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HEALTH LAW

Home or Hospital—Your Medical Board Is Watching

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Giving an alcoholic beverage to a 17-year-old, stashing counterfeit money, unlawfully possessing an automatic weapon, evading your taxes—if this sounds like a just another Friday night to you, then reconsider the profession of medicine [1-4]. A physician's public image is often as important as his or her professional one, particularly to medical licensing boards. All of the above are activities that have caused physicians' medical licenses to be challenged by state boards, whose jurisdiction can extend beyond the physician's practice of medicine to his or her private actions.

State medical boards giveth and they taketh away. Granted their powers by state law, these boards are charged with dispensing and revoking medical licenses, investigating complaints, and monitoring rehabilitation of physicians when appropriate [5]. They were conceived to "give the public a way to enforce...competence and ethical behavior in their physicians, and physicians a way to protect the integrity of their profession" [5].

Deviations from the standard of care are the most common cause of complaints to medical boards. These include overprescribing or prescribing the wrong medications, failing to diagnose an illness, neglecting to provide postoperative care, providing test results in a less-than-timely manner, and not responding to trauma calls [6].

Some states only discipline physicians for actions related to the practice of medicine. Examples of disciplinary causes related to practice include professional incompetence, wrongful or excessive prescription of drugs, improper sexual conduct toward patients, and alcohol or narcotics addiction [7-10]. Other states' boards discipline for conduct outside of professional duties. In these states, personal conduct can warrant disciplinary action if it demonstrates "moral turpitude," meaning that the act reflects "on the character, integrity, and honesty" of the physician [11]. Examples include tax evasion, mail fraud, and sexual offenses outside of work [4, 12, 13].

A careful balance must be struck to avoid over- or underdisciplining physicians. A state medical board that is perceived as going easy on physicians may face public critique and legal liability. A board that disciplines a physician, however, risks a suit brought by the doctor, charging it with wrongfully jeopardizing his or her license. Hence, it is important that boards follow consistent and equitable procedures when reviewing licenses to avoid legal challenges.

Failure-to-Discipline Claims against Medical Boards

In 2010, the Federation of State Medical Boards reported a total of 1,815 losses of license or privileges and 1,296 restrictions on licenses (e.g., probations) nationwide [14]. Public Citizen, a national nonprofit consumer advocacy organization, publicly critiqued medical license boards in March 2011 for underdisciplining physicians. Examining data between 1990 and 2009, Public Citizen concluded that over 55 percent of physicians who got in trouble with their local hospitals were never disciplined by their state licensing boards [15]. Of these physicians, 35 percent were charged with a serious violation such as immediate threat to health and safety, sexual misconduct, fraud, incompetence and negligence, narcotics violations, or defrauding health care programs [15]. Similar concerns were raised recently by the same organization about California's medical board [16].

In one failure-to-discipline case, a patient sued the state medical board over complications of her pregnancy, claiming the board was negligent in failing to discipline her ob-gyn, who had past complaints about his performance [17]. The state's highest court held that the medical board was immune from suit, just as a state prosecutor is immune with respect to which criminals to sue [17]. They reasoned that, without such immunity, a board's fear of liability might prompt it to pursue more cases, leading, presumably, to a higher number of wrongful claims against physicians' licenses.

In some instances, state governments are stepping in to ensure adequate disciplining of physicians. In Illinois, a recently passed law permanently strips licenses from health care workers found guilty of sex crimes, forcible felonies, and battery of a patient—taking the decision out of medical boards' hands [18].

Legal Claims by Physicians against Medical Boards

State medical boards also face suits from physicians who claim they have had their licenses unfairly acted against.

When a court accepts a case against a medical board for review, the level of deference with which it examines the medical board's judgment varies from state to state. In Maryland, the state "review[s] an agency's decision 'in the light most favorable to the agency,' since their decisions...carry with them the presumption of validity" [19]. In Florida, while it is acknowledged that a medical board should have wide latitude, the court also urges caution where revocation of a professional license is at stake, requiring that "any ambiguity [be] interpreted in favor of the licensee" [20].

Physicians can make a number of legal claims against a medical board including arguments that the board did not follow proper due process in its proceedings, that the physician was not treated like others in a similar situation, that the claim constitutes double jeopardy (or punishment for the same infraction twice), or that the medical board was in some way biased or incompetent.

Due process and equal protection arguments. Physicians can make claims that their treatment by the medical boards was unconstitutional either because due process was not followed or because they were not granted equal protection. The right to equal protection “requires the law to treat those similarly situated equally” unless different treatment is justified [21].

One physician sued a medical board, claiming its treatment of him violated his right to equal protection because he had his license suspended after pleading guilty to two different counts of reckless driving while under the influence of alcohol. He argued that he had received treatment unequal to that given to licensed nonmedical professionals, because his board had not had to prove that his actions harmed a client or patient as other professional boards had been made to prove. The court was very deferent to the judgment of medical boards, stating that the board’s purpose was to protect the public, and a medical board’s decisions should only be overruled if they were “palpably arbitrary” [22].

In the same case, the physician argued that his right to due process (a fair trial) had been violated in his medical board hearing, claiming that his guilty plea should not be presumed as conclusive evidence of unprofessional conduct warranting licensure action [23]. Again presuming the appropriateness of the board’s actions, the court stated that the practice of accepting a guilty plea as conclusive evidence of unprofessional conduct could not be deemed unconstitutional “if any basis reasonably justifies it” and held that “it is not necessary to wait until a member of the public is harmed to take steps to prevent such harm from occurring” [24].

