

COPING WITH A STATE BOARD INVESTIGATION

CYNTHIA S. GOOSEN
8TH ANNUAL FORUM ON HEALTH CARE LIABILITY
OCTOBER 17, 2008
DALLAS, TEXAS

Cooper & Scully
A Professional Corporation
900 JACKSON STREET, SUITE 100
DALLAS, TEXAS 75202

These papers and presentations provide information on general legal issues. They are not intended to provide advice on any specific legal matter or factual situation, and should not be construed as defining Cooper and Scully, P.C.'s position in a particular situation. Each case must be evaluated on its own facts. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. Readers should not act on this information without receiving professional legal counsel.

COPING WITH A STATE BOARD INVESTIGATION

Many of us here have been involved either as an attorney, advisor, or support person with physicians and/or nurses who have become the target of a State Board investigation regarding accusations of inappropriate professional conduct. Typically, the target of any such investigation is devastated, regardless of the merit of the claim. That person will need emotional support and an in-depth understanding of the process, along with guidance in how to best respond to the complaint. Initial reactions will range from frustration, anger, disbelief, and in many cases almost a grief-like process.¹ Many targets of the investigation are so angry because of their perception that there is a total “lack of merit” in the complaint that they rant and rave against the State Board for even investigating same. However, regardless of merit, the State Board is required by law to investigate each and every complaint received, and under certain circumstances, may initiate their own investigation.² Accordingly, it is important to point out that the Board is just doing its job, as any governmental agency is required to do, and that the best defense is an unemotional, concise, organized and well supported response.

TRENDS WITHIN THE STATE BOARD ACTIONS

In 2003, the Texas legislature mandated changes to the Medical Practices Act, requiring the Texas Medical Board to complete complaint investigations within 180 days.³ Since then, there has been a dramatic increase in disciplinary actions at the Texas Medical Board. According to the TMB website, between 2000 and 2005 there was a 169% increase in disciplinary actions and a 53% increase in the number of investigations opened. Typically, the Board receives more than 6,000 complaints a year. According to a press release dated August 31, 2006, the Board disciplined a record 99 physicians for violations ranging from failure to meet the standard of care to maintaining inadequate records.⁴

In 2007, approximately 7,000 claims were received and of those, approximately 2,600 were dismissed prior to any significant investigation. 4,400 of the 7,000 claims were pursued.⁵ If the complaint is not summarily dismissed an informal and possibly a formal investigation will follow. Many of these will result in an Informal Settlement Conference (“ISC”). These invariably cause a great deal of angst and anxiety, as well as the need for a careful evaluation and a reasonable persuasive response from the targeted individual.

The Texas tort reform passed in 2003 has dramatically decreased the number of lawsuits against physicians. Conversely in the same time period, the number of Board actions has alarmingly increased. This may be a result of the fact that many Plaintiff attorneys are turning down lawsuits they would have taken and filed prior to tort reform. With no legal forum available to the potential medical malpractice plaintiff, many patients may instead turn to the TMB as the only available avenue to air their grievances.

OVERVIEW

A great source of information describing the intricacies of the complaint and investigation process is the State Board itself. The Texas Medical Board website (located at www.TMB.state.tx.us) has detailed information regarding multiple issues necessary to consider during the complaint and resulting investigatory process. The fall 2007 issue of The Medical Board Bulletin also contains a good synopsis on the basics about an investigation.⁶

When a complaint is received the first issue the Board must address is whether or not it has jurisdiction over the complaint, meaning that sometimes the complaints are not against a physician licensee, or that the complaint, even if proven accurate in all respects, would not actually violate the Medical Practices Act. If either of these are the case, the claim can be summarily dismissed.⁷

The most recurrent cited statutory allegations include phrases that are not readily acceptable to health care providers. The generic terms used are often perceived by the physician/nurse as slanderous, libelous, or otherwise extremely objectionable on at least an emotional level. This is because the terminology is drafted to cover a wide variety and breadth of activities, regardless of the actual specifics of the complaint. Each complaint must be categorized within some statutory terminology. The accusations may include one or more of the following:

- Failure to practice medicine in an acceptable, professional manner consistent with public health and welfare;
- Committed unprofessional conduct likely to defraud or deceive the public;
- Failure to keep records of purchase and disposal of controlled substances;
- Prescribing non-therapeutically;
- Failure to adequately supervise those to whom the physician delegates or delegates to someone known to be unqualified.

