

3-1-1987

## PROFESSIONS AND BUSINESSES Medical Licenses: Provide for Teaching Licenses and for Review of Physician's Fitness to Practice Medicine

J. Hipes

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Law Commons](#)

---

### Recommended Citation

J. Hipes, *PROFESSIONS AND BUSINESSES Medical Licenses: Provide for Teaching Licenses and for Review of Physician's Fitness to Practice Medicine*, 3 GA. ST. U. L. REV. (1987).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol3/iss2/26>

This Peach Sheet is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact [mbutler@gsu.edu](mailto:mbutler@gsu.edu).

## PROFESSIONS AND BUSINESSES

### *Medical Licenses: Provide for Teaching Licenses and for Review Of Physician's Fitness to Practice Medicine*

CODE SECTIONS:	O.C.G.A. §§ 43-34-29.1 (new), 43-34-37 (amended)
BILL NUMBER:	SB 286
ACT NUMBER:	545
SUMMARY:	The Act allows the Composite State Board of Medical Examiners to grant, in its discretion, teaching licenses without an examination to doctors licensed in another state or foreign country. The Act also requires the Board to investigate a doctor's fitness to practice medicine when an insurer reports, pursuant to § 33-3-27, any medical malpractice judgment or settlement in excess of \$100,000, or any two judgments or settlements. Finally, the Act requires doctors to report directly to the Board any settlements relating to the practice of medicine in excess of \$20,000.
EFFECTIVE DATE:	July 1, 1987

#### *History*

The authority of the Composite State Board of Medical Examiners to license doctors in Georgia is codified at O.C.G.A. § 43-34-29. This section initially was established in 1913<sup>1</sup> as a method of protecting people from "illegal and unqualified practitioners of medicine and surgery."<sup>2</sup> It allowed the State Board of Medical Examiners to license resident physicians and to license nonresident physicians by reciprocity.<sup>3</sup> The Board could waive the examination requirement for physicians "from other States requiring equal or higher qualifications."<sup>4</sup> Subsequent amendments to the 1913 Act expanded the Board's discretion for granting li-

---

1. 1913 Ga. Laws 101, 106 § 12.

2. *Bentley v. State Bd. of Medical Examiners*, 152 Ga. 836, 836, 111 S.E. 379, 380 (1922).

3. 1913 Ga. Laws 101, 106 § 12. The licensing fees were \$20 for resident and nonresident applicants, and \$50 for a license by reciprocity.

4. *Id.*

censes without examination<sup>5</sup> and increased the licensing fees.<sup>6</sup>

The 1913 Act was codified at Ga. Code Ann. § 84-914 and, in 1966, was amended and rewritten in a manner reflecting its current organization.<sup>7</sup> For a brief period, the Board established a separate license for interns in Georgia, but this subsequently was eliminated.<sup>8</sup> Presently, interns are not required to be licensed in Georgia.

In 1970, the Georgia legislature created the Composite State Board of Medical Examiners, which governs both medical doctors and doctors of osteopathy.<sup>9</sup> The law also was amended to prevent the licensing by reciprocity of doctors who graduated from foreign (out of state) medical or osteopathic colleges before July 1, 1963, unless the college was approved by the Board.<sup>10</sup>

The Composite State Board of Medical Examiners also has the authority to refuse or revoke a doctor's license or discipline a doctor pursuant to O.C.G.A. § 43-34-37. The origin of this Code section is found in section 14 of the 1913 Act.<sup>11</sup> The original statute gave the Board administrative power to refuse or revoke a doctor's license for specific offenses. In addition, procedural mechanisms, including the right to a jury trial and right to appeal, were incorporated. The 1913 Act also allowed the Board, in its discretion, to reinstate a doctor after six months.<sup>12</sup> Subsequent amendments to the 1913 Act added new offenses, which subjected doctors to Board investigations and instituted new procedures.<sup>13</sup>

Section 14 of the 1913 Act was codified at Ga. Code Ann. § 84-916. This section was amended in 1970 to include it under the authority of the Composite State Board of Medical Examiners, encompassing both medical doctors and osteopaths.<sup>14</sup> Ga. Code Ann. § 84-916 was rewritten in

5. 1918 Ga. Laws 173, 182 § 7. There was no examination requirement for "any licensee of the National Board of Medical Examiners of the United States . . ."

6. 1962 Ga. Laws 611, 612 § 2. The nonresident licensing fees were increased to \$40 and licensing fees by reciprocity were increased to \$100.

7. 1966 Ga. Laws 232, 234 § 2.

