THE SCOPE, PURPOSE, AND METHODS OF THE NEW JERSEY BOARD OF MEDICAL EXAMINERS
A PRACTICAL GUIDE FOR PRACTICING PHYSICIANS

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Upon completion of medical school and post-graduate training, a physician is qualified to evaluate and treat patients in a variety of clinical settings, including private practice and as a member of a hospital medical staff. Formal medical education and training alone, however, do not entitle a physician to begin treating patients. A physician must first apply for and obtain a license to practice medicine in the state in which he or she intends to practice. In the State of New Jersey, this process is conducted by the New Jersey Board of Medical Examiners (hereinafter “Medical Board”) which grants medical licenses.

In addition to this important credentialing function, the Medical Board is responsible for overseeing nearly every aspect of the practice of medicine, including practice standards, ethics issues, issues relating to potential impairment and incapacity of licensees, and reviewing and processing disciplinary actions against physicians found to be in violation of Medical Board regulations. The Medical Board also performs the important function of issuing advisory opinions and letters to update or clarify the scope and meaning of existing regulations or evolving practice areas.

In short, the Medical Board decides who will receive a license, makes the rules, enforces the rules, sits in judgment of those accused of breaking the rules, and imposes punishment for violations. Notwithstanding this, most physicians in this state know little or nothing about this government agency, although they are required under law to be familiar with all applicable Medical Board rules, regulations, and standards.

During the course of their career, many physicians can expect to have an encounter with the Medical Board, and the range of possible issues extends from the minor and trivial to a serious disciplinary action that could result in the suspension or even revocation of a physician’s right to practice medicine. This article will provide physicians with a practical guide to the Medical Board, including its structure, function and methods of enforcement. The article will summarize the type of cases that typically come before the Board for review, and outline the legal process that is followed. Finally, the article will provide the practical advice for management of any potential encounter with the Medical Board.

Statutory framework and purpose

The Medical Board was created by the New Jersey State Legislature, by statutory framework, in an effort to maintain high professional medical and healthcare standards by establishing an administrative body to review and control access to the profession and to investigate licensees accused or suspected of substandard treatment, unethical or professionally inappropriate conduct. The Medical Board is organized under the State Division of Consumer Affairs. It has an administrative staff, an Executive Director, and is made up of physicians from different specialties and lay people, who are appointed by the Governor, and who each serve for a fixed term. In addition, the “legal legwork” of the Medical Board, that is, the investigation of patient complaints and the institution of disciplinary proceedings, is conducted by members of the State Attorney General’s Office, including private investigators, forensic experts, and designated attorneys assigned to process and handle licensing board matters.

The initial function of the Medical Board is to review and process all applications for licensure, by either recent training program graduates or physicians licensed in other states. This is largely accomplished through credentialing review by administrative staff prior to the issuance of a license. This is a responsibility that the Medical Board members take very

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New Jersey courts have held that a physician responding to such an practice or professional life during the course of subsequent proceedings. The Medical Board has the discretion and authority to conduct a broad-ranging inquiry into any aspect of the physician’s complaint, but not always so. The investigation is generally limited to the allegations in the complaint, and relies on its own investigative techniques, such as pharmacy surveys, medical chart review, and, in rare cases, the placement of undercover investigative agents in a physician’s office. These agents often pose as “new” patients in an effort to investigate physician substance abuse, and improper/inadequate referral, insurance and third-party reimbursement improprieties.

The typical complaint is referred to the Medical Board by the filing of a written complaint form. To facilitate patient complaints, allegations can now be made by an “on-line” filing system. Once a complaint has been received, the Medical Board is obligated to conduct an investigation of the physician. The investigation is generally limited to the allegations in the complaint, but not always so. The Board has the discretion and authority to conduct a broad-ranging inquiry into any aspect of the physician’s practice or professional life during the course of subsequent proceedings. New Jersey courts have held that a physician responding to such an investigative inquiry has virtually no “due process” rights and, therefore, is usually unable to learn, in advance, information about the scope of the inquiry. Many cases that start as a simple patient complaint over what appears to be a minor matter often develop into a more serious and extensive inquiry, involving issues completely unrelated to the initial complaint.

