

THE TRUTH ABOUT MEDICAL BOARD ACCUSATIONS

Medical Board accusations, once filed, start a process that is rigged against the MD.

The that you know a complaint has been filed, contact your malpractice carrier to get as much coverage as possible. Then, hire an experienced Board defense attorney. Nipping the problem in the bud is by far the best medicine. If that fails, be prepared for an Alice in Wonderland journey into ADMINISTRATIVE LAW.

Administrative law is to law the way military music is to music. It is result oriented and regimented. It is essentially a scripted march to a preordained result. If you belief in truth, facts and real justice you will be sorely disappointed in the Administrative Law system. It is a world of politics under the guise of law.

The Medical Board of California reviews all complaints whether they come from patients, other physicians and law enforcement agencies. Your first notice of a filing against you may be a Board request for information. In almost all cases you should respond fully, but you need the assistance of an attorney when respond because the slightest error in your response can sink your case. An experienced Board attorney knows the “hot buttons” that the Board is looking for. You might press a “hot button” by accident and the Board may well ignore the merits of what you are saying.

Quality of care complaints are reviewed by hired physicians who practice in the same specialty area as the accused physician. There is a poorly defined, “standard of care” analysis made by the expert. The hired gun often has a prejudice against certain aspects of the practice and will be looking to see whether you fall under that predetermined prejudice. In dermatology for example, the use of an in-house laser is considered a “hot button” to review the accuracy of

your diagnosis. The proper staffing choice (PA or RN vs. lesser licenses) is another “hot button”. Certain billing codes are tracked based upon the type of practice and the frequency of use. Your individual manner or practice or demographic may influence the code choice but if the computer “spits you out” as suspect - the burden shifts to you to prove your “honesty”. Your clinical documentation and office sign in sheets become your lifeline to keeping your license. The “hot buttons” change and an experienced Board attorney knows where the land mines are.

If the Board expert suspects a violation of the standard of care or if there are other violations such as ethical or criminal violations, the case is referred to the politicians and lawyers. Investigators at the Department of Consumer Affairs and attorneys at the Attorney General’s Office work together to investigate the case to see if it should be filed. In general, these investigations are criminal in the manner that they are conducted. The medical opinions provided to the Board are generally accepted as gospel. The factual inquiry is investigatory rather than objective (despite the claims that these are objective investigations). The physician under investigation should become actively involved in this process in order to inject some objectivity or at least balance, to the investigation. This input should be through an attorney rather than personally. The battle is often won or lost at this stage. Most MD’s sit around and represent themselves until an Accusation is actually filed. Rarely is this effective and often it deepens the wound.

I try to avoid too many “your practice” and “my practice” analogies but I’ll make this one. A physician handling his/her own Board defense is akin to your patients going on the internet and providing a diagnosis and treatment plan. They may do a good job but when they are wrong, they can be really wrong because they lack an overall perspective. The same is true when I see physicians handling their own Board matters. When they fail they can do a lot of harm.

If a formal accusation is filed, it proceeds through the disciplinary process and is either settled with a stipulation or continues to a hearing before an administrative law judge (ALJ). The ALJ judges rarely know the law and they almost always do the bidding of the Attorney General who represents the Board. It takes a major defense against the Attorney General to budge the ALJ's in favor of an accused physician. That defense is time consuming and expensive and few physicians can easily afford the time or expense. All the more frustrating is the fact that most administrative hearings are merely a battleground where each side "makes a record". The ultimate decision (usually against the MD) will be reviewed by Board which makes the final decision. That decision is almost always against the MD and the final review is by the State Court of Appeal (real judges) via a "Writ of Mandate/Writ of Mandamus".

The ALJ issues a "proposed decision" and generally spends most of his/her time outlining factual findings against the MD upon which the Board can make its decision. The Board's attorney (the Attorney General) will often write the findings of fact for the ALJ so that the final decision is merely a rubber stamp of what the Attorney General has outlined. The most fluid part of the hearing is penalty and mitigation. The accused MD should almost always present factors in mitigation, meaning facts that would support a lesser penalty after an adverse finding. This should be done before the hearing ends (although you can ask for a two part hearing, first on liability and if you are found liable, then on penalty).

The Attorney General must prove its case by clear and convincing evidence before an ALJ will propose discipline. Clear and convincing evidence is less than beyond a reasonable doubt and more than 51% (the standard civil lawsuit standard). In practice, the "abuse of discretion" standard is applied. In other words, will a Court of Appeal staffed by three real judges, find some rational basis in the record to support the ALJ's factual findings and the

Board's final decision on culpability and discipline.

The Board likes to make the process seem fair and simple. It is neither. It is all about control and the Board uses the Administrative Law process as a tool to implement policy. There are always outliers, cases of obvious guilt and obvious innocence. But most cases fall in between. If you know that the Board is looking at you, an early and strong response is your best defense.