STATE BOARD INVESTIGATIONS
AND
DISCIPLINARY ACTIONS

Roger W. Calton
Attorney At Law
Calton & Burns, LLP
30131 Town Center Drive, Suite 177
Laguna Niguel, CA 92677
(949) 495-3350

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Know Your Rights Before You Respond

Your license to practice is your most valuable possession yet many doctors expose their licenses to unnecessary risks by the way in which they respond to State Board investigations and disciplinary complaints.

As a doctor you have one single asset that is the key to your practice and your livelihood. It's not your office, your equipment, or your staff, but instead, it's a single piece of paper that hangs on your wall. That license represents your right to practice a chosen profession. It was most difficult to acquire, but is often too easy to lose.

In virtually every state, the State Licensing Board has the ability to bring disciplinary sanctions against a doctor. Those sanctions range from censure and reprimand to fines, probation, suspension, or even revocation of the doctor's license. Discipline can often be based on as little as one simple consumer complaint and the effects can be devastating.

I. The Importance of An Unblemished License

Formal disciplinary action entered against a doctor often carries implications far beyond the immediate expose to his or her license. For instance, a doctor placed on probation may not actually spend any time out of practice. However, nearly every time the doctor then testifies in a personal injury case some attorney is going to ask, "Now doctor isn't it true that you were placed on probation by the State Board?" Whenever that doctor applies for licensure in another state, the application form will inquire, "Has your license ever been subject to professional discipline" and that prior disciplinary action may be the grounds for denial of the license. More importantly, where the doctor holds licenses in more than one state, any disciplinary action in the first state may be grounds for entry of an Order of Professional Discipline in the other states, and since there has already been a finding of guilt the secondary actions are difficult to defend. In addition, a disciplinary order entered against a doctor's license will likely cause problems with managed care contracts, staff privileges, and the ability to obtain malpractice insurance.

In order to protect your license you need to know how to best respond to a State Board investigation or to a disciplinary action brought against your license.

II. The Complaint Handling Process

Each State Board works a little differently. However, as a general rule, the process moves in stages. Typically, in order, the stages are:

- A complaint made to the Board
- Investigation
- A letter to the doctor asking for a response
- The determination to file a formal disciplinary action
- Filing of the "Accusation"
- Notice of Defense filed
- Discovery and Investigation
- Pretrial hearing and settlement conference
- Administrative Hearing
- Proposed Decision by Administrative Law Judge
- Decision by the Board
- Petition for Reconsideration and/or Appeal

The process generally begins with a complaint being filed, either by a consumer, another doctor, an insurance company, or in some cases the Board itself. The first notice a doctor has is generally a letter of inquiry from the Board or the appearance of an investigator at his door.

A. When The Investigator Shows Up Unexpectedly

The Board Investigator shows up, demands patient files, and "Just wants to ask you a few questions". All too often doctors invite the investigator in, answer all of his questions, and in the process hang themselves. The doctor wants to be cooperative after all, if you have nothing to hide, what's the harm?

Answering questions without knowing what specific complaint has been made, and without the advice of counsel, can be very dangerous. That was the mistake made by a doctor who was confronted by a Board Investigator's inquiries about fraudulent billings. He wanted to be cooperative. The investigator asked about who authorized certain billings and the doctor replied, "Well, I did, of course". The Board brought charges for fraudulent billings and the principle issue quickly became whether or not the doctor had actual knowledge of the billings, or, whether they were simply clerical mistakes. At trial he testified that since had such a busy practice, he didn't actually review the bills which were handled by his staff. The investigator, of course, testified that the doctor admitted authorizing the billings. The

question then comes as to which statement is more credible; his admission to the investigator or his trial testimony given at a time when he was trying to get off the hook. Resultantly, he was found guilty, placed on probation, and ordered to reimburse the insurance carrier.

The investigator will usually request the patient's records. Assuming that the investigator has proper authorization, then the records should be provided in a timely fashion. Even a subpoena for records, however, does not entitle the investigator to immediate production. You have a reasonable time to respond (typically a week or two), and time to consult with your attorney.

What is proper authorization? Proper authorization, depending upon the state, generally means that the investigator has either a release of records signed by the patient or a valid subpoena for the records. Most states recognize a doctor-patient privilege and the unauthorized disclosure of patient records, even to an investigator for the State Board is improper. The California Constitution includes a guarantee of privacy, which places restraints upon the government's ability to obtain patient records without the patient's written authorization.

The records you produce should in be in response to a specific request and should be limited to those which have been requested. Most State Boards do not have the authority to conduct a wholesale investigation, demanding production of multiple patient records or random samplings. A doctor should never release his only copies of patient records or x-rays[1]. The best approach is to offer to have the records copied and forwarded promptly to the investigator with the originals retained in the doctor's office.

With respect to answering questions, the doctor has a right to consult with an attorney before answering any questions. The doctor, in some cases, may also have the right not to testify against himself based upon the Fifth Amendment's protection against self-incrimination. As a practical matter, it's extremely difficult to respond to questions until such time as you know the nature and substance of the complaint that has been made. The investigator may well be on a fishing expedition, looking for a fish with his mouth wide open. If you don't know what the complaint is about, then you can't possibly know which questions are relevant, and which ones are not. Representation by a knowledgeable attorney is important even at this early stage, so you answer only questions which are relevant and properly phrased.

