

Texas Medical Board: The Basics of the Investigation and Legal Process

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Who are these Guys and Why Should I Listen to Him?

- Former Prosecutors for the Texas Medical Board
- Former Directors of Compliance & Enforcement for the Texas Medical Board
- Partners in Law Firm Representing Doctors and other Health Care Professionals before the various Boards
- More than 50 years of combined experience in this area

Lawyer At Work

- *Disclaimer*
- The opinions expressed are mine.
- My opinions may not reflect those of McDonald, Mackay, Porter & Weitz, LLP
- My opinions may not reflect those of Texas Osteopathic Medical Association

Objectives

- Explain the Investigative Process & Legal process of the Board
- Discuss issues that get doctors in trouble
- How to defend yourself

What is the Purpose of Boards?

- To protect the public
 - Licensure
 - Standards
 - Investigation/Discipline

- Not to protect or help the licensee



The Make-Up of the Board

- The Board is made up of 19 members
 - 12 Physicians
 - Nine MDs
 - Three DOs
 - 7 “Public” members
 - All are appointed by the Governor and approved by the Senate
 - They serve 6 year staggered terms

The Make-Up of the Board

- The District Review Members
- Their role is to assist the Board members
- There are four geographical districts of 28 total people.
- Each district has:
 - 4 Physicians
 - Three MDs
 - One DO
 - 3 “Public” members
 - All are appointed by the Governor and approved by the Senate
 - They serve 6 year staggered terms

The Complaint

- To start an investigation, you need a complaint
- A complaint can be filed in many ways
 - By letter
 - By e-mail
 - By the TMB’s website
 - By telephone
 - The Board can open an investigation on its own

How Does An Investigation Start

- Compliant
 - 55% - Patients & Family
 - 15% - Employees/Other Professionals/Peer Review
 - 15% - Legal (Criminal & Civil & Administrative)
 - 10% - Insurance Companies
 - 3% - Board Created
 - 2% - Self-Reported

Notice of Complaint

- Board sends a letter providing you basic information about a complaint.
- Have 28 days to respond
- Failure to respond will result in an investigation.
- Cases can be dismissed at this level.
- Standard of care allegations often are not dismissed at this stage.
- Better call your med-mal carrier.

Pre-Investigation

- The Board has a statutory deadline to complete an investigation in 180 days.
 - However, there are no consequences if it exceeds that time frame.
- Pre-investigation gives the Board a head start

Investigation

- Once a determination is made to open an investigation, a letter is sent to inform the licensee of this.
- Typical requests from the Board include:
 - A narrative
 - Evidence to support the narrative
 - Medical and Billing records with affidavits
 - Medical Practice Questionnaire

Investigation

- Investigations are conducted by Investigators, most are nurses from field offices.
- All standard of care cases are reviewed by “Board consultants”
- Two consultants review each case
- These are doctors who agree to review cases for the Board.

Investigation Mistakes

- You became an ostrich
- You get mad/emotional
- You fail to provide all the information
- You fail to be truthful, take responsibility, and show insight
- Become a conspiracy theorist
- Fail to get help

Keys to An Investigation

- Cooperate
- Give them all the records
 - Doesn't matter if the investigator only wants a limited number of records, give them all.
 - Copy everything, notes on back, call logs, sticky notes
 - Don't rely on employees to ensure all the records are there – this is your license at stake
 - Make sure your affidavits are correct

Keys to An Investigation

- When you write a narrative remember Joe Friday and Dr. Marcus Welby
 - Joe Friday says “Just the Facts Ma’am”
 - Dr. Marcus Welby keeps it clinical, but friendly
- Be Patient
 - It usually takes six months or more to complete an investigation.

