

## What to do When the Medical Board Comes Knocking - An Overview of Licensing Board Procedures

by Joel Bruce Douglas and Peter R. Osinoff

Every year, on average, one out of every eight physicians licensed by the State of California is reported to the California Department of Consumer Affairs. Medical malpractice lawsuits and disciplinary action by hospitals and peer review organizations are not the sole source of these complaints. Unhappy patients, disgruntled employees, jealous colleagues and competitors, and even angry ex-spouses regularly get the attention of the Medical Board of California. The charges range from negligence, unprofessional conduct, moral misconduct (allegations of drug or alcohol abuse, sexual misconduct, acts of moral turpitude), criminal conduct to fraud. While most of these complaints lack adequate justification for further investigation, of the nearly 11,000 complaints received in the 1998-1999 fiscal year, investigations were nevertheless opened in some 25% of the cases. Of those investigations, about a fourth wound up being referred to the California Attorney General to initiate disciplinary proceedings. The other Boards, Dental, Behavioral Science, Nursing, etc., have their own set of statistics.

The complaints are investigated by a group of men and women under the auspices of the Enforcement arm of the various licensing boards. They are granted peace officer status, issued badges, handcuffs and guns, office behind a bullet-proof window and an automatically-locking door, and they have authority not only to investigate, but to apprehend, arrest, handcuff and incarcerate. To them, the "enemy" is not the criminal element of society. Rather, it is the licensed professional who is the target. These investigators have tremendous power over what will happen next to the licensee. This is why it is so critical to have experienced counsel as soon as the physician has any inkling that an investigation may be afoot, and insist on consulting with a lawyer before giving any statements, even if the doctor believes he or she has nothing to hide. The investigators and medical consultants the investigators employ will often proceed on the uncritical presumption that the complaining witness' allegations are true, and it should be left to the hearing officer to decide conflicts over who is telling the truth. Despite policy statements to the contrary, investigators have been known to shop for opinions from medical consultants which support their preconceived lay belief that the doctor did something wrong or should be disciplined.

If the final investigative report the investigator prepares makes a prima facie showing of a violation of the Medical Practice Act, with the retained medical consultant characterizing the alleged conduct in the subjective vernacular of the MPA ("repeated acts of negligence," "gross negligence," "incompetence" or "dishonesty") the matter is turned over to the Department of Justice. A deputy attorney general is assigned to the case with marching orders to file an Accusation if "legally feasible," and to proceed against the professional's license.

At that point, more than the doctor's license is on the line. The Accusation is a matter of public record. Indeed, the physician's name now appears on the Board's website on the Internet for the world to see, and it immediately gets published in its "Hot Sheet" for all health care members to read about. At this point, more than the doctor's reputation is on the line. Hospitals and peer review and practice groups, as well as insurance providers, feel obliged to conduct their own investigation of the physician and take protective action. What's more, during the pendency of the Accusation, some groups or insurers, such as Blue Shield, may disallow preferred payment reimbursement for new patients.

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Even attempting to negotiate a fair and reasonable resolution of the matter with the Board can be daunting. Although we have experienced success in securing dismissals of Accusations once filed, generally speaking the Board is tough and exacting in its pre-hearing settlement position, with a long laundry list of distasteful if not intolerably draconian demands. A settlement deal reached with the attorney general is not an agreement until approved by the Board. Short of revocation, the Board will seek suspension, probation from one to seven years (with the doctor bearing the \$2,300 annual cost), oral competency exams, physical or psychological testing, random drug tests, appointment of a practice monitor, a chaperon when the doctor examines or treats patients, an ethics course, additional educational or training, such as attending the PACE program in San Diego, all at the physician's expense, and, of course, reimbursing the Board's sometimes inflated costs and fees for investigation and prosecution of the physician.

There is limited discovery in disciplinary proceedings. It is important to anticipate and prepare a compelling defense. Even though the Board must establish its case by the standard of clear and convincing to a reasonable certainty, there is hardly an exact science or measure as to what facts or circumstances will impact the findings and conclusions of the Administrative Law Judge (ALJ) who will be presiding over the hearing at the Office of Administrative Hearings. Representation by trial counsel who know the judges, the deputy attorney generals, the experts and how to put on and sell a formidable defense, can make a difference. Our experience, knowledge and connections with expert witnesses in over 35 years of representing the health care industry both in civil lawsuits and licensing Board matters, are unmatched.

Following hearing, which usually takes place within a year from the service of the Accusation, the ALJ prepares a proposed decision, with findings and conclusions, as well as a proposed order. The judge has 30 days to do this. The proposed decision and order is then submitted to the Division of Medical Quality for adoption. The Board has 30 days to adopt or reject the decision of the ALJ in whole or in part. It has that authority even if the ALJ recommended the Accusation be dismissed. If the Board votes to reject the proposed decision of the ALJ, the trial record is called up for review in Sacramento. The Board then has 100 days from receipt of the transcript to redecide the case.

If dissatisfied with the decision and order of the Medical Board, the respondent physician has 30 days in which to petition the Board for reconsideration. If that fails to yield relief, the licensee's recourse is to file a Petition for Writ of Administrative Mandamus and Stay Order with the Superior Court. In reviewing the action of the Board, the judge's jurisdiction is limited to a search for abuse of discretion and determining the sufficiency of the evidence based on an independent review. Irregularity of proceedings or decisions against the law can be reversed. Attacking the penalty imposed, however, can be a difficult sell. The Board has broad discretion in meting out the type of discipline where cause for discipline has been found to exist, even if the discipline exacted seems harsh in the judge's opinion. Following briefing and a hearing, the Superior Court will either discharge the writ, allowing the decision and order of the Board to stand, or it will grant the writ, commanding the Board to vacate and set aside its decision, and conduct further proceedings not inconsistent with the court's ruling. The court lacks authority to redecide the matter itself; that is the exclusive province of the Board, within the constraints of the law and supervision of the court.

If the licensee is unsuccessful before the Superior Court in securing the relief sought from the Board's decision and order, he or she may appeal to the California Court of Appeal on the charge that the Superior Court judge abused his or her discretion in deciding the writ proceedings. An abuse of discretion, or violation of law or a constitutionally protected right must be shown. The appeals court will either affirm the superior court's opinion, leaving the Board's decision and order intact and final, or it will reverse with directions for the superior court to redecide the underlying petition.

When a licensing agency comes knocking, a lot more is at stake than money and principle. One's reputation and ability to earn a livelihood practicing the profession for which he or she spent a lifetime preparing, educating and training, becomes very much at risk. Reason, perspective and fairness will not necessarily carry the day. The stress and fear over one's plight as an accused, not to mention the feeling of helplessness and uncertainty of the outcome, which could be devastating, is unlike any other "cost of doing business." It is important to seek experienced counsel and representation the moment there is any hint that an investigation by the Board is underway. Even if the professional knows he or she has done nothing wrong, has excellent knowledge and skills, a fine reputation, and nothing to hide, it is important to remember that in dealing with the Board investigator, that is not what counts. What counts is what the Board thinks about the charges it is investigating. And what the Board thinks can have a palpable effect on one's professional career and reputation, ability to practice one's profession and earn a livelihood, as well as one's sense of well-being .