

Handling investigations of the Texas State Board of Medical Examiners

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The Texas State Board of Medical Examiners (TSBME) has the authority to investigate its licensees, including physicians, to determine whether the Medical Practice Act ("the Act") has been violated (1). Violations of the Act include practice inconsistent with public health and welfare (generally a failure to act in accordance with the standard of care), unprofessional and dishonorable conduct, disciplinary actions against a licensee by another state board or peer group, repeated and recurring meritorious health care liability claims against a licensee (3 or more claims in any 5-year period), and crimes by a licensee that involve moral turpitude (2). If a violation is determined to exist, the board can impose penalties that include reprimands, administrative fines, and license restriction, suspension, and revocation (3).

Physicians' chances of being investigated by the board and having some action taken against them appear to be increasing. The statistics published by the TSBME on its website (<http://www.tsbme.state.tx.us>) show that the board has become more aggressive in the investigation and discipline of licensed physicians. These statistics include data by fiscal year (FY) since 1994, through February 28, 2003. In FY 2002, there were 832 pending physician investigations compared with 556 in FY 2001. During the first 5 months of FY 2003, less than half of that year, there were 742 pending physician investigations (4).

TSBME action on investigations has also increased. Temporary license suspensions increased from 7 in FY 2001 to 19 in FY 2002. License revocations and surrenders increased from 15 in FY 2001 to 37 in FY 2002. Further, there were 15 revocations/surrenders in the first 5 months of FY 2003. License suspensions increased from 15 in FY 2001 to 20 in FY 2002. In the first 5 months of FY 2003, there were 12 suspensions (5).

The major increases in disciplinary actions have been in licensure restrictions and administrative penalties. In FY 2001, there were 36 restrictions. This number increased to 61 in FY 2002, and there were 45 restrictions through the first 5 months of FY 2003. While the number of board reprimands has stayed relatively stable, board-imposed administrative penalties have increased in both number and amount. Sixteen administrative penalties were imposed in FY 2001, with a total value of \$59,800. This averages out to about \$3700 per penalty. The 37 penalties in FY 2002 totaled \$175,880, an average of \$4700 per penalty. In the first 5 months of FY 2003, there were 34 administrative penalties totaling \$222,000, with an average of \$6500 per penalty (5).

Given the increasing numbers of investigations and sanctions, board investigations are very serious matters. These proceedings can affect not only physicians' ability to practice medicine but also their hospital privileges, their participation in managed care programs, and their defense in health care liability claims. For these reasons, these investigations need to be given the same effort and attention that a health care liability claim is afforded. Physicians who are made the subject of any board investigation should seriously consider obtaining the assistance of counsel.

In its simplest form, the investigation process has a number of potential components. This article focuses on what many believe is the most important component of this process, the informal show compliance proceeding (ISC). The ISC is thought to be key because during the proceeding the board focuses on what can be proved against a licensee and what it can and wants to do to resolve a legitimate complaint.

By way of background, the TSBME or a private individual can initiate a complaint (1). Once the board receives the complaint, it is screened within 30 days. The purpose of this initial screening is to determine whether the board has jurisdiction over the complaint. During this screening, the board obtains the subject physician's license history and information on the subject from the National Practitioner Data Bank. The board may also solicit information from the complainant and/or the subject physician, but this is not required (6). If jurisdiction exists, the complainant and the subject are notified and the complaint filed with the board (7).

Absent good cause, investigation of the filed complaint is completed within 180 days (8). During this time, the board generally requests records and information from the subject (9) and reviews any past complaints against the subject to determine whether there is a pattern of practice or behavior (10).

After sufficient information has been gathered, the board investigator determines whether the information and evidence indicate a violation of the Act (11). If a violation of the Act is determined to exist, the investigation is referred to the ISC (12). The purpose of the ISC is to allow the subject to show that he or she has not violated the Act. In connection with an ISC, an attorney for the board submits information to a panel of board

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representatives (generally a 3-person panel from the board that consists of 2 physician members and 1 lay member) that includes evidence and information that the board attorney believes will support the position that a violation of the Act has occurred (13). Prior to this time, the subject is given notice of the allegations and the supporting facts. Further, the subject may be asked to respond to written questions about the matter (14) and is given the opportunity to submit information and evidence to the board panel for consideration (15). The subject is also given the choice of having the ISC determined solely by way of written information or of making a personal appearance before the board lawyers and 3-person panel (16).

