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June 6, 2018

The Honorable Irene Bustamante Adams
State of Nevada Assembly
Legislative Commission, Sunset Subcommittee
401 South Carson Street
Carson City, Nevada 89701

Dear Assemblywoman Bustamante Adams:

The Office of the Attorney General (OAG) is in receipt of your request for information, on behalf of the Sunset Subcommittee of the Legislative Commission, regarding debt owed by the Board of Homeopathic Medical Examiners (Board) to the OAG for legal services. Please allow the following to address the specific requests you outlined in your May 2, 2018 correspondence.

Pursuant to attorney-client confidentiality requirements, the OAG's response only details matters which are public in nature, such as court cases, matters in which the Board has waived confidentiality by discussing the details before the Sunset Subcommittee or another public hearing, or matters in which the OAG is responding to allegations made by the Board concerning the OAG's legal representation. Any additional billing information that is not disclosed herein is privileged and should be obtained through the Board.

A. MATTERS FOR WHICH THE OAG HAS RENDERED LEGAL SERVICES

1. GENERAL LEGAL ADVICE

The OAG provides general legal advice to the Board for day-to-day matters including, but not limited to, advising the Board and its staff on Open Meeting Law compliance, attending meetings as board counsel, establishing procedures for license applications and disciplinary complaints, creating and revising administrative regulations, and ensuring compliance with statutory changes.

The OAG has performed approximately 850 hours of general legal services for the Board since 2004 at an average rate of approximately 5 hours per month. The Board currently owes the OAG \$76,515.68 for services related to general legal advice.

The Board required the largest amount of general legal services between 2004 and 2007. The Board initiated disciplinary investigations and prosecutions, which counsel from the OAG performed, and it conducted frequent meetings, at times more than one per month, which OAG counsel attended as board counsel and advised the Board. Since 2007, the Board has consistently utilized the services of the OAG for day-to-day legal representation.

2. LITIGATION AND DISCIPLINARY MATTERS

a. Harvey Bigelsen Case

In 2004, Harvey Bigelsen, a previous applicant for licensure, filed a civil action in federal court against the Board seeking damages for alleged civil rights violations.¹ The OAG successfully defended the Board in the action, conducting significant discovery and prevailing on a partial motion to dismiss due to absolute immunity and a partial motion for summary judgment on the limited issue of actual bias. The Court dismissed the matter on September 14, 2005.

The OAG expended 419.2 hours on the case and billed \$34,826.07, none of which has been paid.

b. Robert Rozen Case

In 2004, Robert Rozen initiated a medical malpractice action against a Board licensee in the Second Judicial District Court.² The Board was not a named party in the action. However, a subpoena was issued to the Board for records, some privileged and some confidential by statute. The OAG represented the Board in contesting portions of the subpoena and in coordinating the document production pursuant to the subpoena.

The OAG expended 52 hours on the matter and billed \$3,838.96. The Board has paid \$155.51 and owes \$3,683.45.

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¹ United States District Court for the District of Nevada Case No. 3:04-cv-00534-HDM-RAM.

² Second Judicial District Court Case No. CV01-03499.

c. Dorea Shoemaker Case

In 2004, at the Board's request, the OAG filed a civil complaint against Dorea Shoemaker seeking a temporary restraining order and preliminary injunction.³ The OAG represented the Board in the matter and reached a settlement with Ms. Shoemaker that included a permanent injunction and a payment of \$1,372.00 by Ms. Shoemaker to the Board.

The OAG expended 34.7 hours on the matter and billed \$3,027.99. The Board has paid \$54.89 and owes \$2,973.10.

d. Daniel Royal Disciplinary Matter

In 2006, the Board initiated a disciplinary investigation into Dr. Daniel Royal and the OAG filed a formal complaint against him in 2007. The Board summarily suspended Dr. Royal's license, but later vacated the suspension.

The OAG expended 36.7 hours on the disciplinary matter and billed \$4,588.56, none of which has been paid. As the Board vacated Dr. Royal's suspension, and elected not to issue a final order regarding disciplinary action, it could not recover attorney's fees.

e. Michael Gerber Case

In February of 2017, the Board initiated a disciplinary investigation into Dr. Gerber. The OAG filed a formal complaint against Dr. Gerber in May 2017, prosecuted the disciplinary hearing before the Board in July and August 2017, and issued a final order in October 2017. Prior to the Board hearings, Dr. Gerber filed numerous challenges to the proceedings in front of the Board and in the Second Judicial District Court. The OAG represented the Board in the court matters as well.

The OAG expended 334.2 hours to the investigation, prosecution and court proceedings in the matter and billed \$45,327.76, \$15,157.97 of which has been paid.⁴ The Board's October 2017 Order requires Dr. Gerber to pay \$30,000 in attorney's fees and costs to the Board.

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³ Second Judicial District Court Case No. CV04-02076.