During this initial phase of the process, physicians often feel intimidated as they find themselves in an entirely new professional arena, with less due process rights and procedures than a defendant has in a criminal investigation. Even though the role of counsel during this initial phase is limited by statute and case law, a physician in such a circumstance should always rely upon the informal guidance and strategy recommendations of an attorney with Medical Board experience. A physician should never have any contact or provide any information to the Medical Board in an investigation without the guidance of an attorney.

The Medical Board generally requests a written response by the physician to the allegations in the complaint. The majority of complaints are resolved during this phase. If the matter involves serious allegations or the resolution of factual disputes (such as alleged sexual misconduct cases), the Medical Board generally “invites” the physician to appear before an investigative committee for questioning. The committee, referred to as the Preliminary Evaluation Committee (“PEC”), is made up of designated physicians and laypersons of the Medical Board.

Legal representation is critical for such an appearance. A Deputy Attorney General, who provides preliminary instructions regarding the proceedings, generally initiates the PEC appearance. Routine questions are then asked about the physician’s training, background, and practice activities. The physician must verify that he or she is current in all CME requirements (which arise from a Medical Board regulation). Following the preliminary matters, any member of the Committee may ask the physician any question on virtually any subject. The format ranges from friendly, collegial exchange to brutal, ongoing cross-examination. The atmosphere cannot be predicted in advance, although it depends to some degree on the personality of the PEC members and the seriousness of the alleged misconduct.

Generally speaking, PEC members are prominent physicians from around the state from various specialties and, in this author’s experience, they generally treat a physician with respect and dignity. There are, however, notable exceptions, and as information is given to the PEC by sworn testimony, which is stenographically recorded, mistakes or inappropriate comments made during difficult cross-examination can make the matter difficult to defend and resolve on a favorable basis.

Following the PEC appearance, the Committee members prepare minutes reflecting findings and recommendations for disposition. Medical Board members have broad discretion in this area. If the PEC finds probable gross negligence or unethical conduct, an effort is often made to resolve the case by offering the doctor a settlement, which is usually structured to address the problem. If the concern is quality of care, retraining or remedial CME may be recommended. In more serious matters, the proposed settlement may include language reprimanding the physician for improper conduct, imposing substantial fines or civil penalties, requiring that a physician practice under direct supervision of another physician, or in some cases, suspension or revocation of the physician’s license to practice medicine.

Disciplinary review standards and procedures
A significant amount of the Medical Board’s resources are committed to investigating and, in certain instances, prosecuting complaints against physicians for alleged professional misconduct, substandard treatment, or ethical violations. Complaints are referred to the Medical Board by a wide variety of sources, and these sources are kept confidential by statute and not revealed to a physician under investigation. While disgruntled patients account for a large percentage of the complaints filed, physicians would be surprised to learn that complaints come from many other sources, as well, including other physicians, nurses, former employees, and hospital administrators. The Medical Board regulations require that any physician or healthcare provider with knowledge of alleged improper conduct has an affirmative obligation to report such a matter to the Medical Board.

The Medical Board also investigates physicians even in the absence of a complaint, and relies on its own investigative techniques, such as pharmacy surveys, medical chart review, and, in rare cases, the placement of undercover investigative agents in a physician’s office. These agents often pose as “new” patients in an effort to investigate physicians who are suspected of engaging in ongoing and serious inappropriate conduct such as prescription abuse, insurance fraud, or sexual misconduct.

The subject matter of complaints is varied, but typically include patients or family members upset with untoward outcomes, chronic pain patients treated with narcotics or other controlled medications, allegations of patient abandonment or improper/inadequate referral, insurance and third-party reimbursement improprieties, physician substance abuse, and alleged sexual misconduct.

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If the case cannot be resolved by way of settlement, the Medical Board has the option of referring the matter to the Enforcement Bureau of the Attorney General’s Office. For serious misconduct, the Medical Board will recommend the filing of a complaint with the Office of Administrative Law (“OAL”). If this occurs, the complaint is generally assigned for disposition to an Administrative Law Judge for pretrial discovery and trial. Depending on what occurs during the trial, the Judge can recommend a wide variety of remedial measures or sanctions, which include substantial financial penalties and license suspension or revocation.