If the ISC is based solely on written submissions, the board panel reviews the written materials and determines whether or not the Act has been violated. The panel then proposes how to resolve the situation (reprimand, administrative penalty, licensure modification, etc.) and reduces these determinations to writing for presentation to the subject (17).

If the ISC is based on a personal appearance, an informal hearing occurs before the board panel in Austin, Texas. The rules of evidence do not apply, and no record is made of the proceeding, like that made during a trial. In an ISC based on personal appearance, the 3-member board panel is present, along with a board prosecutor, the subject, and the subject's counsel, if counsel has been retained. Moreover, a separate board lawyer is present to assist the panel. The role of this attorney is to advise the board panel about whether he or she believes the evidence before it supports a finding that the Act has been violated.

During the ISC personal appearance proceeding, a summary of the complaint allegations is presented to the subject, the board prosecutor makes a presentation, the subject makes a presentation (personally and/or through counsel), and the board panel usually questions the subject. After these presentations, the board panel deliberates in private with the board lawyer; the board prosecutor, the subject, and the subject's counsel are not allowed at this deliberation. The board panel then notifies the subject in person of its recommendations (18). These recommendations are then reduced to writing and later presented to the subject for review and assessment (19). There is usually some room for negotiation on the board panel's recommendations. If an agreement is reached, the board prosecutor then prepares an Agreed Order for resolution of the matter, which the subject must sign. The Agreed Order is then presented to the board for approval.

If the board panel finds that a violation of the Act has occurred and the matter cannot be resolved by an Agreed Order, a further informal conference in Austin may be arranged with the subject, or the matter can be referred for formal proceedings at the State Office of Administrative Hearings (SOAH). If the case goes to the SOAH, an administrative law judge is assigned to the case, and the Administrative Procedure Act of the Texas Government Code governs the proceedings.

This process does not necessarily end at the SOAH and can proceed as far as state district court litigation. However, if an ISC is handled properly, the need for any further proceedings can often be eliminated, either because the complaint is dismissed or the board makes a reasonable and fair offer of resolution. If the ISC is not handled properly, the subject can be put in the position of accepting a less-than-palatable Agreed Order or may have to

defend the complaint up through district court litigation to obtain a better outcome, if that is possible.

The most important point to understand about a board complaint is that representation by counsel can make or break the ultimate outcome. If counsel is present and involved from the outset, the board is aware that the subject takes the complaint very seriously. In fact, the presence of counsel may indicate in a subtle fashion that the subject has the desire and ability to take this matter to the district court level, if necessary. The presence of counsel also emphasizes to the board that its actions and recommendations will be closely scrutinized. Further, counsel handles this situation in a fashion similar to litigation. That is to say, he or she investigates the claim and obtains any supportive evidence. Counsel will likely interview colleagues, other treating doctors, and consulting experts to see if they can provide beneficial affidavit testimony. This evidence may be used to rebut a claim of negligence on the occasion in question, to show that the incident before the board is merely a one-time occurrence that does not merit discipline in any form (or minimal discipline), or to establish the absence of any dangerous or unreasonable pattern of practice by the subject. If this evidence can be obtained, counsel prepares supporting affidavits and submits the information, as well as any other beneficial evidence, to the board for consideration. Counsel can also review and analyze the complaint and the board prosecutor's arguments, review the medical records at issue for beneficial information, and evaluate and investigate any expert witnesses the board uses.

When the complaint is initially being reviewed to determine the existence of a violation of the Act, before referral to ISC, counsel can prepare an effective and persuasive response to any initial requests for information from the board. Sometimes, this assistance can result in a finding that no violation of the Act occurred, and the process ends there without the need for an ISC.

The assistance of counsel is a key factor in obtaining the best result possible from any ISC proceeding. In addition to the investigation and gathering of evidence already discussed, counsel can advise the subject of the risks and benefits of a personal appearance ISC as opposed to an ISC based on written submission. The use of counsel in an ISC based solely on written submission is probably a necessity. If written submission is determined to be the best way to proceed, counsel can prepare and submit an effective and persuasive position paper and provide the evidence available to give the subject the best chance of a successful outcome.