⁴ Following discussions with the Board, the OAG reduced the Board's bill for the disciplinary matter to \$30,000. The balance owed to the OAG in this matter is now \$14,842.03.

Dr. Gerber filed a Petition for Judicial Review of the October Order, which is currently awaiting a decision.⁵ The OAG has represented the Board with the Petition for Judicial Review. The OAG has expended 49.3 hours on the matter, billing \$1,234.89, none of which has been paid.⁶

f. Disciplinary Investigations

The Board receives and investigates complaints from members of the public against licensees and other parties associated with the practice of homeopathic medicine alleging that said parties have violated provisions of NRS 630A and NAC 630A. The Board regularly requests the assistance of the OAG in performing its investigations and determining whether to prosecute the subject licensees and associates. The Board previously utilized an Investigative Committee which reviewed disciplinary files presented by the OAG and determined whether to pursue formal actions or dismiss the matters.

Since 2004, the OAG has expended approximately 188.9 hours on disciplinary matters that were dismissed by the Board's Investigative Committee, settled, or otherwise did not rise to the level of a formal disciplinary hearing.⁷ The OAG has billed \$8,020.84 for these services, \$202.69 of which has been paid, and the Board owes \$7,818.15.

3. OPEN MEETING LAW (OML)

Numerous OML complaints were filed against the Board between 2006 and 2008. The OAG represented the Board in researching the OML, reviewing the Board's actions, and

⁵ Second Judicial District Court Case No. CV17-02142.

⁶ Upon conclusion of the Gerber disciplinary hearing, but prior to the start of briefing on the Petition for Judicial Review, legal representation of the Board was transferred to a new Deputy Attorney General. The hours required for the Board's new counsel to familiarize herself with the Gerber matter, as well as the Board's governing statutes and regulations, were not billed to the Board, thus explaining the amount of the Board's bill in relation to the hours expended.

⁷ Nevada Revised Statute (NRS) 622.400 provides for the recovery of attorney's fees in disciplinary matters where a regulatory body either (1) enters a final order in which it finds that the person has violated a provision of the chapter in which the regulatory body has the authority to enforce, or (2) enters into a settlement agreement in which the regulatory body finds or the person does not contest that they violated any provision of the chapter the regulatory body has the authority to enforce. NRS 622.400(1). Where the Board's Investigative Committee chose to dismiss disciplinary matters after an investigation or where the Board staff elected not to prosecute a matter, the Board could not collect attorney's fees.

responding to the OML complaints. The OML complaints resulted in five separate decisions issued by the OAG, with two containing violations of the OML.

The OAG expended 11.7 hours to prepare responses to one group of OML Complaints, billing \$963.33, none of which has been paid. The OAG expended 9.7 hours to prepare responses to a second group of the OML complaints, billing \$798.65 to the Board's general legal advice account. The Board was only billed for the time its counsel spent in representing the Board, not for any time spent by other attorneys at the OAG in investigating and adjudicating the Open Meeting Law complaints.

B. FEES DISPUTED BY THE BOARD (2008)

The Sunset Subcommittee has also requested a statement from the OAG addressing the Board's 2008 correspondence, to former Attorney General Catherine Cortez Masto, in which the Board disputed OAG fees incurred between 2003 and 2008. A review of OAG records and billing from that time period reveals the following information:

1. TRANSITION OF NEW OAG LEGAL COUNSEL

The Board alleges that the OAG billed it for time spent by its new counsel to research the Board's existing matters and to familiarize herself with the statutes and regulations governing the Board. A review of OAG records reveals that the OAG did not bill the Board for time spent by its new counsel to become up to speed on issues relating to representation of the Board.

In the fall of 2007, the OAG transferred representation of the Board from its existing counsel to new counsel. In October of 2007, the Board's new counsel spent 66.8 hours on researching the Board's past and pending legal matters. The OAG did not bill any of said hours to the Board.

In October of 2007, the Board's new counsel also spent 24.6 hours advising the Board on current legal matters, as well as traveling to and attending a Board meeting as board counsel. The OAG billed the Board \$2,938.75 for counsel's services. The OAG bills were included in the Board's general legal advice account (as described in section A(1)).

As the OAG only billed the Board for research and legal advice related to new matters, rather than time spent by counsel in familiarizing herself with the Board's existing matters, it does not believe that elimination of attorney's fees is warranted.

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2. HARVEY BIGELEN LAWSUIT – ATTORNEY’S FEES

The Board requests that the OAG reduce or eliminate fees associated with representing the Board in the *Bigelsen* matter, which spanned between 2003 and 2005 as detailed in section A(2)(a), because the OAG should have recovered attorney’s fees from Bigelsen after prevailing in court. A review of the case records, including the significant discovery that the parties conducted in the matter, fails to reveal any grounds for which the Board would have prevailed on a motion for attorney’s fees. The Board’s claim that it “won the lawsuit, protected the public from possible harm and fulfilled its legislative mandate” fails to provide sufficient grounds to recover attorney’s fees.⁸ OAG counsel who defended the Board in the matter determined that a motion for attorney’s fees would not be successful and so she did not pursue the matter.

