



## Preventing the Cascade

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By Timothy J. Aspinwall, Esq.

### **How to deal with the collateral consequences of medical board discipline.**

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A PHYSICIAN FACING PROFESSIONAL discipline is exposed to a number of risks - and one misstep can lead to other consequences, much like a series of falling dominos. This article outlines the major collateral issues that should be taken into account when physicians face discipline by the Medical Board of California.

Disciplinary actions can be initiated in a variety of ways. Sometimes the Medical Board files an accusation; sometimes the medical staff at a hospital initiates an investigation; and sometimes discipline is based on a criminal investigation or some other issue. Whatever the allegations and whatever the context, it is imperative to develop a strategy early in the case to limit potential damage.

Thirteen potential problem areas should be assessed in any case involving professional discipline.

### **1. Client's Mental Health**

The threat of discipline is extremely stressful and can exacerbate depression or other mental health problems. Also, the behavior at issue in a disciplinary case may be caused by some treatable mental health problem.

It is advisable to be very attentive to any indication of mental illness. If the client is not dealing well with the stress, or if it appears a mental health problem may be the underlying cause of unprofessional conduct, the client should be referred to a psychiatrist.

It is important that any treating therapist be independent from any forensic psychiatrist or psychologist who might be consulted as an expert in the case. There are three benefits to this. First, the client knows the patient-therapist privilege will be maintained. This obviously facilitates more successful treatment. Second, if the client is emotionally stable, he or she is in a much better position to assist legal counsel. Third, if the client's conduct is related to a treatable mental health problem, any discipline can be mitigated with effective treatment.

### **2. Foreign States**

In any disciplinary case, it is important to determine whether the client is licensed in any other states, and, if so, whether the foreign state requires the licensee to provide notice of discipline in other states, and whether the foreign state is likely to impose discipline based upon the current action.

Many state licensing boards do not require the licensee give notice of discipline in a foreign state, but do require disclosure on the licensee's application for renewal. This is the case with the Medical Board of California. The boards in some other states require

that a licensee provide notice within 30 days of the imposition of discipline in a foreign state.

Most state licensing boards are authorized to impose discipline based upon discipline in another state, without having to prove any of the underlying facts. This means discipline in one state will almost certainly result in discipline in all other states where the client is licensed.

With some exceptions, the general tendency is for a medical board in a foreign state to impose a level of discipline similar to the original discipline. One problem, however, is that some licensing boards, including the Medical Board of California, typically toll probation during any time that the licensee resides outside of the state. This means any licensee living in another state will remain on probation indefinitely, until returning to California to serve probation.

To make matters worse, the Medical Board of California now includes in its disciplinary orders a provision calling for cancellation of the license of a physician who lives outside of California for a continuous period of two years during the term of probation. A cancelled license is likely to be the basis for termination of provider status in the Medicare and Medi-Cal programs. (*42 U.S.C. § 1320a-7(b)(4)(A)*)

Moreover, termination from Medicare or Medi-Cal can result in termination from private health care plans. Thus, the California Medical Board effectively forces physicians to choose between leaving their home state to serve probation in California, or stay in their home state and risk losing their provider status with public and private payors.

### **3. Criminal Prosecution**

It is always advisable to involve a criminal defense attorney if there is a criminal investigation or the possibility of an investigation into a serious offense. Physicians are required to self-report to the Medical Board within 30 days of being charged with a felony, or of any conviction, including a guilty verdict or plea of guilty or no contest, of any felony or misdemeanor. Failure to report as required is a public offense punishable by a fine of up to \$5,000. (*Bus. & Prof. Code § 802.1*)

The most straightforward cases involve a conviction for a misdemeanor such as driving under the influence of alcohol. In a DUI or other substance abuse-related offense, it is important to get the client into an appropriate recovery program as soon as possible. If there appears to be a serious problem, such as two or more DUIs in a relatively short time, the recovery program should be tailored to match the Medical Board's Diversion Program. The Diversion Program typically includes random chemical testing, individual counseling, and group meetings such as AA.

Participation in a recovery program provides mitigating evidence that can be used in settlement or at hearing. An added benefit is that effective treatment will significantly reduce the chance that inpatient treatment will be required.