The remainder of the list of possible violations can be found at the above referenced website.

It is also important to note that the TMB has delineated a category of “Minimal Statutory Violations.” In the fall of 2007, the TMB made a significant change regarding when it will release information to the public about “Minimal Statutory Violations.”⁸ These adverse actions, though still part of the public record, will not be listed in the TMB press releases or the newsletter by name, only by number. Typically, these do not involve standard of care cases as they are for “rule violations” such as failing to timely release medical records, failure to complete CME in a timely required fashion, failure to timely sign a death certificate and the like. For more information about these issues, please see the *Texas Medical Board Bulletin* available at <http://www.TMB.state.tx.us/news/newsletters.php>.

Assuming the TMB has jurisdiction over the complaint, it must investigate the complaint, at least informally. The complainant and the target of the investigation are contacted within a thirty day initial period to make sure the Board has the necessary information and that the physician/professional has an opportunity to refute the charges. As noted below, there are extremely time sensitive dates involved in this and therefore any complaint deserves the professional's immediate attention.

PSYCHOLOGICAL RESPONSE

Once this type of complaint has been received, typically there is a devastating emotional response from the target of the investigation. To fully assist someone in responding to such a complaint it is imperative to be aware of this common phenomenon. It is important to reassure the professional, and be cognizant of the potential impact this has, so that the emotional response does not affect the written submission adversely. Studies show that the psychological impact of a malpractice suit on an individual professional can be daunting, and Board matters are just as difficult, if not more so. Such claims may bring on reactions one might have to a catastrophic life event such as shock, denial, shame, anxiety, anger and depression.⁹ Many physicians may experience some or all of the following:

1. Disillusionment;
2. Magnification of self-doubt;
3. Persistent negative feelings;
4. Isolation;
5. Frustration and the feeling of being singled out;
6. Massive guilt even if their performance was not to blame; and
7. An onset of typical symptoms such as GI and chest pains or exacerbation of pre-existing conditions.¹⁰

Researchers have found that at least two factors commonly contribute to a physician's feeling of vulnerability when faced with a malpractice suit: a lack of legal training and a lack of training in how to deal with resultant stress.¹¹ Physicians are often focused so exclusively over their lifetimes on their vocation that they have not taken the time to develop adequate coping skills for these types of situations.¹²

It has been my personal experience that many times physicians/nurses take a State Board investigation as an even more devastating event than a lawsuit. In a lawsuit, time is on the side of the defense, and litigants can be sure that there will ultimately be a jury of twelve and an ample opportunity for expert witness opinion and review. They would be involved in a process that more often than not concludes itself in an appropriate disposition, over which they have some modicum of control. That is simply not the case when involved with the Texas Medical Board. TMB proceedings are notoriously unpredictable, inconsistent and dependent in large part on the panel drawn at the informal settlement conference proceeding. Moreover, the types of evidence considered in such an investigation are different.

When a physician or nurse is accused of practicing in a manner "inconsistent with the public health and welfare" or "unprofessional conduct likely to deceive or defraud the public" the terminology alone is devastating professionally. The overwhelming majority of physicians and nurses strive to do the best they can for their patients in the circumstances presented and these types of accusations wound them. For the participants in today's seminar, whether you are a claims handler, risk manager, administrator in a health care facility or an attorney, you will often be the first person from whom the target of an investigation seeks advice, support, and direction. It is vitally important to express your appreciation of the psychological impact the claim has made on the individual. If their frustration, anger and/or disillusionment color the

response, it will typically be counterproductive. The desire is for a quick resolution of the claim with a concise, detailed, thorough and respectful response to the Board.

LEGAL ASSISTANCE

Professionals when faced with a complaint may feel that they can and should respond to the Board's inquiries without the benefit of legal assistance or the assistance of risk management at their appropriate facility. Some express the opinion that the complaint is, in their opinion, frivolous or without merit and therefore a brief and perhaps heated response will satisfy the investigators and this will just go away. Others believe that if the Board perceives legal involvement, it will be taken as a sign of guilt. Neither is true. The Board's own website recommends consideration of professional assistance.