The OAG successfully represented the Board in the *Bigelsen* matter and it does not believe that elimination of the attorney’s fees is warranted.

3. NEVADA INSTITUTIONAL REVIEW BOARD

The Board requests that the OAG eliminate the debt the Board incurred between 2005 and 2007 in supervising the Nevada Institutional Review Board (NIRB). The Legislature created the NIRB in 2005 with the purpose of protecting the public by controlling research studies using devices, therapies, and substances regulated by the Board. The Legislature subsequently repealed all statutes pertaining to the NIRB and suspended its activities in 2007.

Through the period in which the NIRB existed, the Board’s OAG counsel billed the Board for less than 10 hours for services related to NIRB. The hours were billed to the Board’s general legal advice account. OAG records reveal two separate NIRB-specific Board billing accounts but the Board was not billed for any time in either account.

The OAG provided the Board with legal representation related to the supervision of the NIRB and it does not believe that elimination of the bills related to the NIRB is warranted.

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⁸ See Nevada Revised Statute 18.010. The Court may, in addition to cases in which attorney’s fees are authorized by statute, award attorney’s fees to a prevailing party if a complaint was “brought or maintained without reasonable ground or to harass the prevailing party” or to “punish for and deter frivolous or vexatious claims and defenses.”

4. DEFENSE OF FRIVOLOUS COMPLAINTS

The Board requests that the OAG eliminate debt incurred by the Board between 2003 and 2008 related to the defense of the Board, its members, and its licensees, against frivolous complaints.

The Board's primary duty is to protect the public health and safety of Nevadans by regulating the practice of homeopathic medicine. NRS 630A.155(1). As such, the Board must investigate and, if required, hear and decide complaints against any homeopathic physicians, advanced practitioners of homeopathy, homeopathic assistants, or any associated agents. NRS 630.155(4). Neither the Board nor the OAG can determine whether a complaint is frivolous until the completion of an investigation. The OAG has incurred costs related to assisting and representing the Board in the investigation and adjudication of complaints.

The OAG provided the Board with legal representation related to the investigation of complaints against homeopathic physicians, practitioners, assistants, and agents. The OAG does not believe that elimination of the bills related to the Board's performance of its statutory duties is warranted.

5. DANIEL ROYAL LAWSUIT

The Board asserts that its former member, Dr. Daniel Royal, sued the Board's former President, Dr. David Edwards, as well as OAG legal counsel, and requests that any costs billed to the Board by the OAG, in defending the Board's OAG counsel, be eliminated. A review of OAG records fails to reveal any lawsuit against Dr. Edwards or OAG counsel and the OAG did not bill the Board for any hours related to such a lawsuit.

OAG records reveal that Dr. Royal filed a number of OML complaints against the Board, and the bills related to the representation of the Board in responding to the OML complaints are outlined above in Section A(3). The OAG provided legal services to the Board in responding to the OML complaints and it does not believe that elimination of the bills related to preparing OML complaint responses is appropriate.

C. OAG COLLECTION EFFORTS AGAINST THE BOARD AND PAYMENT AGREEMENTS

The Sunset Subcommittee has requested information regarding the OAG's understanding of any verbal agreements with the Board not to collect on fees owed to the OAG. Upon review, the only agreement that the OAG has uncovered is referenced in the

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minutes from the Board's April 1, 2006, meeting. The board's meeting minutes reference a verbal agreement, which existed at one time, in which the OAG agreed to accept payments of \$500/month from the Board. OAG records fail to reveal when the supposed agreement was terminated. However, OAG billing records show that the Board has failed to make consistent, monthly payments to the OAG since mid-2007.

The OAG elected not to take collections proceedings against the Board because it recognized, given the Board's financial status, that such proceedings would be fruitless.

D. OAG RECOMMENDATIONS

The Sunset Subcommittee has requested the OAG's suggested resolution to settle the Board's outstanding debt. The Board, as a licensing body, will continue to require legal services including, but not limited to, the investigation and prosecution of complaints, open meeting law compliance, and day-to-day legal advice. Regardless of debt owed by the Board to the OAG, the OAG is statutorily obligated to represent the Board upon the Board's request. *See* NRS 630A.400-410. As such, absent a statutory change to the contrary, the OAG will fulfill its statutory duty and continue to represent the Board in its mission to ensure the safety and general welfare of Nevadans.

To date, the OAG has been able to fulfill its statutory obligations without full reimbursement of its costs and fees, but it may become necessary in the future to request an appropriation to augment this budget deficiency.

Please advise if you require any additional information.

Respectfully submitted,

ADAM PAUL LAXALT

Attorney General

By: 
CAROLINE BATEMAN

Chief Deputy Attorney General

Bureau of Gaming and Government Affairs

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