8. *See id.* for the establishment of the intern's license. *See* 1967 Ga. Laws 826, 827 § 2 for the abolishment of the intern's license.

9. 1970 Ga. Laws 301, 303 § 2.

10. *Id.* at 310-11. *See also* GA. CODE ANN. § 84-914(b) (Harrison 1970).

11. 1913 Ga. Laws 101, 107 § 14. *See also* 1909 Ga. Laws 123, 129 § 10 for the licensing powers of the Board of Osteopathic Examiners.

12. 1913 Ga. Laws 101, 107 § 14. *See also* State Bd. of Medical Examiners v. Lewis, 149 Ga. 716, 102 S.E. 24 (1920), holding that section 14 of the 1913 Act is unconstitutional.

13. *See generally* 1918 Ga. Laws 173, 182 § 8 (Convictions for violating the penal provisions of the Opium Act of 1914 or Harrison Narcotic Law are made offenses. A doctor losing an appeal for a license revocation is liable for court costs. The Board and party are given subpoena power; default proceedings are established.); 1957 Ga. Laws 129 § 1 (Specific offenses are set forth in numbered paragraphs in the Code; the Board is given the power to suspend a doctor during an investigation; the Board's power to investigate doctors is specified.).

14. 1970 Ga. Laws 301, 303 § 2.

1974<sup>15</sup> in a format substantially similar to the present O.C.G.A. § 43-34-37. A later amendment was added granting civil and criminal immunity for persons reporting in good faith violations of the section.<sup>16</sup>

Section 43-34-37 and its predecessors have been interpreted by the courts on numerous occasions. The state has the power to "safeguard public health" and may therefore "regulate and control the practice of medicine and those who engage therein," subject to "reasonable, necessary and appropriate" measures.<sup>17</sup> The state's delegation of this power to the Board of Medical Examiners, and the Board's authority to promulgate rules and regulations also are valid.<sup>18</sup> In addition, the Board's power to revoke a doctor's license under the statute has been specifically upheld.<sup>19</sup> However, the Board may sanction a doctor under O.C.G.A. § 43-34-37 only if the conduct in question relates "to the practice of medicine."<sup>20</sup>

Section 43-34-37 is a penal statute, and the "revocation proceedings themselves are in the nature of criminal proceedings."<sup>21</sup> Because of the penal nature of the Board's hearings, it must adhere to due process rights. This requires the Board, as an administrative body, to grant full and impartial hearings.<sup>22</sup> The fact that the Board may be "both the accuser and judge does not deprive [the] accused of due process of law, especially where an appeal from the determination of the agency may be had to the courts."<sup>23</sup> More generally, the U.S. Supreme Court has held that "[a] State cannot exclude a person from the practice of . . . any . . . occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."<sup>24</sup> However, due process rights do not attach where an agency is acting exclusively as an

15. 1974 Ga. Laws 1156, 1162 § 6.

16. 1977 Ga. Laws 317, 318 § 1.

17. *Geiger v. Jenkins*, 316 F. Supp. 370, 373 (1970), *aff'd mem.*, 401 F.2d 985 (N.D. Ga. 1971).

18. *Jackson v. Composite State Bd. of Medical Examiners*, 256 Ga. 264, 347 S.E.2d 581 (1986).

19. *Smith v. State Bd. of Medical Examiners*, 46 Ga. App. 456, 167 S.E. 769 (1933).

20. *Composite State Bd. of Medical Examiners v. Hertell*, 163 Ga. App. 665, 667, 295 S.E.2d 112, 115 (1982) ("[C]onduct not related to the practice of medicine does not come within the ambit of [O.C.G.A. § 43-34-37] and cannot form the basis of disciplinary action . . .").

21. *Geiger*, 316 F. Supp. at 372; *see also State Bd. of Medical Examiners v. Lewis*, 149 Ga. 716, 102 S.E. 24 (1920).

22. *See Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963) (Denial of petitioner's admission to the New York Bar by an administrative body, without a hearing of the charges filed against the petitioner, violates due process.). *See generally Comment, The Administrative Muddle in Georgia*, 32 *MERCER L. REV.* 359 (1980).

23. *Cf. Clary v. Mathews*, 224 Ga. 82, 83, 160 S.E.2d 338, 339 (1968), quoting 16A *C.J.S. Constitutional Law* § 628b(2) at 862 (court ruling on an administrative hearing involving a bar disciplinary proceeding).

24. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957).

investigatory body.<sup>25</sup> In Georgia, there is no violation of due process where the Board of Medical Examiners acts in its investigative capacity.<sup>26</sup>

### SB 286

The Act contains two provisions, both related to the authority of the Board of Medical Examiners. First, new Code section 43-34-29.1 has been added to allow the Board to issue, in its discretion, teaching licenses to physicians from other states or countries. This provision allows the board to waive the examination requirement and it allows physicians to forgo the requirements of section 43-34-29 (1984). The new section is limited "for the sole purpose of teaching or demonstrating medicine in a board approved medical college or its affiliated clinic in this state."<sup>27</sup> It is applicable only to doctors already licensed in other states or countries.<sup>28</sup> The second part of the Act amends O.C.G.A. § 43-34-37 by adding a new paragraph. The amended Code section requires the Board to investigate any licensee (doctor) pursuant to a notification of a malpractice judgment or settlement in excess of \$100,000 under section 33-3-27.<sup>29</sup> O.C.G.A. § 33-3-27 requires medical malpractice insurers to report to the Board any medical malpractice judgments or settlements paid, on behalf of a licensed doctor in Georgia, for a medical malpractice claim in excess of \$10,000. In addition, if there are two or more previous medical malpractice judgments or settlements paid on behalf of a doctor, insurers must report these claims regardless of the dollar amount.<sup>30</sup> The amended section 43-34-37 requires a Board investigation of the doctor if the reported dollar amount for any one judgment or settlement exceeds \$100,000, or if there are two previously reported medical malpractice judgments or settlements, regardless of the dollar amount.

The Act goes one step further and requires every doctor to report directly to the Board "any settlement involving the licensee and relating to the practice of medicine in excess of \$20,000.00."<sup>31</sup> The purpose of this measure is to ensure that settlements made by doctors, without public disclosure or resort to insurance, are reported to the Board for investigation.<sup>32</sup>

Overall, the reporting and investigating provision of the Act is designed

25. *Hannah v. Larche*, 363 U.S. 420 (1960).

26. *Gilmore v. Composite State Bd. of Medical Examiners*, 243 Ga. 415, 254 S.E.2d 365 (1979).

27. O.C.G.A. § 43-34-29.1 (Supp. 1987).

28. Telephone interview with Valerie A. Hepburn, Director of Administration, Office of the Secretary of State (May 8, 1987) [hereinafter Hepburn Interview].

29. O.C.G.A. § 43-34-37(i) (Supp. 1987).

30. O.C.G.A. § 33-3-27 (Supp. 1987).

31. O.C.G.A. § 43-34-37(i) (Supp. 1987).

32. Hepburn Interview, *supra* note 28.

to protect the consumer public<sup>33</sup> and comes under the "umbrella of tort reform."<sup>34</sup> The legislation was supported by the Medical Association of Georgia and the Composite State Board of Medical Examiners.<sup>35</sup> Opponents expressed concern over the low threshold dollar amount which invokes the requirement that a malpractice claim be reported.<sup>36</sup>

The direct reporting requirement of medical malpractice settlements, which may not be a matter of public record, subjects doctors to possible sanctions by the Board. These sanctions are determined by hearings in the form of criminal proceedings. Where a doctor is required to reveal information that "could well be 'a link in the chain' of evidence leading to prosecution and conviction,"<sup>37</sup> a possible violation of the privilege against self-incrimination arises.<sup>38</sup> The privilege would not be violated unless the doctor believes there is a substantial risk of incrimination.<sup>39</sup> Furthermore, the Act's disclosure requirement is constitutional provided that it is not "directed at a highly selective group inherently suspected of criminal activities."<sup>40</sup> Georgia's need for the disclosure of medical malpractice settlements as weighed against the doctor's right against self-incrimination is another factor to be considered.<sup>41</sup>

*J. Hipes*

---

33. Atlanta J., Mar. 12, 1987, at 18A, col. 1.

34. Telephone interview with Senator Pierre Howard, Senate District No. 42 (May 7, 1987).

35. *Id.*

36. Representative George Green, House District No. 106, proposed a floor amendment which would have increased the threshold dollar amount to \$200,000 before the Board would investigate and would have eliminated the direct reporting requirement by doctors. SB 286, § 2, 1987 Ga. Gen. Assem.

37. *California v. Byers*, 402 U.S. 424, 428 (1971).

38. "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." U. S. CONST. amend. V.

39. *Byers*, 402 U.S. at 429. See also *Marchetti v. United States*, 390 U.S. 39, 53, 54 (1968).

40. *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965) (Registration requirement which is not "in an essentially non-criminal and regulatory area of inquiry, but . . . in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime" violates the privilege against self-incrimination.). See also *Marchetti*, 390 U.S. at 57.

41. *Cf. Byers*, 402 U.S. at 427.