the Executive Director of your North Dakota State Board of Dental Examiners. I'm here today providing the Board's testimony on HB 1512.

Since before statehood, the Board has been made up primarily of skilled dental professionals who use their technical expertise to regulate the practice of dentistry in ways that result in safe, quality dental care in our state. As Board members, they assess the content of dental education program curriculum; analyze applicants' dental skills, competency and disciplinary history; review the many skilled duties that are carried out in a dental office; and assess the type of dental training that is to be required before someone is allowed to perform duties that could put patients at grave risk if done improperly.

This Bill would go a long way toward changing that historical purpose by greatly expanding the Board's authority—making it more closely resemble a jury with power to issue large monetary judgments. My testimony today will discuss the Bill's four changes in pairs, in hopes of better highlighting how they operate together to do that.

### **II. Consumer Members (P1; L9) and Patient Entitlement to Costs (P3; L6-7)**

The first change increases the number of consumer members on the Board to three—at which point consumers are only one member shy of a quorum. The Board

presently has a consumer member position and benefits greatly from her perspective. But giving the consumer perspective three times more influence than dental hygienists have on the Board, or that dental assistants have on the Board, seems to create an imbalance. And for what purpose?

Well, with that newly reconstituted Board in mind, I'd like to turn quickly to the last change in the Bill. It apparently mandates this issuance of a monetary award to consumer/patients by granting them an "entitlement" to recover costs in every case where discipline is warranted.

Having three consumer members on the Board seems designed to make the Board look and act more like a jury. And the perception seems to be that a board that resembles a jury is more likely to vote in favor of discipline—and that it would also be more likely to vote for higher dollar amounts of costs being awarded to the patients.

Issuing monetary awards that could easily rise into the hundreds of thousands of dollars is a drastic change to the purpose of the Board and is an immense amount of power to give to any licensing board. And it is a power the Dental Board is not seeking.

Aside from the Board wanting to make you aware of this material change to the Board's purpose, it would also like to share some detailed concerns about these two provisions:

- The language seems to lack any Board discretion. So it seems as soon as discipline is found, a patient immediately has a right to an "entitlement" and not just a chance at being granted an award.

- The language also seems to lack an actual role of the Board in granting the entitlement.

- There does not seem to be a limit on the kinds of costs that can be recovered (e.g., refunds; lost wages; pain and suffering; emotional distress; the costs of an attorney; the costs of litigation; etc.);

-Dentists might seek their own entitlement. They might ask you to consider granting them an entitlement to recover money from the consumer for unpaid costs in the form of invoices.

-There doesn't seem to be an awareness of how the Board will function in its technical dental roles once nearly one third of its members are consumers. Just like the other Board members, these three consumers will be obligated to make all the decisions on all sorts of dental issues—not just complaints—without having any dental training to guide them.

-Consumer positions are historically not easy to fill on licensing boards.

### **III. Mandating a Complaints “Committee” (P2; L11-12) and the Release of Responses at Preliminary Stages of Investigations (P2; L8).**

These two changes work in unison with the first pair, but are also perhaps easier to understand in their own pairing. They seem designed not only to lead to increased disciplinary findings and monetary entitlements like the first pair, but also seem designed to use the Board as a tool for creating evidence that otherwise wouldn't exist—and that can be used in litigation.

I'll first turn to the release of responses. In looking at that change it is important to understand how open records laws currently operate on these documents. Our laws allow for transparency and the release of records, but with some limits that this part of the Bill would eliminate.

We all know that complaints can harm any business. That's fair. And it's a risk any business owner has to accept.

But sometimes complaints contain inaccurate or incomplete information, or can even be purposely false and designed to harm a business or individual.

Our open records laws are written to allow for transparency, but in a way that prevents the Board from being used as a tool to aid in unfairly harming a dentist's, hygienist's, or assistant's reputation or business.

These laws require us to release complaint file information like responses once the Board concludes that discipline is warranted. That seems fair. The government should not be ‘hiding’ information about a dentist whose conduct resulted in discipline.

But the law also allows us to not release complaint file information (e.g., responses) when the Board has found no cause for discipline. That limit prevents the Board from being used as a way to increase the harm unfounded allegations can have. Because if we are required to release responses to the patient, the patient can then make that response as public as they want—posting it online, or what have you. And that response would never have existed except for the fact that the Board required it from the dentist. And now their own words responding to an unfounded complaint can be used to even further harm their own business.

