

Responding to State Licensure Board Investigations

Here are tips on how to react to this predicament.

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The most recent survey from the Federation of State Medical Boards indicates that state medical boards throughout the United States collectively discipline over 9000 physicians per year.¹ Less serious offenses result in a fine, reprimand, or increased continuing education requirements. Approximately 50% of these investigations result in more serious board actions, such as probation or license restriction, suspension, surrender, conditions, or revocation.¹

State professional licensing boards receive and review thousands of complaints each year regarding licensed healthcare professionals from patients, patients' friends and family members, healthcare organizations, other individual healthcare providers, out-of-state licensing boards, and related government entities. State licensing boards have the authority to investigate these complaints and take adverse action on a professional's license for violating practice statutes or board regulations, which can include permanent restriction or revocation of a license.

The results of a disciplinary proceeding from a licensing board can be dire and even career ruining. However, courts have considered a professional license a property right that cannot be taken away without the due process of law (*Goldberg v. Kelly*, 397 U.S. 254, n.8 (1970)). Consequently, professionals usually are entitled to

procedural due process protections—adequate notice and a fair hearing—before a state licensing board can deprive them of their license (See *Aylward v. State Bd. of Chiropractic Examiners*, 31 Cal.2d 833, 838 (1948) (“[T]he statute evidences the legislative intent that there should be notice and a hearing in any case where a license is to be revoked.”). Although healthcare providers are afforded these due process protections, disciplinary investigations and the proceedings that result are hard to navigate. Each licensing board

conduct, conviction for a felony, alcohol and drug abuse, improper prescribing practices, and failure to conform to the prevailing standard of care (*Ohio Revised Code* § 4731.22; *Texas Occupations Code* § 301.452).

Although the number of disciplined licensees compared to the number of licensees total is statistically low—less than 1% of licensed physicians were disciplined in 2012¹—healthcare professionals should be prepared to deal with disciplinary allegations, investigations, and hearings.

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adopts its own process and rules for conducting investigations with varying levels of complexity. With the proper preparation, however, healthcare providers can protect their licensure and due process rights during a state licensure board investigation.

The state practice act governing a professional licensee will outline the types of actions that constitute misconduct and subject a licensee to discipline. When a licensing board receives a complaint or other information indicating that there has been a disciplinary violation, the board will investigate the information, conduct disciplinary proceedings, and determine and administer a disciplinary action if and as appropriate under the governing law. Examples of disciplineable offenses include sexual miscon-

A variety of legal issues can arise in an investigation, including due process, patient privacy, and medical record issues. This article seeks to address various issues that may arise and provide guidance to licensees to ensure that they comply with the disciplinary process and protect their license to the best of their ability.

Elements of a Board Investigation

When the board receives a complaint, it will determine whether the alleged conduct could subject the licensee to discipline. If so, the board notifies the licensee and conducts an investigation. The board will likely request additional information from the licensee and other sources, such as the hospital or medical practice where the alleged violation

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occurred. This information will then be used to resolve the investigation—either formally or informally. Some investigations will be handled through informal resolution, which may involve some kind of settlement or corrective action agreement with the licensing board. Some investigations will lead to formal resolution, including a formal disciplinary hearing. After these proceedings are completed, the board will hand down an order or other resolution of the charges. The licensee may then have appeal rights within the licensing board or directly to the courts.

Compliance Tips

Start Complying Before the Investigation

There are some steps that providers can take in everyday practice to prepare themselves in the event of a disciplinary investigation. Providers should maintain thorough and adequate medical records. Strong documentation may help a provider show why or how certain medical decisions or actions were made and why or how those actions comply with the applicable standard of care. Further, providers can obtain malpractice coverage that covers licensing board investigations. If the provider's employer or healthcare system provides malpractice coverage, then providers should ascertain whether this coverage includes board investigations and how they can add this coverage if not.

Abide by Self-Reporting Requirements

Most boards require self-reporting and peer reporting of conduct that may be subject to discipline (*Ohio Revised Code § 4731.224*; *Michigan Public Health Code § 333.16222*). If a professional licensee determines that he or she has taken an action that may violate the applicable state practice act or board regulations, then the licensee should consult an attorney to determine whether to self-report the action. If a provider fails to self-report conduct that is later reported by an employer, patient, or other complaint source, then the provider may be subject to stricter discipline for failing to comply with the state's

self-reporting obligations. Additionally, self-reporting evidences a provider's willingness to take corrective action regarding the disciplinable conduct and to cooperate with the board.

If an employer or other entity affiliated with a provider knows of the conduct and also has a reporting obligation to the board, then the provider and entity should cooperate in complying with their respective reporting obligations. Providers can ask the entities to refrain from reporting until the provider has had a chance to self-report, so that the provider himself or herself can be the first to communicate to the board when potential misconduct arises.

The content and form of notice provided to a licensee who is subject to discipline will vary by state. Some state courts have held that notice to a provider must be given in a manner that fairly and reasonably informs the provider of the alleged acts of misconduct so that the provider can properly prepare to defend himself against the charges (*Tarr v. Hallihan, 30 N.E.2d 421, 423 (Ill. 1940)*). State statutes and administrative rules may also dictate the amount and type of information that should be included in the notice of a disciplinary investigation, and any notification from the board must meet these statutory requirements (*Evers v. Med. Licen-*

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Consult an Attorney to Protect Your Due Process Rights

When a healthcare provider receives a notification of an investigation from his or her licensure board, the healthcare provider should take the notification seriously and comply with the board's directives. Failing to comply or ignoring the board can lead to harsher discipline. At the same time, however, the provider should take all steps possible to ensure that his or her due process protection with respect to a professional license is fully provided.

