

# Report More, Sooner, or Face Consequences: New Ohio Facility and Provider Mandatory Reporting

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Conference

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## ▶ Agenda:

1. S.B. 109 Introduction
2. Ohio's Evolving Reporting Priorities and Current Law
3. Specifics about S.B. 109
4. Best Practices
5. Questions



# INTRODUCTION ABOUT S.B. 109



- ▶ Legislation signed by Ohio Gov. Mike DeWine on Dec. 20, 2024 will significantly expand mandatory reporting duties for professionals and facilities, including hospitals and ambulatory surgery centers.
- ▶ These changes, and others from Ohio Senate Bill 109 (“S.B. 109”), not only impose new obligations to report, including the reporting of facility investigations, but also attach new penalties for failing to do so.
- ▶ Changes pertaining to the State Medical Board of Ohio (“Board”) and all of its licensees (M.D., D.O., D.P.M., P.A., AA, RCP, GC, Dietician, M.T., etc.)
- ▶ Changes effective either March 21, 2025, or April 9, 2025.

# INTRODUCTION ABOUT S.B. 109

## ▶ Major Changes Include:

1. **For Facilities**: Adds new obligation to Ohio's "mini-HCQIA" for facilities to report **investigations** of criminal conduct or sexual misconduct against Board licensees within 30 days of the beginning of the investigation;
2. **For Licensees**: Adds new obligation for mandatory reporting to the Board by individual licensees when they know or have reasonable cause to suspect that a fellow licensee has engaged in **criminal conduct or sexual misconduct**;
3. **For Licensees**: Adds new 30 day individual licensee **self-reporting** duty to disclose criminal charges, including DUI-related offenses; and
4. **For Both**: Attaches **criminal penalties** to facilities and licensees for failing to make such reports.

# INTRODUCTION ABOUT S.B. 109 – EVOLVING PRIORITY

## Why is this happening?

- ▶ Continuance of trend of reporting as a regulatory priority.
- ▶ Stemming from growing emphasis through media attention and regulatory focus on professional reporting that has heightened implications for Ohio hospitals, ASCs, and their affiliated physicians.
- ▶ Much of this is an enhanced focus on boundary violations, including sexual misconduct and other sexual impropriety involving patients.
- ▶ As priority examples – see new regulations requiring license renewal CME videos on reporting duties.
- ▶ And because of . . .

# INTRODUCTION ABOUT S.B. 109 – EVOLVING PRIORITY

**Why is this happening?**



# INTRODUCTION ABOUT S.B. 109 – EVOLVING PRIORITY

- The attention surrounding the Dr. Richard Strauss case resulted in the Governor appointing a task force to address hundreds of instances of patient sexual abuse which raised public questions of physician reporting.
- In 2019, Gov. DeWine directed the Board to review any failure to act against physician sexual misconduct as well as neglect in reporting such misconduct by licensees.
- **January 2021 Board Report & March 2021 Working Group Report:** Headlines in early 2021 focused on Board review of prior closed sexual impropriety cases and decision to reopen 91 such cases.
  - [https://publicsafety.ohio.gov/static/Strauss\\_Investigation\\_Closing\\_Report\\_of\\_Working\\_Group.pdf](https://publicsafety.ohio.gov/static/Strauss_Investigation_Closing_Report_of_Working_Group.pdf)
  - <https://med.ohio.gov/for-the-public/transparency/transparency>
- **Mandatory Reporting to the Surface:** Scrutiny results in disclosure that from the Board's prior review, they were opening 42 cases of possible failure to comply with the mandatory reporting laws.

# INTRODUCTION ABOUT S.B. 109 – EVOLVING PRIORITY

## Why is this happening?

**The Columbus Dispatch**

February 2, 2023 6-part Investigational Report: ***PREYING ON PATIENTS***  
***'A black hole': How the state medical board bungled sex abuse cases for years***

- ❖ Board response to Dispatch expose:
  - Town-hall meetings with public and Dispatch
  - Appointment of sex abuse staff, advocates, investigators, and attorneys
  - Sexual misconduct specific public announcements, policies, and website page
- ❖ This is the priority.
- ❖ Now one of the primary sources of discipline after the advent of the Confidential Monitoring Program, which reduced disciplinary complaints, authority and overall statistics.