Unfortunately, a suboptimal initial response to the Board will likely result in an escalation from an informal investigation to a formal investigation. The initial suboptimal written response is unfortunately something that later retained counsel will have to defend at each stage of the process. Therefore, it is highly recommended that the target of an investigation seek advice from someone knowledgeable with the process, and that legal advice be considered. Of course, if the physician feels strongly about cloaking legal involvement, an attorney can provide assistance and "ghost write" the response. Seeking professional advice and relying on same is recommended as money and time well spent.

INSURANCE

It should also be noted that there are many professionals who may have, even unknowingly, purchased insurance to assist in defraying legal costs and expenses. By way of example, the Texas Medical Liability Trust does offer coverage for these types of investigations with certain deductibles and limitations. If such insurance exists for the individual in issue, there may be certain time constraints within which the insuring company must be informed of the

existence of the claim. A carrier may require notification of the claim within a certain time period. It would be unfortunate to waste such an asset due to a lack of awareness that same may exist, and/or a failure to meet certain contractual requirements. Accordingly, this should be one of the first avenues investigated.

In addition, many times a Plaintiff's attorney who is pursuing a malpractice claim for a patient may request his client pursue a concurrent claim with the Texas Medical Board. It is no doubt their hope that the result will be adverse to the professional targeted and therefore helpful in the lawsuit. If a physician or nurse is sued for some egregious practice or some repetitive practice he/she may lose his/her license to practice medicine or have his/her license restricted as a result of a Board investigation. If that result is made public prior to the time the case is submitted to a jury, the Plaintiff's attorney will attempt to use that to their advantage in the lawsuit. As a result, if a concurrent investigation is ongoing and the targeted individual has medical malpractice insurance that does not specifically cover Board investigations, they may still help. The same is true of a hospital when their nurse's conduct is investigated and the nurse cannot afford an attorney. At times it may be in the insurer's/hospital's best interest to encourage the malpractice defense attorney to assist in responding to the Board investigation, as it may have a positive impact on the outcome of the litigation they are defending. While not necessarily "covered," an astute claims handler/risk manager may see the benefit of financially assisting to defeat the Board claim, and therefore defray at least a portion of their insured's expense.

TIMING

It must be noted that timing is everything with a State Board investigation. There are many strict deadlines imposed by the administrative process that are statutory in nature, and extensions of time are not freely granted. Per the State Board's website, under an article entitled

Disciplinary Process Overview for Licensees, Texas Medical Board (www.TMB.state.tx.us), once the physician has received a notice that a complaint has been received; the physician only has fourteen days to respond with additional information before the complaint is “filed” and an investigation opened. It has been my repeated experience that while the letter notifying the physician of the complaint may be dated, say September 1st, it may not be received by the physician until September 8th, but the stated fourteen day deadline will have been calculated when the letter is prepared on September 1st. It is not uncommon that from a practical standpoint that the practitioner has only several working days to respond to the complaint, given the sluggishness of bureaucracy in mailing the complaint out. Extensions are typically not granted even if all fault lies entirely with the Board. The TMB does not care.

It is imperative that the response be timely received and that the physician gathers as much information as possible in the limited time period allowed. If the submitted information is adequate to show there was no violation of the Medical Practices Act, the investigator has the opportunity to not officially file the complaint, and to recommend the claim be closed.¹³ The website goes on to indicate that if the response is not timely received, any response may be considered only after the investigation is filed. Accordingly, a failure to timely respond will likely result in a filing of an investigation complaint. Respond timely and then supplement if necessary.

TMB ISSUES

The TMB can initiate its own investigation into the medical competency of a physician if three or more separate lawsuits and/or settlements are reported within a five year period. Obviously, any time the Board receives a complaint or grievance they are required to investigate same. The investigative process varies depending upon the allegations. If the allegations concern standard of care issues, an investigator sends the relevant medical records to an expert

panelist. These experts are to be certified by an American Board of Specialty Certification. They are mandated to be located in a vicinity different than the professional under investigation, and practicing within that same general area of expertise.

Regardless of the outcome of the first expert's opinion, the case is also evaluated by a second independent expert. If they both agree on the conclusion, the case can go to an investigator for further disposition. If there is an agreement that there was no violation, there will be a recommendation to the Board Committee for dismissal. If there is no agreement by the experts, a third expert's opinion is requested, and at that point there must be a decision to either refer the claim for a Quality Assurance Evaluation/Litigation or a recommendation for dismissal. If it is dismissed, both parties are notified.¹⁴

THE PROCESS

As noted previously, the first thing done at the Board level upon receipt of a complaint is a determination of whether or not jurisdiction exists. If it does not, nothing further need occur. If in fact jurisdiction exists, the Board is statutorily required to investigate same. The targeted individual will be asked to supply any response deemed appropriate. Upon receipt of the response, the complaint will either be dismissed as meritless or proceed to a formal investigation stage. Again, there will be time sensitive deadlines at that stage which must be respected to avoid adversity.