Perhaps just as importantly, that response to an unsupported complaint could also be used in lawsuits against the dentist, hygienist, or assistant. Because sometimes their responses contain statements where the dental professional might not only explain why their conduct was justified, but they might also use words that could sound like an admission of guilt (e.g., saying they wish it had gone differently; offering refunds; apologizing; etc.). These honest statements accepting responsibility or expressing regret could be harmful statements when used against the dental professional in litigation.

Were this change to be adopted, it would seem to make dentists, hygienists, and assistants all strongly consider hiring lawyers before ever responding to any complaint filed with the Board. They would want to ensure they don’t make potentially problematic statements. This would greatly increase the cost, expense, and time for everyone involved in a complaint.

And now turning to the remaining change suggested by this Bill. It is a one-word change that, while perhaps less obvious, would also mandate inefficiencies and could be used to create evidence that wouldn’t otherwise exist.

At present, the Board processes complaints using either the ‘Portfolio Model’ where one Board member is assigned to work on a complaint, or they can use the ‘Committee Model’ where complaints are only worked on by that grouping. The Board has the option of using whichever model is more efficient on any particular complaint.

The Board often uses the Portfolio Model. In it we assign a complaint to a single Board member who works on the file, gathers information, and then provides the entire file to the full Board. The full Board, at a noticed meeting, reviews all information, perhaps seeks more documentation, and arrives at a decision.

The Board can also use the Committee Model. It usually uses that on more complex complaints. But using that model is a bit more complicated. The way it works is a Complaint Committee Board member contacts me in order to set up a committee meeting; I then work with all the committee members to find a time where they could all meet; we post the meeting notice at the Secretary of State's Office website and on our website; we find a room, create an online room, or both; we convene the members; we ask the public to leave because we are required to go into executive session for complaints; we record that session; we have the meeting; we close the meeting; we create minutes; etc. And then if another piece of evidence arrives the next day, we go through that same process again. But then just like in the Portfolio Model, the full complaint file is presented to the entire Board for review and discussion at one of our public Board meetings. So you can see that while the Committee Model can be useful in a complex complaint, it is also a far more inefficient model to use.

Forcing us to always use this model for every single complaint would substantially slow down our processing of complaints, create additional work, and cost everyone involved more time, money, and frustration. But another result that mandating the Committee Model would have—and one that it seems this Bill might be aiming for—is that the process involved in using the Committee Model creates a trail of documents and recordings on even the most unsupportable and vindictive complaints. And those documents could be sought out for use in litigation. And when tied back to the release of complaint file materials like responses, we'd have no choice but to release those—thereby making them public—with the resultant potential harm to reputations.

#### **IV. Conclusion**

In conclusion, I want to share that your Dental Board members work hard to meet their obligations for regulating dental professionals, and they take their responsibility of

protecting consumers seriously. Board members are patients themselves. They go to the dentist; so do their spouses, kids, nieces, cousins, and neighbors. So, it seems unfair to conclude that dental professionals can't understand a patient's concerns and will always side with another dentist's interests.

Another example of this consumer point of view on the Board is that the Board is regularly approached by its partners and stakeholders in the dental field, such as dentists and associations who seek changes to laws, rules, or policies that dentists would prefer. I think they'd be the first to tell you that the Board does not always accept dentist-focused positions. It regularly disagrees with some or all of a suggestion in favor of more patient-centered approaches.

The Board can understand the frustrations that resulted in this Bill, but it asks that you thoughtfully consider its concerns. Your Dental Board is made up of dental experts fully competent to carry out the roles you have already given them, but they are less sure about serving in a role very similar to a judge and jury. They do not relish the idea of spending hours and days each year hearing evidence and testimony from lawyers and experts about the many and varied costs that a patient might be entitled to, the harm they suffered, and the related financial calculations. Board members are already volunteering to take days away from their patients and businesses every year to serve on the Board. If this Bill passes, their workload would seem to increase exponentially when consumers and their attorneys see that they can use North Dakota licensing boards as an easier path toward financial awards and entitlements to cash. That is an immense amount of power for a licensing board to wield and a substantial change in our Board's purpose. And keep in mind that if you do not pass this Bill, there is already a place for these types of disputes—the courthouse.

Thank you for your time. I am happy to address any questions.

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