# OHIO'S EVOLVING REPORTING PRIORITIES – NATIONAL ABUSE/REPORTING SCANDALS ADD TO EVOLUTION

- In addition to the 2023 Dispatch expose and fall out from Dr. Strauss/OSU, there have been a series of national abuse and reporting scandals raising questions of timely reporting.
  - Dr. Larry Nassar and MSU/USA Gymnastics (conviction and \$638m)
  - USC and Dr. Tyndall (conviction and \$1.1b)
  - Dr. Chris Duntsch who was labeled “Dr. Death” by the popular podcast



# FROM DR. RICHARD STRAUSS TO S.B. 109



- ▶ Due to this trend, highlighted by media attention, liability claims, and new regulatory risks, whenever an issue of abuse, misconduct, suspect prescribing, fraud, suspect clinical performance or outcome, or anything related to Ohio's Medical Practice Act arises within a health care entity or system, consideration of reporting obligations has become a higher priority to regulatory agencies, health care entities, and providers.
- ▶ This is true more than ever given the increase in hospital and physician alignment.

# OHIO'S EVOLVING REPORTING PRIORITIES – INDIVIDUAL PROVIDERS

## CURRENT LAW

**General Rule:** If an Ohio physician or other licensee “believes” that a violation of the Medical Practice Act has “occurred”, then the individual “shall report to the board the information upon which the belief is based.” RC 4731.224; OAC 4731-15-01

**When** does a physician or other licensee “believe” or have such a “belief”?

- ▶ “‘Reason to believe’ or ‘a belief’ does **not** require absolute certainty or complete unquestioning acceptance, but only an opinion that a violation has occurred based upon firsthand knowledge or reliable information.” OAC 4731-15-01(D)

## What Must be Reported?

- ▶ Almost everything, as a physician or other licensee must report any “belief” of a violation of the Ohio Medical Practice Act as well as rules promulgated by SMBO.
- ▶ This is an expansive scope of what must be reported as this encompasses all the laws of medicine in Ohio.
- ▶ Overall this combination of “what” must be reported and “when” results is a very broad obligation for two reasons:
  - 1) “Belief” is a low standard; and
  - 2) The Medical Practices Act is very broad.

# OHIO'S EVOLVING REPORTING PRIORITIES – INDIVIDUAL PROVIDERS

## CURRENT LAW

### Time frame for reporting to Board:

- ▶ Within 48 hours
- ▶ OAC 4731-15-01(E)

### Content of Report:

- ▶ Name, dates/places, and a description of the violation believed to have occurred.
- ▶ OAC 4731-15-01(G)



# OHIO'S EVOLVING REPORTING PRIORITIES – FACILITY

## CURRENT LAW

### Required reporting from hospitals and ambulatory surgical centers:

#### ▶ Standard:

- ▶ Any health care facility, including a hospital, health care facility operated by a health insuring corporation, ambulatory surgical center, or similar facility must report formal action against a physician or other licensee within 60-days.
  - ▶ ORC 4731.224(A)
  - ▶ This is Ohio's "mini-HCQIA" – but is actually already broader in scope.
  - ▶ 60-day timeline is changing per S.B. 109

#### ▶ Who must report?

- ▶ Report is to come from the chief administrator or executive officer of the facility.

#### ▶ What needs reported?

- ▶ Name of the physician or other Board licensee, the action taken by the facility, and a summary of the underlying facts leading to the action taken.

# OHIO'S EVOLVING REPORTING PRIORITIES – PROTECTIONS UNDER CURRENT LAW

## Reporting Considerations:

- ▶ Confidentiality: Reports made under RC 4731.224 and OAC Ch. 4731-15 are confidential and not subject to discovery or admissible as evidence in “any federal or state civil action involving a health care professional or facility arising out of matters which are the subject of such reporting to the board.” RC 4731.224.
- ▶ Immunity from suit: An individual or entity which reports to the Board, the monitoring organization, or who refers an impaired practitioner to an approved treatment program shall not be subject to suit for civil damages as a result of the report, referral, or provision of information. RC 4731.224.
  - ▶ Similar for individual reporting too.
- ▶ Peer Review Exception: Peer review members have exception to reporting when the “sole source of their belief” that would be reported is from peer review.
- ▶ Anonymity option for individual reports: Reports may be anonymous subject to procedures set forth in OAC 4731-15-01(E).



# S.B. 109

## **In just a few weeks, S.B. 109 will bring about some transformative changes to Ohio law, including:**

- ▶ Requires reporting of certain investigations by hospitals and ASCs.
- ▶ Expands duty of licensed providers to report criminal conduct or sexual misconduct.
- ▶ Requires licensed providers to self-report criminal charges, alleged sexual misconduct, and OVI's.
- ▶ Authorizes the Board to suspend a license for pending criminal charges.
- ▶ Requires Board licensees on probation for sexual misconduct to provide written disclosure to patients and document the same.
- ▶ Shortens the institutional discipline reporting timelines.
- ▶ And more...