In cases of drug abuse, physicians should be very cautious about pleading no contest with a deferred entry of judgment. While a deferred entry of judgment may be the best resolution in the criminal case, the no contest plea is a conviction for administrative purposes and exposes the client to discipline by the licensing board and possible exclusion as a Medicare and Medicaid provider. (*42 U.S.C. § 1320a-7(a)(4); 42 U.S.C. § 1320a-7(b)(3)*)

### **4. Medicare and Medicaid Exclusions**

In all discipline cases - and especially in cases involving potential criminal liability, poor quality of care, or loss of licensure - the client is vulnerable to mandatory or permissive exclusion from participation as a provider for federal health care programs.

There are five grounds for mandatory exclusion: (a) conviction of program-related crimes;

(b) conviction related to patient abuse; (c) felony conviction related to health care fraud; (d) felony conviction related to controlled substance; and (e) failure to enter an agreement to repay a Health Education Assistance Loan. (42 U.S.C. §§ 1320a-7(a), 1395ccc)

There are 16 grounds for permissive exclusion from participation as a provider in federal health care programs: (a) conviction related to fraud; (b) conviction relating to obstruction of an investigation; (c) misdemeanor relating to controlled substance; (d) license revocation or suspension; (e) exclusion or suspension under federal or state health care program; (f) claims for excessive charges or unnecessary services; (g) fraud, kickbacks; (h) entities controlled by sanctioned individual; (i) failure to disclose required information; (j) failure to supply requested information on subcontractors and suppliers; (k) failure to supply payment information; failure to grant immediate access; (l) failure to take corrective action; (m) default on health education loan or scholarship obligations; (n) individuals controlling a sanctioned entity; (o) failure to meet statutory obligations of practitioners and providers to provide medically necessary services meeting professionally recognized standards of health care. (42 U.S.C. §§ 1320a-7(b), 1320c-5)

## **5. Medicare and Medicaid Investigations**

Most government investigations are initiated because of irregular billing patterns or evidence of poor quality of care. The investigation may be administrative or criminal.

All too frequently, criminal investigations come to the provider's attention with the execution of a search warrant. If possible, it is best to have a criminal defense attorney go to the scene during execution of the warrant. In any event, the client or legal representative should get a copy of the warrant and the supporting affidavit if it is not under seal. Beyond that, the client should be firmly instructed not to talk with investigators.

Administrative investigations can be as stressful for the client as criminal investigations. They can lead to a criminal investigation, and administrative sanctions can create financial hardships, including exclusion and civil monetary penalties.

## **6. DEA Certificate**

Any physician who prescribes medications to patients must have a certificate from the Drug Enforcement Administration (DEA). The DEA will initiate action to revoke the certificate of any physician convicted of a felony relating to enumerated controlled substances.

## **7. Private Insurance**

Private insurers often seek to remove providers from their respective panels because of billing irregularities or allegations of substandard care. These cases are generally initiated because of a criminal conviction or discipline by the Medical Board. Occasionally, though, the insurer initiates its own action.

These cases should be taken very seriously because of financial losses that accompany removal from the provider panel, and because insurance companies often share their allegations with the Medical Board and administrators of Medicare and Medi-Cal. There should be an early assessment of whether it will be possible to either explain the issues or put together a corrective action plan that satisfies the insurer. Depending on the insurer's bylaws, this can frequently be done at an informal meeting prior to a formal appeal hearing.

## **8. Hospital Staff Privileges**

In investigations or disciplinary actions initiated by a hospital medical staff, the deck often seems stacked against the physician. The medical staff executive committee can initiate an investigation, impose summary suspensions, designate a hearing officer and select physicians to serve on the judicial review committee.

The physician does, however, have substantial protections under the Health Care Quality

Improvement Act and state peer review statutes. (7 42 U.S.C. §11112; Cal. Bus. & Prof. Code §§809-809.9) If the medical staff or hospital abuses their authority, they can suffer substantial financial liability. (*Poliner v. Texas Health Sys, No. 3-00-CV-1007-P, 2006 U.S. Dist. LEXIS 13125 (N.D. Tex. Mar. 27,2006)*)

These cases should be handled by attorneys experienced in this area who can protect the physician's legal rights and respond to any abuses by the hospital or medical staff.

