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REVIEW OF LEGAL ISSUES CONCERNING FLORIDA BOARD OF MEDICINE DISCIPLINARY PRACTICES

REPORT ABSTRACT

- The time required to discipline physicians is primarily a function of whether they choose to go to informal hearing, to administrative hearing, or negotiate a consent agreement. Administrative hearing cases generally take the longest to resolve.
- The Board does not demonstrate a pattern of modifying Recommended Orders to impose stricter sanctions against foreign-trained physicians.
- The Board's responsibility is to regulate and discipline physicians, while the court's responsibility is to compensate injured parties; therefore, actions taken by the Board and the courts should be expected to complement but not necessarily parallel each other.
- The Board of Medicine's public disclosure policy, established by statute, provides consumers with reliable information and protects physicians from unsubstantiated complaints that could diminish their professional reputations.

PURPOSE OF REVIEW

This review is a follow-up to Report No. 95-14, Licensing and Disciplinary Practices of the Board of Medicine, and discusses issues that impact the disciplinary actions of the Board. [1]

ISSUES

Why does it take more than two years to discipline most physicians? The time required to discipline physicians varies widely among cases, and appears to be primarily a function of whether the physicians choose to resolve charges through informal hearing, consent agreement, or administrative hearing. [2]

In 1994, the average time from initial complaint to final order, including the investigation phase, was 19 months for informal hearings, 29 months for consent agreements, and 40 months for complaints resolved through administrative hearing. There was no correlation between the severity of the sanctions imposed and the time it took to resolve cases.

We reviewed the time required to resolve all 180 complaints closed through final order in 1994. On average, it took approximately one year from the time a complaint was filed until the Probable Cause Panel determined that the physician should be officially charged. [3] During this time, the agency investigated and reviewed the facts and obtained the advice of other physicians in the field to assure that the complaints were legally and medically sufficient before further action was taken. In the past year, the Board has made a concerted effort to speed up this initial phase of the disciplinary process by recruiting additional physicians to review complaints for medical sufficiency.

When charged by the Board, a physician may elect an informal hearing, consent agreement, or formal hearing. At informal hearings, the physician is

[1] The Board of Medicine is organized within the Agency for Health Care Administration (AHCA).

[2] Consent agreements are negotiated settlements.

[3] In those cases when the physician posed an immediate and serious threat to the public, the agency issued an Emergency Suspension or Restriction Order: this occurred 15 times in 1994.

allowed to explain the circumstances surrounding a complaint to the Board before it decides whether to impose sanctions. Informal hearings average 19 months from complaint through final orders, and are the quickest form of Board discipline; however, only 20 physicians chose the informal hearing option in 1994. (See Exhibit 1.)

Exhibit 1
Informal Hearings Provide the Quickest Resolution

	Informal Hearings	Formal Hearings	Began as Formal Hearing; Ended as Consent Agreement	Consent Agreements
Number of Physicians	n=20	n=20	n=15	n=125
Average	19 months	40 months	33 months	29 months
Median	15 months	39 months	33 months	27 months
Minimum	4 months	6 months	14 months	7 months
Maximum	56 months	61 months	62 months	78 months

Source: Office of Program Policy Analysis and Government Accountability analysis of 1994 Final Order data from the Agency for Health Care Administration.

Most physicians elect to resolve the charges against them through consent agreement. According to agency staff, even when both parties agree immediately to a settlement, it can take up to 18 months to resolve a case: the initial 12-month investigation period; plus a minimum of 6 additional months during which the physician elects the consent agreement option; the parties meet to negotiate; the agreement is written, revised, and signed; and the Board meets to approve the agreement.

Agency staff identified three main reasons for delays in resolving charges through consent agreements. First, physicians may delay notifying the Board of the method of resolution they are electing. Second, to better assess their cases, many physicians request time to consult medical experts before negotiating a settlement. Third, longer negotiations are needed when the physician and the agency staff cannot agree on a sanction. Because consent agreements take less time than administrative hearings, agency staff said they try to work with the physician and come to resolution through consent agreement if at all possible.

The administrative hearing process usually increases the time required for the Board to resolve a complaint because it adds a step to the disciplinary process. Formal hearings, defined by Ch. 120, F.S., provide a way to resolve disputes over facts and evidence when the parties cannot come to an agreement; formal hearings are administered by the Division of Administrative Hearings (DOAH). Following the hearing, the hearing officer writes a Recommended Order that is delivered to the Board for final action.