# S.B. 109 – NEW FACILITY REPORTING OF INVESTIGATIONS

- Requires facilities, including hospitals and ASCs, to now report to the Board **investigations** regarding criminal conduct or sexual misconduct against Board licensees within 30 days of **commencing** the investigation. RC 4731.224(B)(2).
  - Not just adverse actions and surrender of privileges any longer
  - *Much* greater duty than NPDB, where investigations are not reportable
  - Peer review law does not prevent this mandatory reporting (though peer review privilege still protects peer review proceedings) and you must report “summary” of “underlying facts” of investigation
  - New Penalty: 4<sup>th</sup> misdemeanor (1<sup>st</sup> offense) and 1<sup>st</sup> degree on each subsequent offense. \$1,000 Fine per offense.
  - S.B. 109 will now enable the Board to investigate while facilities are doing the same
- Also, the adverse action reporting time is reduced to **30 days** (from 60).

# S.B. 109 - INSTITUTIONAL DISCIPLINE REPORTING DEFINED TERMS

## New defined terms from ORC 4731.224(A):

- "Criminal conduct" - conduct that constitutes a felony, a misdemeanor committed in the course of medical practice, an offense of violence, or a sexually oriented offense.
  - ✓ A charge or indictment is not required.
- "Sexual misconduct" - conduct that exploits the *patient* relationship in a sexual way, whether verbal or physical, and may include the expression of thoughts, feelings, or gestures that are sexual or that reasonably may be construed by a patient as sexual.
  - ✓ Important to workplace investigations – must involve a patient.
  - ✓ Sexual misconduct definition includes Board sexual boundary rule.
  - ✓ OAC Chapter 4731-26.

# INTRODUCTION ABOUT S.B. 109 – WHAT IS A BOUNDARY VIOLATION?

## Ohio Administrative Code Chapter 4731-26 (Current Best Practices)

- ▶ **"Sexual misconduct"** – conduct that exploits the licensee-patient relationship in a sexual way, whether verbal or physical, and may include the expression of thoughts, feelings, or gestures that are sexual or that reasonably may be construed by a patient as sexual.
- ▶ **"Sexual impropriety"** – conduct by the licensee that is seductive, sexually suggestive, disrespectful of patient privacy, or sexually demeaning to a patient, including but not limited to, the following:
  - a) Neglecting to employ disrobing or draping practices respecting the patients privacy;
  - b) Subjecting a patient to an intimate examination in the presence of a third party, other than a chaperone, without the patients consent or in the event such consent has been withdrawn;
  - c) Making comments that are not clinically relevant about or to the patient, including but not limited to, making sexual comments about a patient's body or underclothing, making sexualized or sexually demeaning comments to a patient, criticizing the patients sexual orientation, or making comments about potential sexual performance;
  - d) Soliciting a date or romantic relationship with a patient;
  - e) Participation by the licensee in conversation regarding the sexual problems, sexual preferences, or sexual fantasies of the licensee;
  - f) Requesting details of the patients sexual history, sexual problems, sexual preferences, or sexual fantasies when not clinically indicated for the type of health care services; and
  - g) Failing to offer the patient the opportunity to have a third person or chaperone in the examining room during an intimate examination and/or failing to provide a third person or chaperone in the examining room during an intimate examination upon the request of the patient.

# S.B. 109 – ADDITIONAL LICENSEE REPORTING DUTY

- ▶ New law requires Board licensees that have reasonable cause to suspect that another licensee of the Board has committed or participated in criminal conduct or sexual misconduct to report that information to the Board.
- ▶ As with facility investigation reporting, charge/indictment is not required.
- ▶ All the ways by which your client or physician leaders can have “reasonable cause to suspect”:
  - ▶ Credentialing disclosures
  - ▶ Communications
  - ▶ Protection orders
  - ▶ Source does not matter



# S.B. 109 - FAILURE TO REPORT A CRIME

- S.B. 109 expands the offense of **failure to report a crime** by prohibiting any person who knows that a licensed medical professional has committed an offense under the Sex Offenses Law (R.C. Chapter 2907) against a patient from failing to report such knowledge to law enforcement authorities within 30 days of obtaining the knowledge.
  - R.C. 2921.22(F)(1)
  - A violation is a fourth degree misdemeanor.
  - Grants civil or criminal immunity generally to a person as a result of making a report as described in the preceding dot point so long as the person is acting in good faith without fraud or malice.
- No Privilege: Provides that the physician-patient relationship or physician assistant-patient relationship is not a ground for excluding evidence against the medical professional in any judicial proceeding.
- Double Duty? May have duty to report to Board and law enforcement as to the same occurrence!

