Representing Docs Before the Medical Board

by SOFIA ADROGUE

Over the past decade, doctors’ dissatisfied patients and unhappy colleagues increasingly have turned to the Texas Medical Board to air their grievances. With investigations and proceedings against physicians nearly doubling over the past 10 years — perhaps due in part to Texas medical malpractice tort reform — and the board’s statutory authority and budget also on the rise, the board wields broad statutory powers over the lives of affected physicians. Lawyers whose clients are the subject of board scrutiny must know how to represent doctors effectively before this administrative tribunal.

Established in 1907, the board is empowered to regulate the practice of medicine in Texas. Appointed by the governor, the 19-member board handles the licensure and discipline of physicians and other allied health care providers.

The board’s mandates are clear and broad. It receives complaints and investigate possible violations of the Texas Occupations Code, which was formerly the Medical Practice Act, and/or the board’s rules and regulations. It investigates violators through appropriate legal action, including the authority to cancel, revoke, restrict, suspend or otherwise limit the license of any physician.

The process commences in a seemingly benign manner, with a complaint. But its conclusion may have significant and career-altering consequences to the affected practitioner. Although ostensibly a confidential procedure, the conclusion of the complaint process is very public, as a violation of the act is conspicuously placed in the Texas Medical Board Bulletin as well as in the individual physician’s profile, which is published on the board’s Web site.

Board Rule §100.8 states that the following constitute violations of the Medical Practice Act — with the caveat that this is not an “exhaustive or exclusive listing” and that the behavior must be “substantiated by credible evidence”:

- Practice inconsistent with public health and welfare. This includes failure to treat a patient according to the generally accepted standard of care; failure to safeguard against potential complications; and failure to timely respond in person when on-call or when requested by emergency room or hospital staff.
- Unprofessional and dishonorable conduct. This includes failing to comply with a board subpoena; refusing to allow on-site inspection at a facility subject to the board’s ownership interest; failing to timely respond to communications from a patient; and failing to maintain the confidentiality of a patient.
- Repeated or recurring meritorious health-care liability claims. The board is charged with receiving reports against physicians based on allegations of professional liability. Under Rule §178.8(b), the board reviews the medical competency of a licensee if three or more lawsuits and/or settlements are
Significantly, unlike in civil actions, there is no statute of limitations for board complaints. In essence, until filed, no time limit exists within which the board must investigate a complaint under Rule 179.6(d), which lays out the guidelines for investigations.

Additionally, under Rule 179.7, investigations conducted and past complaints made to the board concerning the physician may be examined during the course of a new investigation to determine if there is a pattern or practice of behavior.

Lawyers must be aware that informal show cause compliance (ISC) proceedings are informal in name only. Described by the board as an “informal, confidential settlement meeting” and “not a court,” the ISC is anything but an informal process. Under the procedural rules set forth in Rule 179.6(d) and the board’s general guidelines, a physician facing an ISC should expect an arduous process with severe potential ramifications, including a report to the National Practitioner Data Bank, which tracks adverse actions against health-care providers.

As the ISC general guidelines articulate, “[g]iven the possible impact on [the] medical practice, [physician] should seriously consider having an attorney to represent [his/her] interests.”

The ISCs format is similar to a court proceeding: an opening statement by the licensee, if he or she is present, and a board staff attorney; presentation of oral and/or written evidence; questioning of the witnesses and licensee; and a closing statement by the licensee and board staff attorney. However, unlike a court proceeding where a party has the opportunity to cross-examine the other, in an ISC, the complainant is often not present.

A board attorney, not involved with the preparation of the case, is designated as the hearings counsel and is present during the ISC and the ISC panels deliberations to advise on legal issues that arise.

The hearings counsel can ask questions of the ISC participants to clarify any statements. He or she provides a historical perspective on comparable cases that have appeared before the board, keeps the proceedings focused and ensures that the ISC participants have an opportunity to present relevant information.

The ISC panel is composed of two or more board representatives and announces the recommendation after deliberation. Possible recommendations include: 1. dismissal of the complaint or allegations without prejudice to additional investigation and/or reconsideration at any time; 2. determination of a violation and recommendation of settlement via agreed order; 3. determination of a violation and direction that a complaint be filed with the State Office of Administrative Hearings (SOAH) if the panel determines no agreed settlement is likely to be successful; 4. determination of the ISC, pending further investigation; or 5. convening of a disciplinary panel to consider the temporary suspension or restriction of license, if the panel determines the licensee poses a continuing threat to the public welfare.

An adverse board ruling constitutes a scarlet letter on the physician. Reversing a decision by the board once a hearing has been held before one of SOAH’s administrative law judges is difficult at best.

As noted in the Texas Supreme Court’s 1986 decision in Railroad Commission of Texas v. Texas & Pac. Operating Co., courts utilize a substantial evidence review standard that gives significant deference to the board, not allowing a court to substitute its judgment for that of the board. With a physician bearing the burden of overcoming this presumption, courts affirm administrative findings if there is more than a mere scintilla of evidence to support them. Courts need not determine that the board reached the correct conclusion; a reasonable basis suffices.

Thus, even at the ISC’s putatively informal level, the ramifications to a physician’s practice are formidable.

As the board has indeed become an arsenal and venue of choice, affected practitioners must be armed and ready with counsel to navigate this precarious, adversarial process.