As a routine part of the administrative hearing process, the physician and AHCA hire expert witnesses and take depositions. This stage is often prolonged by delays in scheduling depositions and obtaining and providing information. Attorneys may also require longer pre-hearing preparation if the case is complex or involves multiple individuals. Often after the discovery process has brought more facts to light, a consent agreement is signed. In 1994, 20 physicians chose administrative hearings; an additional 15 physicians requested an administrative hearing but subsequently resolved their cases by consent agreement. The average time for resolution of these cases was 33 months; cases completing the administrative hearing process took an average of 40 months.

Although the administrative hearing process adds to the time required to discipline a physician, it allows due consideration before sanctions are imposed. Chapter 120, F.S., directs that administrative hearings be available to members of all state-regulated professions. According to DOAH staff, the time it takes to resolve medical cases is generally comparable to the time it takes to resolve other DOAH cases. DOAH cases can be heard in less time, if either party pushes for an earlier hearing date and the hearing officer concurs. DOAH staff indicated that an accelerated hearing date is problematic if both parties are not ready: good legal preparation is time-consuming, but is essential for conducting a fair hearing.

Conclusion and Recommendations

We conclude that while the administrative hearing process and consent agreement negotiations extend the disciplinary process beyond the time required for informal hearings, they allow physicians due process of law regarding their licenses and livelihood.

Some consumer advocates suggest that, to shorten the disciplinary process, hearing officers should handle all disciplinary cases and make final decisions without referral to the Board. We do not concur: administrative hearing cases generally take the longest

to resolve. By conducting informal hearings and accepting consent agreements early in the process, the Board accelerates the resolution of many complaints. Further, the present disciplinary system allows the Board to adjust the independent determinations made by hearing officers to maintain a coherent state disciplinary policy.

We recommend that the Board continue to consider ways to speed up case resolution. One option would be to specify a limited time during which the Board would accept consent agreements. Limited negotiating time may encourage the parties to come to an agreement faster, rather than proceed to administrative hearing.

Does the Board demonstrate a pattern of modifying hearing officers' Recommended Orders to impose stricter sanctions against foreign-trained physicians? The Board may amend hearing officers' Recommended Orders, including the recommended penalties, if there is sound justification for doing so. The Board did not demonstrate a pattern of amending orders to impose stricter sanctions on foreign-trained physicians.

In our prior report, we found that more foreign-trained than domestic-trained physicians chose administrative hearings. We reviewed the most current and complete set of data, 1994 Final Orders, to determine if the Board amended hearing officers' Recommended Orders to impose stricter sanctions on foreign-trained doctors. As indicated in Exhibit 2, in 13 of 22 cases the Board adopted the hearing officers' recommended sanctions. In those cases when the Board modified the Recommended Order, it raised penalties in five instances: three cases involved foreign-trained physicians and two cases involved domestic-trained physicians. In all four cases in which the Board reduced the recommended penalties, the physicians were foreign-trained.

Exhibit 2
The Board's Amended Sanctions Appear Equitable

	Number of Sanctions		
Physicians	**Board Concurred**	**Raised by the Board**	**Reduced by the Board**
Domestic-Trained	7	2	0
Foreign-Trained	6	3	4
Total	**13**	**5**	**4**

Source: Office of Program Policy Analysis and Government Accountability analysis of Division of Administrative Hearings' records.

Conclusion

We conclude that the Board did not demonstrate a pattern of modifying Recommended Orders to impose stricter sanctions against foreign-trained physicians.

Why are physicians who pay malpractice claims sometimes not disciplined by the Board? The Board of Medicine's function is to regulate and discipline medical professionals; the function of the court is to compensate injured parties. Because their obligations differ, the statutes require the Board and the court system to employ two different standards of evidence. As a result, a physician found liable by the court may not be sanctioned by the Board.

In any Board action that could result in license revocation or suspension, s. 458.331, F.S., directs that the findings must show "clear and convincing" evidence of violating the medical practice act. In contrast, the burden of proof against a physician in civil court is less stringent—it is based upon a finding that, more likely than not, a physician was negligent and thereby caused harm. Therefore, although a physician can be found guilty of medical negligence by the court, the case against him may not be strong enough for the Board to restrict his license. Florida statutes hold the Board to a higher standard of evidence than boards in many states: only 15 states use the "clear and convincing" standard, while the majority use the "preponderance of evidence" standard.

