



Final Regulation Agency Background Document

Agency name	Board of Medicine, Department of Health Professions
Virginia Administrative Code (VAC) citation	18 VAC 85-20
Regulation title	Regulations Governing the Practice of Medicine, Osteopathic Medicine, Podiatry and Chiropractic
Action title	Criteria for paid malpractice claim reporting
Document preparation date	10/19/06

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The Board has adopted amendments to section 290, which sets out the requirements for reporting of malpractice paid claims and board actions. The changes are intended to clarify ambiguous provisions and specify more clearly the timing of a malpractice report, the definition of a malpractice paid claim and the conditions under which a report is required.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

On October 19, 2006, the Board of Medicine adopted a final regulation for 18VAC85-20-10 et seq., Regulations Governing the Practice of Medicine, Osteopathic Medicine, Podiatry and

Chiropractic to specify what constitutes a paid malpractice claim for the purpose of reporting on the physician profile system.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400, which provides the Board of Medicine the authority to promulgate regulations to administer the regulatory system:

§ 54.1-2400 -General powers and duties of health regulatory boards

The general powers and duties of health regulatory boards shall be:

...

6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ [54.1-100](#) et seq.) and Chapter 25 (§ [54.1-2500](#) et seq.) of this title. ...

The statutory requirements for paid malpractice claims to be reported on the Practitioner Profile System are found in § 54.1-2910.1:

§ 54.1-2910.1. Certain data required.

A. The Board of Medicine shall require all doctors of medicine, osteopathy and podiatry to report and shall make available the following information:

- 1. The names of the schools of medicine, osteopathy, or podiatry and the years of graduation;*
- 2. Any graduate medical, osteopathic, or podiatric education at any institution approved by the Accreditation Council for Graduation Medical Education, the American Osteopathic Association or the Council on Podiatric Medical Education;*
- 3. Any specialty board certification as approved by the American Board of Medical Specialties, the Bureau of Osteopathic Specialists of the American Osteopathic Association, the American Board of Multiple Specialties in Podiatry, or the Council on Podiatric Medical Education of the American Podiatric Medical Association;*
- 4. The number of years in active, clinical practice as specified by regulations of the Board;*
- 5. Any hospital affiliations;*

6. Any appointments, within the most recent 10-year period, of the doctor to the faculty of a school of medicine, osteopathy or podiatry and any publications in peer-reviewed literature within the most recent five-year period and as specified by regulations of the Board;

7. The location and telephone number of any primary and secondary practice settings and the approximate percentage of the doctor's time spent practicing in each setting. For the sole purpose of expedited dissemination of information about a public health emergency, the doctor shall also provide to the Board any e-mail address or facsimile number; however, such e-mail address or facsimile number shall not be published on the profile database and shall not be released or made available for any other purpose;

8. The access to any translating service provided to the primary and secondary practice settings of the doctor;

9. The status of the doctor's participation in the Virginia Medicaid Program;

10. Any final disciplinary or other action required to be reported to the Board by health care institutions, other practitioners, insurance companies, health maintenance organizations, and professional organizations pursuant to §§ 54.1-2400.6, 54.1-2908, and 54.1-2909 that results in a suspension or revocation of privileges or the termination of employment or a final order of the Board relating to disciplinary action;

11. Conviction of any felony; and

12. Other information related to the competency of doctors of medicine, osteopathy, and podiatry, as specified in the regulations of the Board.

B. In addition, the Board shall provide for voluntary reporting of insurance plans accepted and managed care plans in which the doctor participates.

*C. The Board shall promulgate regulations to implement the provisions of this section, including, but not limited to, the release, upon request from a consumer, of such information relating to a specific doctor. **The Board's regulations shall provide for reports to include all paid claims in categories indicating the level of significance of each award or settlement; however, the specific numeric values of reported paid claims shall not be released in any individually identifiable manner under any circumstances.***

In addition, § 54.1-2909 of the *Code of Virginia* requires any settlement or judgment of a malpractice claim be reported within 30 days of its occurrence:

§ 54.1-2909. Further reporting requirements; civil penalty; disciplinary action.

A. The following matters shall be reported within 30 days of their occurrence to the Board:

1. Any disciplinary action taken against a person licensed under this chapter in another state or in a federal health institution or voluntary surrender of a license in another state while under investigation;

2. Any malpractice judgment against a person licensed under this chapter;

3. Any settlement of a malpractice claim against a person licensed under this chapter; and
4. Any evidence that indicates a reasonable probability that a person licensed under this chapter is or may be professionally incompetent; has engaged in intentional or negligent conduct that causes or it likely to cause injury to a patient or patients; has engaged in unprofessional conduct; or may be mentally or physically unable to engage safely in the practice of his profession.

The reporting requirements set forth in this section shall be met if these matters are reported to the National Practitioner Data Bank under the Health Care Quality Improvement Act, 42 U.S.C. § 11101 et seq., and notice that such a report has been submitted is provided to the Board.