[1] The primary exception to this rule is when a search warrant is served and the original records are seized by governmental authorities.

In most instances the doctor is not legally required to answer an investigator's questions. We normally, however, recommend cooperation with the investigation, but by using processes which allow us to better protect the doctor's interests. The ideal posture is to be able to respond, in writing, to specific questions based upon the complaint under investigation. The doctor should suggest that the investigator contact his attorney or that the investigator place his questions in writing whereupon written answers will be provided.

Investigators are generally not doctors, but instead are often ex-police officers. As such they have a prosecutorial mind; that is an investigative pattern geared toward prosecution of the doctor as opposed to complete objectivity. When the doctor succumbs to the simple answering of questions his responses are then provided to the Board by way of a Report, often paraphrasing the doctor's response. Whether it is intentional or not, verbal responses are frequently subject to distortion. A complete written response, on the other hand, will generally be provided to the Board, in full, and without edification.

The response to the complaint or to written questions should be prepared after consultation with legal counsel. Generally the response should come from the attorney and not from the doctor directly. Whereas the doctor's own statements may later be used against him, a response from the attorney is much less likely to be used as evidence against the doctor. The response in any event should not be made until such time as the nature of the complaint is known, the medical records have been completely reviewed, and the applicable Statutes and Board Rules examined.

The investigator may sometimes attempt to interview your staff. You need to be extremely cautious when this happens. Don't tell your staff not to speak with the investigator. This could be an "obstruction of justice" and a separate charge. Your staff have the right to either speak to the investigator, or not, of their own choice, and can certainly consult with counsel as well.

B. Responding To A Letter of Complaint From the Board

As an alternative to an investigator arriving at the office, some Boards send a letter to the doctor requesting a response to the complaint being made. Again the doctor, wanting to be a good guy, is often his own worst enemy. Some doctors have even been known to confess a little wrong doing, but indicate that they have made changes in hopes of getting the Board to

leave them alone. The confession of any wrongdoing may lead to disciplinary action because the doctor then leaves the Board no choice.   Once a Board has definitive information proving a violation, the Board has an obligation to take affirmative actions. Failing to do so, the Board may be criticized for protecting doctors, instead of protecting the public.

Again, the best response is through your attorney, addressing the issues raised by the complaint after review of the appropriate records. A cardinal rule for giving testimony is: When you've answered the question, say no more. All too often the doctor's response attempting to explain the situation, volunteers unnecessary information which leads to further inquiry and trouble for the doctor.

With a proper response to the initial inquiry from the Board most complaints can be handled and resolved. Even the initial filing of a Formal Disciplinary Complaint, whether it is with or without merit, can be devastating to a doctor's practice. His license is threatened, he loses confidence and sleep, and may be subject to adverse publicity. The proper response to the initial inquiries can often avoid these problems.

III. Disciplinary Actions – Defending The Doctor

A patient files a simple complaint alleging that his or her insurance company was billed for services which the doctor did not perform. That allegation is suddenly transposed into a formal disciplinary proceeding claiming that the doctor is guilty of fraud. This is not a simple lawsuit where a small amount of money is at stake; instead it's an action brought by the State Board seeking professional discipline; reprimand, censure, probation, suspension, or revocation of the doctor's license. These actions have a tremendous impact upon a doctor's ego and emotions, his practice, and his livelihood. Even though the complaint may not have been justified the doctor's practice may be permanently injured.

The patient's complaint first undergoes an investigative process. Any patient complaint or inquiry from the State Board should be addressed promptly and courteously with every effort made at that point in time to satisfy any concerns and to avoid the filing of a formal disciplinary action.

If, however, the State Board decides to proceed on a complaint, the action is initiated by the filing of a petition for disciplinary action and notice to the Doctor. Although the disciplinary process varies from state to state, it generally follows one pattern. The underlying reason for that pattern is the

Constitutional guarantee of due process of law.

The Fourteenth Amendment to our Constitution provides that the State shall not deprive any person of life, liberty or property without due process of law. A doctor's license and his right to practice are recognized as "property" within this Constitutional framework and the right to a good reputation may be recognized as a form of personal liberty. This concept of due process requires a number of steps. The first is that an action is being brought. That notice must be meaningful, that is, it must describe the charges and the basis for those charges. The doctor must be given an ample opportunity to respond to the charges and has a right to be represented by counsel. With very few exceptions, the doctor has a right to a full and fair hearing before any action is taken against his license and that hearing must be before an impartial judge. If the decision is against the doctor, the case can be reviewed by a court of law on appeal.