Another reason that civil and Board actions are not comparable is that malpractice suits may request compensation for pain and suffering, and solicit fines for damages inflicted by physician negligence. The Board can only discipline the physician; it is not authorized to make awards to victims. Therefore, the court may impose financial penalties that the Board cannot.

In cases in which the physician has not violated accepted medical standards, the Board will not take disciplinary action, even though a settlement has been paid. According to attorneys representing AHCA and those representing physicians, malpractice insurance claims often reflect economic realities rather than failure to meet standard-of-care. It may be less expensive for a physician to settle a lawsuit than to defend himself in court.

Conclusion

We conclude that because of the differences between the Board's responsibility to regulate and discipline medical professionals and the court's responsibility to compensate injured parties, their actions should complement but not necessarily parallel each other.

Should the Board disclose to the public information concerning physician complaints, civil suits, malpractice settlements, and disciplinary actions in other states? Florida statutes limit the Board to disclosing only those charges against physicians that it has investigated and taken action upon. This disclosure policy applies to all state-regulated professions.

Some consumer advocates have suggested that the public would be better served if the Board of Medicine also disclosed other physician information it receives, including complaints, legal actions, and malpractice claims. Court records and malpractice insurance claims are public record and can be obtained at county courthouses and the Department of Insurance.

The Legislature established provisions that limit disclosure to ensure that unsubstantiated complaints do not damage the professional reputation of physicians. In our review of all complaints resolved in 1994, more than 90% were dismissed because they were medically or legally insufficient. As described earlier in this report, court settlements and insurance claims also may not be indicative of standard-of-care violations. Physicians may make an economic decision to pay an insurance claim rather than pay to defend themselves in court, even if no wrong has been committed.

Insurance companies and self-insured physicians are required by law to report all paid claims, closed cases, and court judgements to AHCA and the Department of Insurance. Although the Board is not authorized to release information concerning court actions and medical malpractice settlements, it does review this information and take disciplinary action if warranted. All Board disciplinary actions are reported to the public.

The Board also reviews information from two other types of sources to identify possible malpractice. The Board reviews all serious incidents reported by hospitals and other licensed health facilities, and disciplinary actions taken against physicians by health facilities. This information is confidential pursuant to s. 395.0197(5)(c), F.S.

In addition, the Board reviews information about Florida licensees who are charged with misconduct in other states. Staff check for Florida licensees on a list published by the Federation of State Medical Boards of doctors disciplined in every state. Some state boards also notify AHCA if a physician they have disciplined holds a Florida license. Pursuant to s. 458.331(1)(b), F.S., the Board initiates disciplinary actions against physicians whose licenses have been acted upon by other jurisdictions. These cases are reviewed by the Board's Probable Cause Panel; if an administrative complaint is issued, this information is reported to the public.

The Agency receives information from a number of different sources, which may result in the same incident being reported several times. The Agency evaluates these reports to correlate incidents and identifies cases that should be investigated. If three closed malpractice claims of $25,000 or more are received within a five-year period, AHCA conducts an investigation of all three cases and any subsequent ones, unless they have already been investigated.

Conclusion

We conclude that the public disclosure policy defined by statute for the Board of Medicine provides consumers with reliable information and protects physicians from unsubstantiated complaints that could diminish their professional reputations.

RESPONSE TO THIS REVIEW

The Director of the Agency for Health Care Administration, in his written response to our preliminary report, concurred with our presentation of the medical board's disciplinary process and the discussion of serious concerns regarding this complex system and agreed with our recommendations. However, the agency does support a legislative change providing greater access to information regarding physicians to enable the consumer to make more informed health care decisions.

This project was conducted in accordance with generally accepted government auditing standards and included appropriate performance auditing and evaluation methods. Copies of this report may be obtained by telephone (904/488-1023), by FAX (904/487-3804), in person (Claude Pepper Building, Room 312, 111 W. Madison St.), or by mail (OPPAGA Report Production, P.O. Box 1735, Tallahassee, FL 32302).

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