

# Health Care Law

## Physicians Under Scrutiny

### Representing Doctors Before a More Assertive Board of Medical Examiners

By Joseph M. Gorrell

Your client, a physician, receives a letter from the executive director of the N.J. State Board of Medical Examiners (the Board), advising that a complaint has been filed by one of his patients. The letter attaches the complaint and asks for the physician's response within 21 days. Or, a physician receives a "demand for statement under oath," posing questions (essentially interrogatories) about prescriptions that the physician has written. Alternatively, the physician may receive a letter from the Board demanding that he or she appear before a committee to discuss a complaint or an aspect of the physician's medical practice. How seriously should these demands be taken, and what role do you, as counsel to the physician, play in responding?

As a longtime practitioner, once having represented the Board and having appeared before it for 27 years, this

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writer can report that the majority of Board inquiries result in no disciplinary action against the physician under scrutiny. However, some matters do end up with the imposition of discipline, including license suspension or revocation, and, as described below, the Board has become more assertive in prosecuting cases against physicians.

The onset of the investigation is a critical point in protecting the client's interest. In responding to a letter from the Board, a physician has the choice of responding on his or her own behalf, or having legal counsel submit the response. In either case, the physician is bound by the statements contained in the response. It is extremely important that the attorney meet with the physician to discuss the complaint and look into all of the facts relevant to the inquiry. If, as is often the case, patient care is at issue, it is essential that the attorney review the medical records of each of the patients involved and discuss the records with the physician. After doing so, it is sometimes advisable for the physician to prepare a draft of the response for review by legal counsel. Alternatively, legal counsel can prepare the first draft and the physician can review it. In either case, it is critical that attorney and client openly and carefully discuss the initial draft and proposed modifications, to ensure that the patient care provided by the physician is appropriately described, and specific allegations in the complaint submitted to the

Board are directly addressed.

The demand for statement under oath requires a sworn response. Again, relevant documents should be gathered, and attorney and client should collaborate. Unlike interrogatories in a civil case, where the responding party often seeks to provide as little information as possible, the goal in responding to this demand is to end the investigation as quickly as possible. Therefore, while answers should be concise, they should also be complete without jeopardizing the physician's position.

When a physician is called to appear before a committee of the Board, the attorney's most important role is client preparation. The Board members want to hear from the physician, not the attorney. Again, the goal is to cut off the investigation before it flowers into a formal administrative complaint, and therefore it is imperative that the physician appear to be knowledgeable, concerned and aware of the issues that have been raised. And, once again, careful review of medical records by both the attorney and the physician is essential. It is often helpful if the attorney has the physician explain the case, the patient treatment provided and whatever medical issues may be involved. This not only helps to educate the attorney, but can serve as a dress rehearsal for the physician. In addition, it is often useful for attorney and physician to review relevant medical literature, which can be provided to the Board to support the care provided by the physician, as well as alerting the physician to issues pertaining to his or her medical care. Finally, in some cases, it is invaluable for physician and attorney to consult with a medical

expert to help prepare for the appearance.

The physician appearing before such a committee must be prepared to discuss a variety of background information. Before appearing, the physician will be required to submit a curriculum vitae and the continuing medical education that the physician has completed. In addition, the physician will be questioned about such items as malpractice cases, disciplinary actions at hospitals, licensure actions in other states, and investigations conducted by the Medicare or Medicaid Programs or private insurance companies. All of these should be reviewed with the physician by legal counsel prior to the appearance.

Appearances before a committee of the Board can be a trying, and sometimes emotional, experience for a physician. Physicians in this setting are out of their element, and they are often understandably nervous. It is thus essential that, in addition to being factually prepared, the physician understand the procedure and the setting for the investigatory meeting.

The meeting takes place in a private conference room in a government building in the presence of approximately three Board members, a court reporter and a deputy attorney general assigned to represent the Board. Typically, initial questioning is conducted by the deputy attorney general, but generally when the subject turns to medical issues, the questioning is conducted by the physician Board members. In the course of the proceeding, counsel may feel that information should be brought out or clarification of the physician's testimony would be appropriate. Generally, a request by the attorney to ask certain questions during the inquiry will be granted. In those cases where the committee does not want counsel to intercede, the attorney will have the opportunity at the

end of the inquiry to ask any questions that he or she deems important.

Furthermore, at the end of the proceeding, the physician and counsel are afforded the right to make a statement to the committee. In this writer's experience, it is usually best for counsel to give a short summation, briefly summarizing the issues and explaining why the investigation should end at this stage. The meeting generally ends with a statement by the deputy attorney general advising that the committee will review the matter and make a recommendation to the full Board, and counsel will be advised of any action that the Board deems appropriate. These actions can range from a finding that there is no cause for any discipline, to a private letter agreement requiring the physician to agree to undertake certain remedial action, to a public consent order and lastly to the filing of a formal administrative complaint. If the latter occurs, the matter is forwarded to the Office of Administrative Law (OAL) for a disciplinary hearing pursuant to the Administrative Procedure Act. See N.J.S.A. 52:14B-1 et seq; N.J.S.A. 52:14F-2.

The importance of careful and complete preparation for Board matters cannot be overemphasized. That need has become more acute in the last several years, as in the view of this writer and other counsel who practice before the Board, the Board has become increasingly assertive. This increased assertiveness can be traced to a statement by Dr. Joseph Gluck, a former medical director of the Board, at a regularly scheduled Board meeting on Sept. 10, 2008, when he publicly complained that the Board was not strong enough in disciplining physicians. Dr. Gluck's remarks were reported widely in the news media, which cited his example of a physi-

cian whose license was suspended for six months, whom he contended should have received a suspension of several years. More recently, the public interest group Public Citizen published a report, and the director of the Public Citizens Health Research Group testified, before a committee of the state legislature, alleging that New Jersey ranked low on the list of states imposing discipline on physicians.

An example of the Board's more aggressive stance is a case handled by this writer involving a surgeon who mishandled two surgeries in the winter of 2004, one involving insertion of a chest tube in the wrong lung, and the other the severing of an artery during major thoracic surgery. Immediately after these cases occurred, the surgeon voluntarily ended his surgical practice, limiting himself to wound healing. At the hearing in the OAL, the physician did not contest the fact that he had mishandled the two surgeries, and there was no evidence presented that his errors were anything but inadvertent. Moreover, evidence was presented, and not controverted, that he had handled his wound-healing responsibilities in a highly competent fashion for the four years that had elapsed before the hearing occurred. Consequently, the Administrative Law Judge (ALJ) recommended that the physician's practice be limited to wound healing, but that no active suspension of licensure was necessary. Rather than accept the ALJ's judgment, the Board imposed a suspension of licensure of three months.

This writer can say with confidence that until recently, the Board would have accepted the initial decision of the ALJ. However, times have changed. More than ever, it is critical that counsel work collaboratively with physician clients in responding to Board investigations. ■