B. The following persons and entities are subject to the reporting requirements set forth in this section:

1. Any person licensed under this chapter who is the subject of a disciplinary action, settlement, judgment or evidence for which reporting is required pursuant to this section;
2. Any other person licensed under this chapter, except as provided in the protocol agreement entered into by the Medical Society of Virginia and the Board for the Operation of the Impaired Physicians Program;
3. The presidents of all professional societies in the Commonwealth, and their component societies whose members are regulated by the Board, except as provided for in the protocol agreement entered into by the Medical Society of Virginia and the Board for the Operation of the Impaired Physicians Program;
4. All health care institutions licensed by the Commonwealth;
5. The malpractice insurance carrier of any person who is the subject of a judgment or settlement; and
6. Any health maintenance organization licensed by the Commonwealth.

C. No person or entity shall be obligated to report any matter to the Board if the person or entity has actual notice that the matter has already been reported to the Board.

D. Any report required by this section shall be in writing directed to the Board, shall give the name and address of the person who is the subject of the report and shall describe the circumstances surrounding the facts required to be reported. Under no circumstances shall compliance with this section be construed to waive or limit the privilege provided in § 8.01-581.17.

E. Any person making a report required by this section, providing information pursuant to an investigation or testifying in a judicial or administrative proceeding as a result of such report shall be immune from any civil liability or criminal prosecution resulting therefrom unless such person acted in bad faith or with malicious intent.

F. The clerk of any circuit court or any district court in the Commonwealth shall report to the Board the conviction of any person known by such clerk to be licensed under this chapter of any

(i) misdemeanor involving a controlled substance, marijuana or substance abuse or involving an act of moral turpitude or (ii) felony.

G. Any person who fails to make a report to the Board as required by this section shall be subject to a civil penalty not to exceed \$5,000. The Director shall report the assessment of such civil penalty to the Commissioner of the Department of Health or the Commissioner of Insurance at the State Corporation Commission. Any person assessed a civil penalty pursuant to this section shall not receive a license, registration or certification or renewal of such unless such penalty has been paid.

H. Disciplinary action against any person licensed, registered or certified under this chapter shall be based upon the underlying conduct of the person and not upon the report of a settlement or judgment submitted under this section.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The intent of the Practitioner Profile System is to make information available to the public that will assist them in choosing appropriate practitioners who can safely deliver health care. Since the payment of a malpractice claim is not always an indicator of a practitioner's ability to practice with skill and safety, the following disclaimer is displayed before a consumer can scroll down to the malpractice information on the Profile.

When considering malpractice paid claims data, please keep in mind:

Some studies have shown little correlation between the existence of a malpractice paid claims history and the practitioner's competence to provide care.

Malpractice paid claims histories tend to vary by specialty. Some specialties are more likely than others to be the subject of litigation.

Some doctors work primarily with high-risk patients. These doctors may have malpractice paid claims histories that are higher than average because they specialize in cases or patients who are at very high risk for problems.

Settlement of a claim may occur for a variety of reasons, which do not necessarily reflect negatively on the professional competence or conduct of the practitioner. A payment in settlement of a medical malpractice action or claim should not be construed as creating a presumption that medical malpractice has occurred.

The incident causing the malpractice paid claim may have happened years before a payment is finally made. Sometimes, it takes a long time for a malpractice lawsuit to move through the legal system.

Presentation of Required Data:

Practitioners are required to report all paid claims in the last 10 years. For doctors practicing less than 10 years, the data covers their total years of practice.

To provide perspective regarding the reported data, the Board displays information about the paid claims experience of the practitioner's specialty along with the practitioner's history of paid claims. In reporting the data in this manner, each practitioner is seen relative to other practitioners in the specialty, rather than to all practitioners in all specialties.

Paid claims are not expressed in dollar amounts. Each paid claim has been analyzed and assigned to one of three statistical categories: below average, average, or above average. This analysis was made relative to the other claims in the specialty in which the claim occurred.

The information provided, in the manner provided, should offer perspective about this aspect of medical practice. You could miss an opportunity for high quality care by excluding a doctor based solely on the presence of a malpractice history. You may wish to discuss information provided in this report, and malpractice generally, with your doctor.

With a disclaimer about paid claims in general and about the characterization of such claims on the Profile, the Board believes the malpractice information that is presented is an important element for informed patients in making health care decisions that affect their health and safety and should be inclusive of all paid claims regardless of the method of payment.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The amended regulations will accomplish the following:

- 1) In subsection A, the Board proposes to repeat the statutory requirement in § 54.1-2909 for reporting of a paid malpractice claim within 30 days. However, claims are sometimes paid through structured settlements or in installments, so an additional amendment will clarify that the report must be made within 30 days *of the initial payment* rather than after completion of the settlement.
- 2) Subsection C is added to specify the definition and requirements for a malpractice paid claim. By doing so, the Board will clarify provisions for practitioners who have raised questions about what is considered a paid claim and therefore is required to be reported.