A personal appearance ISC, however, is generally thought to be preferable because it shows the board prosecutor and the panel members that the subject takes this process seriously and is willing to take the time to come before them and face their questions. In this situation, counsel can not only prepare and submit a persuasive written presentation to the board prosecutor and panel (along with supporting evidence) but also help in preparing the subject for any questioning by the board panel, in much the same manner as one would be prepared by counsel for a deposition in litigation. The board panel appears to place a lot of weight on the manner in which the subject presents. Thus, the role of counsel in advice and preparation is paramount. Counsel also has an opportunity, albeit a brief one (the panel mainly wants to hear from the subject), to make a legal and factual presentation

to the prosecutor and panel about why no violation of the Act exists and why there is no reason to discipline the subject.

If the board panel finds that the Act has been violated, counsel can assist in determining whether acceptance of an Agreed Order is the best option. As already mentioned, there usually is some room for negotiation as to the board's findings and recommendations in the Agreed Order, and counsel can seek and obtain all possible concessions. Thus, if acceptance of an Agreed Order is the best option, the subject can obtain the best Agreed Order possible.

Physicians may be entitled to legal representation for these proceedings under their professional liability insurance policies. A number of insurance carriers pay for legal representation in board proceedings under their professional liability insurance policies. Physicians who receive notice of a board investigation should call their liability insurance carriers and determine if legal services are covered.

When determining whether to retain counsel for a board complaint, regardless of coverage for legal expenses, keep in mind that the last thing the board wants is a SOAH proceeding or district court litigation of a matter. The board appears to desire to resolve these situations in an informal manner at the ISC level. Physicians who proceed on their own, without counsel, risk a blemish on their record or, worse, a restriction on their license, which might otherwise not be necessary.

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1. Texas State Board of Medical Examiners, Complaints, Section 178.4 (2004).
 2. Texas State Board of Medical Examiners, Disciplinary Guidelines, Violation Guidelines, Section 190.8 (2004).
 3. *Texas Occupations Code*, Sections 164.001, et seq. (West 2003); Texas State Board of Medical Examiners, Disciplinary Guidelines, Sanction Guidelines,

- Section 190.14; Texas State Board of Medical Examiners, Procedural Rules, Section 187.9 (2004).
4. Texas State Board of Medical Examiners. Enforcement statistics, summary of investigations, 1994–February 28, 2003. Available at <http://www.tsbme.state.tx.us>; accessed May 5, 2004.
5. Texas State Board of Medical Examiners. Enforcement statistics, medical board decisions, 1997–February 28, 2003. Available at <http://www.tsbme.state.tx.us>; accessed May 5, 2004.
6. Texas State Board of Medical Examiners, Complaints, Section 178.5(b) (2004).
7. Texas State Board of Medical Examiners, Complaints, Section 178.6 (2004).
8. Texas State Board of Medical Examiners, Complaints, Section 178.7 (2004).
9. Texas State Board of Medical Examiners, Investigations, Section 179.4 (2004).
10. Texas State Board of Medical Examiners, Investigations, Sections 179.5, 179.7 (2004).
11. Texas State Board of Medical Examiners, Complaints, Section 178.7(a) (2004).
12. Texas State Board of Medical Examiners, Complaints, Section 178.7(b) (2004).
13. Texas State Board of Medical Examiners, Procedural Rules, Sections 187.16(a) and (b) (2004).
14. Texas State Board of Medical Examiners, Procedural Rules, Section 187.16(a) (2004).
15. Texas State Board of Medical Examiners, Procedural Rules, Section 187.16(c) (2004).
16. Texas State Board of Medical Examiners, Procedural Rules, Sections 187.17, 187.18 (2004).
17. Texas State Board of Medical Examiners, Procedural Rules, Section 187.17 (2004).
18. Texas State Board of Medical Examiners, Procedural Rules, Section 187.18(e) (2004).
19. Texas State Board of Medical Examiners, Procedural Rules, Sections 187.18(p), 187.19(b) (2004).