If a board begins an investigation, whether based on a self-report or report from another source, the provider should promptly consult an attorney to ensure that his or her legal rights are protected and to determine the best way to respond to the board. The board's notification may instruct the provider to submit information to the board or attend a hearing, but it is important to review the board's requests to ensure that they are following the proper administrative procedures under state law. Additionally, the board's requests should seek only information that is not otherwise protected from disclosure by law. If the notice and subsequent investigation and proceedings do not meet legal requirements, then they may be invalid.

sure Com'n, 523 So.2d 414, 416 (Ala. Civ.App.1987); *Cooper v. Bd. of Med. Examiners, 123 Cal.Rptr. 563, 570 (Cal.App.1975)*). Regardless of the source of the requirements for proper notice, providers should ensure that the notice that they receive respects the provider's notice rights.

While providers do not necessarily have the right to a formal disciplinary hearing in all disciplinary investigations, state laws will dictate what hearing and other procedural requirements a licensing board must follow before taking adverse action on a provider's license. If the provider is subject to discipline for certain conduct or is subject to certain discipline that requires a formal administrative hearing, then the disciplinary action may be invalid if this disciplinary hearing is not provided correctly or at all (*Spuza v. Dept. of Health, 838 So.2d 676, 678 (Fla.App.2003)*).

A provider may or may not have a right to counsel at a hearing (*Bazin v. Novello, 301 A.D.2d 975, 976, (2003)*). If the provider does have a right to counsel, however, then he or she should request the advice and presence of counsel before communicating with or otherwise providing information to the board and when attending any hearing, interview, or other investigation-related proceeding.

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Understand How Investigations Implicate Patient Privacy Laws

Medical boards may have the authority to issue administrative subpoenas or other legal processes to obtain medical records and patient information relevant to a disciplinary investigation. HIPAA prohibits healthcare providers from disclosing patient information without the patient's authorization, subject to certain exceptions (45 CFR § 164.502(a)). One of these exceptions allows for disclosure of patient information without authorization to a "health oversight agency" for "health oversight activities" (45 CFR § 164.512(d)). A health oversight agency includes a state agency, such as a medical professional licensing board, "that is authorized by law to oversee the healthcare system" (45 CFR § 164.501). Health oversight activities specifically include "licensure or disciplinary actions" (45 CFR § 164.512(d)(1)).

Courts have held that this excep-

tion allows a provider to provide medical records to a health professional licensing board as part of a disciplinary investigation without obtaining a patient's authorization (*N. Carolina State Bd. of Dental Examiners v. Woods*, 688 S.E.2d 84, 91 (N.C.App.2010)). Nevertheless, a disclosure of patient information must still be limited to the minimum necessary to comply with the request (45 CFR § 164.502(b)).

To prevent liability for a HIPAA violation, a request from a licensing board should be thoroughly reviewed to ensure that the HIPAA exception for disclosures to health oversight agencies or some other exception applies. Further, the provider should disclose only the information necessary to comply with the board's request, ensuring that unrelated or unrequested medical records are not improperly disclosed.

In addition to HIPAA, courts have held that physician (and other provider)—patient privilege laws may not prevent the disclosure of patient infor-

mation during a board investigation. (See *Solomon v. State Bd. of Physician Quality Assur.*, 845 A.2d 47, 57 (Md. App.2003.) (quoting *State Med. Bd. of Ohio v. Miller*, 541 N.E.2d 602, 606 (1989)) ("We feel that the interest of the public at large, served here through the board's investigation of possible wrongdoing by a licensed physician, outweighs the interests to be served by invocation of the physician-patient privilege.")) Again, however, a provider should review a request for information from a licensing board in light of state privilege and medical records laws to ensure that the requested information is not disclosed in a way that could violate a physician's obligation to maintain the confidences of patients.

Understand the Options for an Impaired Provider

Research indicates that 10% to 12% of physicians will suffer with drug or alcohol abuse at some time in their

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career.² Some licensing boards, in addition to general misconduct reporting, impose reporting requirements on healthcare providers and their peers who suspect that a licensee has a substance abuse problem. At the same time, however, boards also facilitate treatment programs for impaired providers so that they can get help instead of facing discipline. Some boards even offer immunity from discipline for providers who voluntarily request treatment for substance abuse.³

Providers and their colleagues who suspect substance abuse should follow the applicable licensing board reporting options to help these providers seek treatment for addiction. Substance addiction is a sensitive subject, but self-reporting and taking advantage of a licensing board's treatment resources may help a provider avoid discipline and, most importantly, prevent harm to patients.

Takeaways

Responding to a licensing board investigation can be time-consuming and intimidating, and can ultimately subject a provider to serious sanctions. However, providers should abide by self-reporting requirements, cooperate with medical board investigations, and never ignore a licensing board request. Failing to comply and cooperate with a licensing board investigation can subject a provider to harsher discipline. At the same time, state laws designed to afford providers due process rights before revoking or restricting a professional license govern board investigations and the subsequent disciplinary proceedings. Providers should ensure that their due process rights are respected, take advantage of any right to counsel, and ensure that the provision of patient information to the board complies with patient privacy laws. **PM**

References

¹ Federation of State Medical Boards. U.S. Medical Regulatory Trends and Actions. 2014; www.fsmb.org/Media/De-

[fault/PDF/FSMB/Publications/us_medical_regulatory_trends_actions.pdf](#).

² Berge KH, Seppala MD, Schipper AM. Chemical dependency and the physician. *Mayo Clin. Proc.* 2009;84(7):625.

³ Mossman D, Farrell H. Physician impairment: when should you report? *Current Psychiatry.* 2011;10(9):68-69.x



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