Unfortunately, many times the practitioner is unaware of the exact nature of the complaint during the first several months, and this is frustrating. All that is certain is that there is some complaint by a particular patient. It can be difficult to "respond" to the correct issue in a vacuum. One could potentially raise new, previously unknown, concerns in a response. The target of the investigation will have only their own records, and the Board will not provide a

HIPAA compliant release to allow the practitioner to obtain hospital records or the subsequent treater records.

The Board, of course, will have access to all medical records from all the prior and subsequent treaters, and their experts' opinions from their panelists. The Board is exempt from HIPAA. The TMB may take months perusing this information, but the practitioner will only have weeks to assemble a defense. As a result, on any claim of potential significance, once it goes to the formal stage an aggressive pursuit of expert opinions, research of the medical literature for supportive information on standard of care issues, and attempts to muster a full response is indicated.

The Board will ultimately give up the records it has acquired and their experts' reports, but are not required by law to do it when the practitioner first requests same. There are time sensitive, statutorily created deadlines relied on by the Board, all of which limits the opportunity to prepare the best defense. The Board generally will not provide the physician with the medical records it obtained from other providers or a copy of the TMB's expert analysis of the care rendered until thirty days before the Informal Settlement Conference. As noted above, a package of information dated thirty days prior to the hearing may not be received timely, and with weekends, etc. . . . one may have only 15-20 working days to respond. This really limits the professional's ability to be effective and persuasive. This is another solid reason to line up experts in advance and have drafts of their reports ready to forward with indexed medical records and literature.

ISC

If an agreed order or administrative fine is not offered and accepted prior to a scheduled "Informal Settlement Conference", a packet of all the information and evidence that will be presented by staff and considered by the panel at the ISC is thirty days before the ISC hearing.

Again, this almost never happens timely or if it is “sent out” timely it is “received” late. Accordingly, waiting for the ISC to send its materials before preparing to respond to same is not recommended. There is simply not enough time to get the records, expert testimony, etc. within that time frame allowed if one waits for the TMB to start the clock. Once in receipt of the expert panel report, the defense’s timely retained an expert can provide his/her rebuttal to those opinions quickly to hopefully give the panel experts a chance to review same.

It is important to submit a rebuttal very quickly because the TMB experts then may have at least a chance to review the defense expert opinions prior to the ISC. This has (rarely) resulted in a change in the experts’ recommendations that could potentially result in a panel recommendation of dismissal prior to the ISC. If it is submitted “by deadline” which is five business days prior to the ISC meeting, the slim opportunity to have the experts reverse their medical reasoning will be lost. Accordingly, the sooner the rebuttal can be submitted at least theoretically, the better for the process.

FORMAL INVESTIGATION

If the matter proceeds to litigation the case is then assigned to a staff attorney. Next, a Board panel made up of a public (lay) member and a physician member will hear the case at an Informal Settlement Conference, or the ISC. This title is misleading. The ISC is not a “conference” at all and it is not “informal.” It is held in Austin and once again, the Board will assign a date and time at its convenience that is not highly negotiable. The TMB will afford around 60 days notice (if that) of the hearing date. There are strict deadlines set out to request a rescheduling so these must be noted immediately. A delay in the request to change the date may be denied if not timely received, even if the request would have been granted if made within the timeline.¹⁵

The physician who is being investigated is to appear at the informal settlement conference, typically with an attorney. There will be a staff attorney representing the Texas Medical Board so the presence of a defense attorney is not taken askance. At the informal settlement conference (ISC) the Board panel hears from both sides, deliberates and then determines whether there has been a violation of the Medical Practices Act. If the TMB concludes that has occurred, it will recommend a disciplinary order to the physician which will be styled as an “Agreed Order.” This is basically drafted at least in concept before the hearing and unless the panel is persuaded otherwise, may be proposed to the practitioner at the end of the conference. If the panel, based on the presentation, determines there has been no violation, the panel will recommend to the Board the case be dismissed.