The Board will specify that, for purposes of reporting required under this section, a malpractice paid claim is a payment for the benefit of a doctor of medicine, osteopathic medicine, or podiatry in satisfaction in whole or in part of a settlement or a judgment based on the provision of or failure to provide healthcare services by that practitioner. A claim is considered a paid claim when a lump sum payment is made or when the first payment of multiple payments is made and must be reported at that time. A claim is reportable even if payment is made from personal funds or if a payment was made on behalf of a doctor of medicine, osteopathic medicine, or podiatry by a corporation or entity comprised only of the doctor of medicine, osteopathic medicine, or podiatry.

The regulations should also specify that when a doctor of medicine, osteopathic medicine or podiatry who was named in the claim is dismissed independently of the settlement, judgment or release, then the payment is not reportable. However, if the doctor is dismissed as a condition of, or in consideration of the settlement, judgment or release, then the payment is reportable.

Issues

Please identify the issues associated with the proposed regulatory action, including:
 1) *the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
 2) *the primary advantages and disadvantages to the agency or the Commonwealth; and*
 3) *other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.*

-
- 1) The primary advantage to the public is the availability of malpractice information on the patient’s current doctors or in seeking a doctor to provide medical care. With a more explicit definition of what constitutes a paid claim, there should be more consistency in reporting and more valid information. While the practitioners would argue that reporting of paid claims is not of benefit to them, the specificity should create a level playing field so all doctors are reporting the same occurrences. Without such specificity, some practitioners are penalized by full reporting while others are choosing to limit reporting to an individual interpretation of a “paid claim.” There are no disadvantages to the public in having more complete information about a doctor’s malpractice history.

 - 2) The primary advantage to the agency is consistency and clarity in the rules; it may alleviate the number of calls received by the Board asking for interpretations of the law and regulations. There are no disadvantages.

 - 3) There are no other pertinent matters of interest.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

In subdivision 4 of subsection C, the article “the” was changed to “a” in the last sentence to clarify and distinguish that sentence from the previous sentence.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Proposed regulations were published on July 24, 2006 with a 60-day comment period ending on September 22, 2006. A public hearing on proposed regulations was held on August 11, 2006. There were no public comments submitted.

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
290	n/a	<p>Subsection A require reporting of all paid claims in the most recent 10-year period.</p> <p>Subsection B specifies the methodology for displaying the claims on the profile by a comparison with other doctors in the same specialty.</p>	<p>Subsection A: A timeframe for reporting is added (within 30 days) for consistency with other data elements that must be entered on the profile and with § 54.1-2909 of the Code of Virginia. Since some paid claims are structured settlements with payments over a period of time, it was necessary to specify that the report is made upon the occurrence of the initial payment.</p> <p>B. A change in terminology is proposed for consistency with the term used in law and regulation.</p> <p>C. A new section is added to define and specify what constitutes a paid claim as a payment for the benefit of a doctor of medicine, osteopathic medicine, or podiatry in satisfaction in whole or in part of a settlement or a judgment. It must be a monetary payment in response to a written demand based on the provision of health care or professional services rendered, or which should have been rendered.</p> <p>The language adopted by the Board as a definition of a paid claim is consistent with § 60.7 CFR for reporting to the National</p>

			<p>Practitioner Data Bank (NPDB). The Board has added that the payment must be in response to a written demand based on professional services that were rendered or should have been rendered. There was concern that a verbal threat of a lawsuit resulting in some sort of refund for services could be construed as a paid claim, but that was not the intent nor is the waiver of an outstanding debt considered a malpractice payment in federal rules. The definition in this regulation is consistent with the definition in § 60.3 CFR for a “medical malpractice action or claim.”</p> <p>Regulations specify that a malpractice paid claim includes:</p> <ol style="list-style-type: none"> 1. A lump sum payment or the first payment of multiple payments; 2. A payment made from personal funds; 3. A payment on behalf of a doctor of medicine, osteopathic medicine, or podiatry by a corporation or entity comprised solely of that doctor of medicine, osteopathic medicine, or podiatry; or 4. A payment on behalf of a doctor of medicine, osteopathic medicine or podiatry named in the claim where that doctor is dismissed as a condition of, or in consideration of the settlement, judgment or release. If the doctor is dismissed independently of the settlement, judgment or release, then the payment is not reportable. <p>Since the Code requires reporting of <u>all</u> paid claims, neither the method of payment nor the entity making the payment can obviate the responsibility</p>
--	--	--	---

			for reporting. However, if a doctor is dismissed independently of the action, then the payment is not reportable.
--	--	--	---

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability.

There is no impact of the proposed regulatory action on the institution of the family and family stability.