The Fork In the Road: After the Investigation

- Once the investigation is done, the system takes over
 - It's reviewed by the Investigation's Manager
 - It's then reviewed by the staff's Quality Assurance Committee
 - It's then referred to Legal for review

The Fork In the Road: After the Investigation

- There is then a decision to make: Does it stay in Legal or does it go to Committee?
 - If it is referred to committee, it is sent to the Disciplinary Process Review Committee (DPRC)
 - This is made up of half the Board membership and they determine whether a case is dismissed
 - Complainants have a right to appeal this decision

The Fork In the Road: After the Investigation

- If it is referred to Legal from either the internal staff review or through the DPRC, then the investigation has made it to the Informal Settlement Conference (ISC).

The Informal Settlement Conference

- It is called an “Informal” Settlement Conference (ISC) because the rules of evidence and rules of civil procedure do not apply.
- It is anything *but* “Informal” for the doctor.



The Informal Settlement Conference

- You will be notified by letter of the date of the ISC.
- Continuances are rarely granted.
- Later they will send a CD containing the evidence the Board plans to present against you.



The Informal Settlement Conference

- The ISC packet will usually contain the following:
 - A notice letter of the time of the ISC
 - A summary of the allegations and the evidence
 - A copy of the physician profile
 - The records that support the Board allegations such as medical records, statements from other parties, and legal records
 - An expert report
 - NPDB report

The Informal Settlement Conference

- You need to be careful. The ISC Packet is put together by a prosecutor or that individual's staff.
 - Medical records may not be complete records
 - Exculpatory information may be left out
 - Additional information you submitted may be left out

The Informal Settlement Conference

- You need to file a rebuttal
- Submit any mitigating information
- Must be submitted fifteen business days prior to the ISC otherwise, the Panel does not have to accept it.
- It's up to you to defend yourself!
- Do not assume they are on your side – They are not!



The ISC Process: Nothing Like You've Ever Seen Before

■ The Players

- Two representatives of the Board. Always one doctor and one public member. Generally speaking at least one is a member of the Board.
- Encouraged to have similar specialties present, but not always possible.
- A Counsel for the Board. They are the legal advisor to the Board's representatives
- A Board prosecutor

The ISC Process: Nothing Like You've Ever Seen Before

■ The Process

- The Counsel will go over the ground rules
- The prosecutor will have an opening statement
- The licensee has the option of a statement
- The Board representatives ask questions
- The licensee is dismissed
- The Board representatives confer in private with the Counsel
- The licensee is permitted back in
- The Counsel explains the decision of the Board
- The licensee is told to leave

The ISC Process: Nothing Like You've Ever Seen Before

- This is a specialized practice. This is not District Court and lawyers and licensees who appear and think it is, will get killed.
- This is as much about communication as it is the evidence.
- Each Board representative has their own style and that plays a role in the outcome.

What to Do

- Truth
- Insight
- Responsibility
- Professional
- Experts
- Corrective Action
- Be Prepared
- Emotion
- Conversational

Outcome of the ISC

- Six Possible Outcomes
 - Recommendation to dismiss. Goes to DPRC for review
 - Defer for additional information
 - Remedial Plan
 - Offer of an Agreed Order
 - Directive to take a Temporary Suspension
 - Directive to take directly to the State Office of Administrative Hearings.

Remedial Plan

- Public, Non- Disciplinary Action
- Looks like a contract
- The information stated is usually vague
- Self-funding, \$500 annual fee
- Must be approved by both parties

Agreed Order

- In short, it is an agreement to accept some action by the Board to keep one's license and avoid court.
- Board can do almost anything the licensee is willing to accept.
- The Order must be accepted by both the licensee and a majority of the full Board to be effective.

Agreed Order

- Four Parts to an Agreed Order
 - **Preamble** – Provides an explanation of how the Order got here.
 - **Findings of Fact** – What the Board believes occurred.
 - **Conclusions of Law** – What law was violated.
 - **The Order** – The requirements under the agreement.