If offered a proposed disciplinary order, the physician has the opportunity to negotiate the terms of same. Instead of blanketly accepting a proposed disciplinary action, one should take the time to discuss it with counsel outside the presence of the panel. Typically, the Board will consider rewording some of the issues presented by the order and astute counsel may be able to negotiate more favorable terms, particularly if the physician made a good presentation.

Absent unusual circumstances, each hearing is scheduled for an hour and usually there are five or six hearings scheduled a day, making it difficult to provide a concise but powerful “sound bite” presentation. The time allotted will be tight. While the physician/nurse’s attorney is welcome (and recommended) to attend, typically the panel wants to hear primarily from the practitioner themselves to reach an accurate judgment of the targeted individual on many different levels. The attorney’s job is to help prepare the written documents, make sure that all the bases are covered as far as experts, organization, information, literature, etc. and to prepare the client to make a concise, relevant and persuasive presentation.¹⁶

To quote the State Board's website on *Disciplinary Process Overview for Licensees*

“TMB Rule 187.7 requires the dignified, courteous, and respectful behavior of all participants in ISCs. Panel members are not accustomed to court room antics. Although you are welcome to have your attorney accompany you in the ISC, the panel wants to hear from the physician (licensee) not the attorney. The important work of the defense attorney is in the preparation of the client, not in addressing the panel.”¹⁷

I have personally witnessed the effect a powerful presentation by the practitioner can exert on the process. My representation of a “repeat offender” (a M.D. with 7+ lawsuits in three years) exposed me to that experience. The Board appeared determined to take adverse action on the license of this very highly credentialed and skilled professional's license at the outset of the hearing. His presentation was so “spot on” that we were allowed almost two hours for his presentation and it resulted in dismissal of all claims after a probationary period and no adverse action on his license. An impressive presentation can be key to the outcome.

REPORTING ON ORDERS

It is important to note that the TMB only reports certain things to the National Practitioner's Data Bank regarding “agreed” orders. The Board must report to the National Practitioner's Data Bank any Board order that places restrictions on a license. This includes suspension, revocation, or a restriction that prevents the licensee from performing a type of procedure. On the other hand, if the “Agreed Order” only places **requirements** on the licensee it is not reportable.¹⁸ By way of example, this includes participation in the TMB chart monitoring program, extra CME, or an administrative fine. This is one of the reasons it may be helpful to have an attorney assist when negotiating the terms of a Board order. It is important to understand the difference because it may affect the decision of whether or not to accept an Agreed Order.¹⁹

FAILURE TO “AGREE”

If the practitioner decides the last proposed “Agreed Order” is not an acceptable proposed disciplinary order, the case is referred to the State Office of Administrative Hearings (SOAH) for a formal hearing. This will include the elements of a civil court trial, with sworn witnesses, rules of evidence, depositions and a formal record by a court reporter. It is also possible that at this stage the case may be mediated and then resolved without the need for the court formality and the expense of an attorney’s involvement. If tried to verdict, the administrative law judge who hears the case deliberates and eventually presents a proposal for decision to the Board with a recommendation for disposition of the case. However, the final decision ultimately rests with the Board. It can agree with the proposal, modify the administrative judge’s recommendation, or take an entirely different action.²⁰

¹ Stacey J. Simmons, JD and Dan Ballard, JD, *Surviving a TMB Investigation*, THE REPORTER, January – February 2008, at 1 – 3.

² Anna Tauzin, *TMB Action? Alert TMLT’s Medefense*, THE REPORTER, November – December 2006, at 1-2.

³ *Id.*

⁴ *Id.*

⁵ Texas Medical Board Bulletin, The Newsletter of the Texas Medical Board, Fall 2007, Volume 5, No. 1, at 3.

⁶ *Id.*

⁷ *Id.*

⁸ Stacey J. Simmons, JD and Dan Ballard, JD, *Surviving a TMB Investigation*, THE REPORTER, January – February 2008, at 3.

⁹ Katherine Cleghorn, “*You’ve Been Served*” *Coping with the Stress of Medical Malpractice Litigation*, MEDICAL LIABILITY WATCH, Spring 2006, at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Texas Medical Board website *Disciplinary Process Overview for Licensees* (Visited October 4, 2008) <<http://www.TMB.state.tx.us>>. (www.TMB.state.tx.us).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*