Most physicians are, not surprisingly, unfamiliar with the procedural mechanics of a Medical Board complaint. Once a complaint is filed, the physician has due process rights such as pretrial discovery, the right to cross-examine adverse witnesses, and the right to serve expert reports in support of his or her position. Unfortunately, the statutes and applicable case law make it very difficult for a physician to prevail in a disciplinary matter once it has been referred to the OAL for disposition. The Medical Board is not bound by the judge’s findings and recommendations; they are only advisory. A physician can go through a protracted and expensive trial and prevail, only to discover that the Medical Board has made separate findings, apart from the judge, and imposed sanctions notwithstanding a favorable judicial recommendation.

Recent case law has demonstrated that appellate courts are willing to give the Medical Board wide discretion and latitude in this area. The courts assume that the Medical Board members are acting in good faith and, as experts, know what they are doing in defining and enforcing applicable practice standards and ethical requirements. The judges, who do not consider themselves to be experts in medical matters, are very reluctant to overturn a Board disposition in the absence of a clear showing that fundamental due process procedures and rules were not followed, and that the proceeding was, therefore, fundamentally unfair. The appellate courts will not overturn a Medical Board decision, including one imposing sanctions, merely because it is different, even contrary, to the findings and recommendations of the Administrative Law Judge.

There are additional procedural disadvantages for the physician. If the Administrative Law Judge or Medical Board finds gross negligence, statutory provisions permit the Medical Board to compel the physician to pay the Medical Board’s legal fees and expenses incurred in the trial. Such fees and expenses are often substantial in contested matters, often in excess of $50,000. The prospect of such an assessment can create great anxiety and concern to a physician who is already faced with the prospect of losing his or her medical license and, in essence, livelihood. This procedural reality makes the Deputy Attorney General and the Medical Board members reluctant to compromise during any settlement negotiations. With statutory discretion and limited appellate review, the effected physician has very limited options and often must accept any terms that are offered.

**What to do if you receive an inquiry**

Practitioners should be aware of the potential risks and exposure associated with a Medical Board inquiry. As in medicine, the best results come from early diagnosis, appropriate management, and cooperation with the Medical Board. If a case moves from the PEC into the formal complaint stage, it has the tendency to become a “run-away train.” The longer the proceedings go, the more difficult the case can be to resolve. The best strategy is to cooperate with the Medical Board members early in the investigation and influence, to the best degree that you can, their perception of your case.

It is important to be represented early on by an experienced attorney who regularly handles Medical Board matters and is well known to the PEC members and the Deputy Attorneys General who handle licensing board matters. It is critically important to have the right advice and the right strategy, as early information and documentation is provided. Even in a serious matter, significant “damage control” can be achieved through informal negotiations. A solution can be found to almost any type of case. As the Board members serve on an appointed basis, meet infrequently, and have limited enforcement resources, there are generally options for resolving a case short of formal proceedings. The Board members are eager to settle most cases in order to avoid protracted litigation, which ties up personnel and resources.

**The good news**

These are difficult times for physicians and hospitals. Medical malpractice cases, managed care, increased costs, complex regulations regarding medical records, privacy, and a host of other issues are all coalescing to make the current practice of medicine a difficult and anxiety-producing experience. Most practitioners would be alarmed to learn that there is another component to this picture, that is, their license is issued by what is, in effect, a government agency and the license can be taken away or suspended because of a mistake. A physician facing a Medical Board matter can literally be facing the end of his or her career.

There is a good side to this story, however. Obviously, in a profession as important, complex, and technical as medicine, there has to be some oversight regarding who gets in, what the rules are, and who is punished. Such oversight is inevitable. The medical profession is fortunate, in a sense, that this function is performed by physicians.

In this author’s experience, the members of the Medical Board (and the related agency, the Medical Practitioner Review Board, which screens disciplinary cases for the Medical Board by reviewing malpractice settlements) are, generally speaking, responsible and experienced practitioners from different specialties who understand the current practice environment and the stress and pressure currently facing the medical community. In 25 years of representing physicians before the Medical Board, I have rarely seen an unfair result. The Board must be sensitive to the public’s perception that the medical profession does an inadequate job in policing its own.

The average practitioner need not fear a Medical Board inquiry. With the appropriate advice and counsel, most cases can be managed informally and without protracted or involved legal proceedings. Any physician receiving a Medical Board inquiry should first contact his or her professional liability insurance carrier to determine the scope of coverage and representation. The doctor should retain an experienced lawyer, who will make every reasonable effort to resolve the matter with as little time and associated stress as possible. The overall prognosis is usually good.