Collateral Damage

- The Agreed Order has many possible effects:
 - It's public, therefore:
 - Newsletter
 - Website
 - Various Data Banks
 - Press Release
 - May affect insurance contracts
 - May affect hospital privileges
 - May affect Board certification
 - May affect Malpractice insurance
 - May affect who and what you can supervise in your practice
 - Of course, whatever the Order requires, you must do.
 - It enters the licensee into the Compliance Program.

Formal Charges

- The Board's representatives send someone to the State Office of Administrative Hearings or if the Agreed Order is rejected, then the Board prosecutor files a complaint or "formal charges".
- Once a complaint is filed, it is much like a civil lawsuit with discovery, depositions and motions.
- A complaint is a public record and is treated similar to an Agreed Order in terms of reporting it to the public and the media.

The State Office of Administrative Hearings

- The State Office of Administrative Hearings (SOAH) is an administrative (executive branch) court.
- A licensee appears before an Administrative Law Judge to hear the case.
- The Board has the burden of proof, which is a preponderance of the evidence – this means 51%

The SOAH Process

- SOAH is similar in many ways to District Court. One difference is there is no jury.
 - Both sides get an opening argument. The Board goes first.
 - The Board presents its case first. It can use witnesses, experts and exhibits.
 - The licensee can cross examine and object.
 - After the Board rests its case, then the licensee can call their witnesses, experts and file its exhibits.
 - The Board can cross examine and object.
 - The Board can field a rebuttal case.

The SOAH Process

- It is at the end when the SOAH process gets a little odd.
 - There can be closing arguments, but most ALJs would rather have written closing arguments.
 - The ALJ may want other issues briefed after the hearing.
 - The hearing remains open until the ALJ says it is closed.

The SOAH Process

- Once it is closed, the ALJ has 60 days to draft a Proposal for Decision (PFD).
- Both sides write a brief objecting to or supporting the PFD.
- Both sides write a counter to the other side's brief.
- Once that is done, the ALJ writes a final PFD.

The SOAH Process

- The ALJ has complete control over the Finding of Fact and Conclusions of Law
- Has no authority over the actions taken by the Board.
- Therefore, if an adverse finding is made, the Board could do anything it wants to.

Why a PROPOSAL for Decision?

- It's called a PROPOSAL for Decision, because the Board, who sent you there in the first place, has the legal power to amend or even reverse the decision of the ALJ.
- The prosecutor speaks and then the licensee. The Board asks questions and then votes to accept, reject or modify the PFD.
- There is a complex appeals process thereafter, but it is difficult and expensive.



Time Line

- In a pre-investigation the licensee has 28 days to respond. The Board will typically take thirty days to make a determination.
- An investigation usually takes six months after the licensee receives notice.
- A case set for an ISC usually takes another three to six months to resolve.
- SOAH can take an additional eighteen months to two years in order to resolve. Sometimes longer.
- An appeal of a Board decision can take years.

Hot Topics Controlled Substances and Boundaries



Boundaries

- Boundary Violations
 - Not just sex
 - Economic
 - Dual Relations
 - Improper relationship
 - Gifts



Controlled Substances

- Improper/ Non-Therapeutic Prescribing of a Controlled Substance
 - War on Drugs
 - Deep fear of abuse
 - Lots of rules and regulations
 - 555



What to Do To Insure Against A Complaint

- Outstanding record keeping
- Employees
- Patients
- Know the rules
- Statistics
- Internal audits
- Criminal violations
- Suspicious activity by patients
- Business arrangements

Protection Plan

- Self-Awareness
- Policies and Procedures
- Forms – such as Controlled Substance Agreement
- Good Communication Skills
- Great Documentation
- Trained Staff

Protection Plan

- Saying “No”
- Know You Are a Licensee 24/7
- Don’t Self-Medicate, Family, Employees
- Knowing Your Limitations
- Knowing Your Vulnerabilities
- Not Making Someone Special

Protection Plan

- Creating strong boundaries.
 - Hours
 - Communications
 - Gifts
 - Dress
 - Education
 - Informed Consent

Questions?

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