# S.B. 109 - SUSPENSION FOR PENDING CRIMES

S.B. 109 authorizes the Board to a license be suspended without a prior hearing if the Board receives verifiable information that a licensee has been **charged** with a felony and the conduct charged constitutes a disciplinary violation under Ohio law.

- R.C. 4731.22(B)(9) – The Board may discipline a licensee for “a plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a felony”
- R.C. 4731.22(B)(10) – The Board may discipline a licensee for “commission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed”
- New prosecutor reporting duties to the Board
  - Not just convictions; but now indictments too
- Certified copy of criminal case documents
- R.C. Chapter 119 administrative hearing



## S.B. 109 - LICENSEE SELF-REPORTING

- ▶ S.B. 109 requires Board licensees to report to the Board criminal charges regarding criminal conduct, sexual misconduct, or any conduct involving the use of a motor vehicle while under the influence of alcohol or drugs
  - ▶ Previously reporting on license renewals; now an affirmative duty to report
  - ▶ Charges must be reporting within 30-days



- ▶ <https://med.ohio.gov/home>

# S.B. 109 - PROBATIONER'S DUTY TO DISCLOSE PRIOR SEXUAL MISCONDUCT

S.B. 109 authorizes the Board to require licensees who are subject to certain probationary orders for sexual misconduct or patient harm to provide a written disclosure to each patient, or the patient's guardian or a key third party, of all of the following:

1. The practitioner's probation status;
2. The total length of the probation;
3. The probation end date;
4. Practice restrictions on the practitioner;
5. The Board's telephone number; and
6. An explanation of how the patient can find additional information regarding the probation on the practitioner's profile page on the Board's website.



The disclosure, if required by the Board, must be provided before the patient's first visit following the probationary order. The patient, or the patient's guardian or a key third party, must sign the disclosure, and the practitioner must maintain a signed copy in the patient's medical record.



# S.B. 109 – PENALTY SUMMARY

S.B. 109 enhances existing penalties and creates new penalties for the new reporting duties:

## **Licensure:**

- Individual: failure to report is disciplinary violation. Subject to license action. See Dr. Geiger and OSU/Strauss actions.

## **Criminal and Financial:**

- Failure to report generally by either individual or facility or self: Minor misdemeanor (1<sup>st</sup> offense) and 4<sup>th</sup> degree on each subsequent offense. Fine up to \$1,000 per offense.
- Failure to report “sexual misconduct” or “criminal conduct” by either individual or facility is now 4<sup>th</sup> degree misdemeanor (1<sup>st</sup> offense) and 1<sup>st</sup> degree on each subsequent offense.

# S.B. 109 - OVERCOMING

*Like many professional industries, health care has faced challenges in reporting.*

- ▶ Anti-Snitch Popular Culture
- ▶ Medical Code of Silence



Whatever the reasons for this reporting inertia, S.B. 109 represents the latest in the continuing trend toward the need to give appropriate prioritization to mandatory reporting in Ohio health care settings for institutions from large to small and at individual provider levels as well.

# S.B. 109 RISK - HOSPITAL PHYSICIAN EMPLOYMENT

New facility reporting requirements for investigations of sexual misconduct or criminal conduct produces greater risk of using termination “without cause” as a “path of least resistance” when dealing with challenging provider situations.

While easy and contractually compliant, that is where the benefits will often end and where new troubles can begin if there is any element of sexual misconduct, criminal conduct, or any misconduct (in the event your physician leaders aware)

## **Bottom line:**

More than ever, you should always be considering reporting obligations.

# OHIO LAW – MANDATORY REPORTING – BEST PRACTICES

1. Review, update, revise, or adopt policies and procedures relative to the inclusion and consideration of reporting obligations from S.B. 109.
2. Include this issue in training programs to elevate awareness and compliance to avoid becoming a “worst case scenario”.
3. Track and stay updated on Board guidance since this is an evolving and developing area.
4. Have reporting procedures and forms in place to comply and assert confidentiality and immunity protections.
5. Avoid falling into the “without cause” termination contract trap.
6. Know the exceptions . . . they can still help diffuse situations.



**QUESTIONS?**

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