In many of these cases, after careful review of the legal merits and the political situation at the hospital, the physician may be best advised to settle the case without a hearing. This avoids the potential of a highly damaging set of findings. Additionally, the political environment may be so toxic that the physician is at risk of additional legal action if he or she remains on staff. If a formal investigation has not yet been initiated, it should be possible to settle without a report to the National Practitioner Data Bank (NPDB). If an investigation has been initiated or discipline imposed, it will be difficult to avoid a report to the NPDB (42 U.S.C. §11133; Cal. Bus. & Prof. Code §805), though any settlement should include a stipulation regarding the language to be submitted to the NPDB.

## **9. Specialty Boards**

The various specialty boards of the American Board of Medical Specialties each have their own standards for membership. Board-certified physicians convicted of a crime or disciplined by the Medical Board may also have certification revoked by their specialty board. The specialty board will often allow a physician to appear before the board to present reasons why revocation is inappropriate.

## **10. Employment**

Physician employees are often overwhelmed by the power and financial resources of their employer in an action to either impose discipline or terminate employment. Employees, however, have substantial protections that should be asserted in appropriate cases. In addition to protections against discrimination and retaliation, employment contracts in California and many other states include a covenant of good faith and fair dealing requiring that neither party do anything to injure the right of the other to receive the benefits of the agreement. (*Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 683*)

When there is strong evidence of employee misconduct, the best strategy is often to negotiate a departure on the best terms possible. For instance, in cases involving credible allegations of substance abuse, sexual exploitation of patients, or any other unprofessional conduct, it is best to negotiate a confidentiality agreement as part of an exit strategy.

A confidentiality agreement will not protect against a lawful subpoena. Moreover, recent legislation makes it impermissible to include in any settlement of a civil dispute a clause that prohibits the adverse party from contacting or cooperating with the Medical Board. (*Bus. & Prof. Code § 2220.7*)

A well-drafted confidentiality agreement will, however, prevent the employer from disclosing restricted information to prospective employers.

## **11. Immigration Status**

If a non-citizen is facing possible criminal prosecution or loss of employment, it is imperative to consult with an immigration attorney. The consequences for non-citizens convicted of a crime are simply too severe, and the immigration statutes too complex, for these cases to be handled without an experienced immigration attorney. Similarly, if a non-citizen's status in the U.S. is based upon employment, it is necessary to consult with an immigration attorney.

## **12. Tort Liability**

In any disciplinary case involving allegations of sexual misconduct or substandard care, there is the possibility of a separate civil suit alleging tort liability. The key in these cases is to carefully coordinate the defenses in the separate cases. Very frequently different law

firms will handle the various cases, making it imperative attorneys communicate clearly about case strategies.

Plaintiff's counsel is likely to use the administrative proceedings as a source of evidence for a civil case. For this reason, the client should be very cautious about making admissions during an administrative investigation or hearing that may affect an existing or potential lawsuit.

In cases involving alcohol or drug abuse, the attorney in the administrative case should seek a protective order to prevent disclosure of any treatment records. The client has a right to privacy regarding any treatment records. Under no circumstances should plaintiff's counsel be allowed uncontested access to them.

### **13. Contractual Liability**

Disciplinary actions can lead to substantial contractual liabilities. For instance, consulting agreements between physicians and medical device manufacturers generally allow the corporation to terminate the agreement in the event of professional discipline. Given the sums involved in consulting agreements, this can be a substantial financial setback.

Contractual liabilities can also accrue in recruitment agreements, which typically require that all or a portion of the recruitment bonus be repaid if the relationship is terminated early. For example, hospital physician recruitment agreements almost always require the physician remain on staff for a certain number of years to justify the bonus. If a physician loses his or her license or is terminated from the medical staff, the hospital will seek a full or partial refund.

It is imperative to develop a clear strategy early in a case to prevent a career-threatening cascade of events. With careful management of the collateral issues, the consequences of disciplinary actions can be contained, allowing the client to maintain a career in medicine.

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