Double jeopardy. In another case, a physician was convicted of kidnapping and sexually abusing an employee. The board suspended his license to practice medicine for 1 year [25]. The physician claimed a violation of the Constitution’s double jeopardy clause, arguing that he was punished twice—once with 5 years of probation and community service and a second time with the suspension of his medical license [25]. The court acknowledged that the license suspension may “carry the sting of punishment” but emphasized that the purpose for it was distinct—the probation was to protect the public from criminal behavior, and the license suspension was to protect the public from unfit physicians [26]. Thus both punishments were permissible.

Competency. Another possible complaint is that the board in question is not competent to revoke or suspend a license. A pediatrician convicted of child molestation argued that her 6-year license suspension was invalid because the board’s decisions were inconsistent, it impermissibly viewed facts outside of the case record, and it made no effort to keep track of past cases and use them as guideposts for future ones [27]. The court likened the process of medical boards to that of a court, and was reluctant to pass judgment on the board’s proceedings. Although a board has “a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other” [28].

Bias. A physician in the Virgin Islands whose license was suspended challenged a medical board with the claim that it was biased against him [29]. Specifically, he argued that one member of the board was in direct competition with him and that the rest of the board ignored this and permitted that person to participate in disciplinary proceedings [29]. The court held that the physician had not provided adequate proof of the board member's bias, but did not suggest that such a claim would be untenable if better evidence existed [29].

Physicians are often perceived as public figures in their communities, so professional and private wrongdoings can be equally troublesome. Medical boards continue to pursue the task of protecting the public through careful issuing, suspension, and revocation of medical licenses. They face critiques (and sometimes legal liability) on both ends. Some argue that they are too proscriptive, and physicians have fought back by claiming violation of their equal protection, due process, or double jeopardy rights, as well as making claims of incompetency or bias against the board, when their licenses were in peril. However, medical boards also may face suit and public outcry for failure to discipline doctors who are hazardous. As boards continue to walk that fine line, physicians must continue to remember what is at stake in how they behave, whether at home or at the hospital.

References

1. *Lorenz v Board of Medical Examiners*, 46 Cal2d 684, 298 P2d 537 (1956).
2. *State Medical Board v Rodgers*, 190 Ark 266, 79 SW2d 83 (1935).
3. *Raymond v Board of Registration in Medicine*, 387 Mass 708, 443 NE2d 391 (1982).
4. *In re Kindschi*, 52 Wash2d 8, 319 P2d 824 (1958).
5. Federation of State Medical Boards. *State of the States: Physician Regulation 2009*. http://www.fsmb.org/pdf/2009_state_of_states.pdf; 5. Accessed August 12, 2011.
6. Federation, 20.
7. 28 *Am Law Rep* 3rd (West Group Annotation) 487 (2011).
8. 19 *Am Law Rep* 6th (West Group Annotation) 577 (2011).
9. 59 *Am Law Rep* 4th (West Group Annotation) 1104 (2011).
10. 93 *Am Law Rep* 2nd (West Group Annotation) 1398 (2011).
11. 34 *Am Law Rep* 4th (West Group Annotation) 609, 2a (2011).
12. *Munch v Davis*, 23 Ga App 647, 99 SE 147 (1940).
13. *McLaughlin v Board of Medical Examiners*, 35 Cal App 3d 1010, 111 Cal Rptr 353 (Cal Ct App 1973).
14. Federation of State Medical Boards. Summary of 2010 board actions. <http://www.fsmb.org/pdf/2010-summary-of-board-actions.pdf>. Accessed August 12, 2011.
15. Levine A, Oshel R, Wolfe S. State medical boards fail to discipline doctors with hospital actions against them; March 2011. Public Citizen. <http://www.citizen.org/documents/1937.pdf>. Accessed August 12, 2011.

16. Wolfe S. Letter regarding performance of Medical Board of California. Public Citizen. <http://www.citizen.org/documents/1962.pdf>. August 9, 2011. Accessed August 12, 2011.
17. *Koppen v Board of Medical Examiners*, 759 P2d 173 (Mont 1998).
18. Twohey M. Sex offenders will lose medical licenses. *Chicago Tribune*. July 22, 2011. http://articles.chicagotribune.com/2011-07-22/news/ct-met-medical-license-revocations-20110722_1_medical-licenses-health-care-sue-hofer. Accessed August 12, 2011.
19. *State Board of Physicians v Rudman*, 185 Md App 1, 968 A2d 606, 615 (2009).
20. *Elmariah v Department of Professional Regulation, Board of Medicine*, 15 Fla L Weekly D 3031, 574 So2d 164, 165 (1990).
21. *Griffiths v Superior Court of Los Angeles County*, 96 Cal App 4th 757, 117 Cal Rptr 2d 445, 458 (2002).
22. *Griffiths*, 459.
23. *Griffiths*, 459-461.
24. *Griffiths*, 461.
25. *Loui v Board of Medical Examiners*, 78 Haw 21, 889 P2d 705 (1995).
26. *Loui*, 711.
27. *Medical Licensing Board of Indiana v Provisor*, 669 NE2d 406 (Ind 1996).
28. *Medical Licensing Board of Indiana*, 410.
29. *Williams v Government of the Virgin Islands Board of Medical Examiners*, 360 Fed Appx 297 (3rd Cir), *cert denied*, 130 S Ct 3445 (2010).

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