Disciplinary cases throughout the country follow this general pattern. In some states disciplinary cases are tried with the Board members sitting as judges in the case. In other states (such as California) the process requires the appointment of an independent hearing officer to act as the judge, determine the facts, and issue conclusions and recommendations to the State Board. Often the doctor has a choice between having the case heard and decided by the Board or by an independent hearing officer. In most circumstances the doctor's rights are best protected by requesting an independent hearing officer decide the case. The decisions that must be made often involve disputed facts, legal burdens of proof, and questions of the admissibility of evidence. The independent hearing officer, generally a lawyer, is trained in these areas, whereas Board members are largely doctors who may be competent in their field, but have little or no legal training.

A. The Nature of The Charges

The State Board is an agency created by State Law. Its powers are therefore limited to those which have been granted by the state. The charges or grounds upon which a doctor's license may be disciplined are described in detail in the state statues. The most common are:

- Unprofessional Conduct
- Fraudulent Billings
- Gross Negligence
- Repeated Negligence
- Criminal Convictions

- Failure to maintain adequate records
- Sexual Contact with a patient

Additionally most State Boards have the ability to make rules and regulations which form additional grounds for professional discipline. Those rules, however, cannot contradict the State Statute which is the governing law.

B. Available Defenses

In the responsive filings, and at the hearing, the doctor has a right to raise defenses. There are four general categories of defenses. Due to the seriousness of these cases, all defenses should be considered and, if appropriate, raised. The four categories are:

1. On the Merits

These are defenses that go directly to the complaint such as the defense of "I didn't do it"; or "Yes, I did that, but it was proper and does not constitute a violation".

2. Procedural Defenses

State law governs disciplinary proceedings. All too often State Boards fail to follow their own procedures in bringing complaints. For instance, some states require that the patient's complaint must be written and sworn before a notary public. If it is not properly sworn, then the foundation for the Board's complaint fails and the action should be dismissed. There are a multitude of other procedural pitfalls and these should be carefully examined by an attorney and raised at the appropriate time.

3. Constitutional Defenses

These defenses generally attack the validity of the governing law or the adequacy of the hearing process. Over the past twenty five years we have seen numerous State Statutes relating to professional advertising fail, because they were in violation of the First Amendment protections of Freedom of Speech. Another common Constitutional defense comes from the vagueness doctrine which requires that the state's regulations be sufficiently clear so that they can be understood and applied consistently. A person must be able to govern his own conduct in such a way that he can avoid violations of the law. Laws that don't provide clear standards of

conduct violate the vagueness doctrine and may be unconstitutional.

4. Other Defenses

Disciplinary cases hold a multitude of other defenses that may be raised. The structure or composition of the Board itself may even be challenged. In one such case the entire Board was declared invalid based upon the method by which Board members were chosen.

A disciplinary action can have a tremendous impact upon the doctor's practice. Although settlement of the case should always be considered, the entry of any stipulation of discipline even an order of reprimand or probation, can have far reaching effects, impacting a doctor's practice for several years, threatening other state licenses which the doctor holds, and impinging upon the ability to ever become licensed in another state. Thus, all the consequences of a stipulated settlement must be carefully weighed and should be entered only with great caution.

The greatest failing of lawyers in these types of cases stems from taking the case too lightly. All too often we see cases where the lawyer walks into a Board hearing inadequately prepared, assuring his client that this is no big deal and there's nothing to worry about. The doctor comes out of the hearing with a suspended license and the lawyer's worthless apology.

Disciplinary cases must be carefully prepared and defended. Most states allow for pre-hearing discovery, depositions and written questions designed to allow the defense lawyer to properly investigate the complaints and prepare the case for trial. Expert testimony can and should be used in appropriate cases to prove the doctor's defense. Almost never should the doctor waive his right to a hearing before an impartial hearing officer or attend a Board hearing without competent counsel.

IV. Insurance Coverage

In recent years, many of the malpractice insurance companies offer some coverage for "administrative defense" or "defense of governmental investigations". This coverage, if available, can help to cover the cost of responding to the Board's investigation and defending a disciplinary action. Some companies include this coverage in their basic policy, while others offer this type of coverage as an option. The amount of coverage varies widely, typically ranging from $5,000 to $50,000.

V. Conclusion

The most important document in any disciplinary proceeding is often the very first letter of response to a State Board inquiry. If you receive a Board complaint, you need to take it seriously, respond promptly and professionally, and consult with qualified counsel right away.

Here are our seven top suggestions:

1. Don't answer questions until you know the specifics of the complaint.

2. Don't answer questions which are not relevant to the inquiry.

3. Don't produce confidential patient records without proper authorization or a valid subpoena.

4. Respond prompty and professionally. Any response you make should be concise and carefully planned. Be careful not to raise issues which are not already in question.

5. Don't alter records, give false testimony, or attempt to interfere with the investigation. Any of these actions is likely to create even greater problems.

6. Try to resolve the complaint at the earliest opportunity, but be prepared for a lengthy battle if necessary.

7. Don't try to handle this on your own. You have a great deal at stake. Seek advice and assistance from an attorney who is familiar with board complaints and administrative law and procedure.

Roger W. Calton
Calton & Burns, LLP
30131 Town Center Drive, Suite 177
Laguna Niguel, Ca 92677
(949) 495-3350

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This article provides general information. It does not constitute specific legal advice. Individual problems should be discussed with an attorney knowledgeable in this field.

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