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The Physician Disciplinary Process

Regulatory authority of physicians has expanded and the public's access to data has increased

By Alma L. Saravia

The New Jersey State Board of Medical Examiners (BME) is a regulatory body that licenses and disciplines more than 33,000 physicians and other professionals and has broad statutory and regulatory authority over its licensees. Over the past decade, a number of interesting changes in the disciplinary process have taken place. See A. Saravia, "Disciplining Physicians: An Insiders View," 139 N.J.L.J. 139 (Jan. 9, 1995). The BME has been vested with extensive new regulatory authority, a public data bank has been established and the number of complaints by disgruntled patients has skyrocketed.

In implementing its mission to protect the health and welfare of the public, the BME is authorized to investigate the conduct of a licensee and deny, suspend or revoke his license. The BME is comprised of 21 members appointed by the governor, including 12 physicians, a podiatrist, a bioanalytic lab director, a physician's assistant, a nurse midwife, a representative of the governor, the

Commissioner of Health and Senior Services and three public members. Since several of the current members have served on the BME for more than a decade, it will be interesting to see if the new governor appoints members with any particular focus.

The BME has adopted regulations governing licensure and the practice of medicine including, for example, patient records and confidentiality, patient abandonment, female chaperone during examination, patient discharge from practice, copying of medical records, in-office procedures and anti-referral prohibitions. N.J.A.C. 13:35-1 et seq. Counsel representing physicians before the BME focus on compliance with these regulations and on defending those physicians subject to a disciplinary investigation or complaint.

Expansion of the BME's Function

Four years ago, the Legislature granted the BME extensive new powers to investigate and discipline physicians. P.L.2001, c.307. This act also authorized the BME to appoint a full-time

educational director to oversee its new continuing medical education (CME) program and the monitoring and remediation program for physicians with deficient skills.

The "New Jersey Health Care Consumer Information Act" (P.L.2003, c.96) became effective June 23, 2004, mandating reporting of any medical malpractice court judgment, settlement in the past five years, or arbitration award against a practitioner; and establishing a data bank providing consumers with information about the education, experience and professional conduct of New Jersey's physicians and podiatrists. The New Jersey Division of Consumer Affairs (Division) now maintains informational files on all physicians and podiatrists, which consumers may access via the Internet at <http://12.150.185.184/dca/> or by calling a toll-free telephone number at (888) 654-2701.

These expansions in the scope of the BME's authority reflect the current national concern with patient safety and uniformity of physician regulation. See, i.e., Jim Edwards, "Bad Doctors Do Keep On Practicing," N.J.L.J., Dec. 17, 2003 (citing a 2003 *New Jersey Law Journal* survey covering 30 years of BME records finding that only one in three physicians who repeatedly committed malpractice lost his or her

Saravia is a shareholder in the health care law practice group at Flaster/Greenberg of Cherry Hill and former board member of the New Jersey Board of Medical Examiners. Saravia gratefully acknowledges the assistance of Julie K. Assis, an associate in the firm's health care law practice group.

license); Judith Dickinson, "The Disparity in State-Based Quality of Care Disciplinary Standards," *J. Med. Licensure & Discipline* 91(1): 2005. Some groups such as Public Citizen advocate increased disciplinary action by state medical boards as the solution to patient safety concerns, while others suggest the opposite tactic of letting consumers control physician performance (and reducing or ending regulation through licensing boards). See, i.e., *Ranking of the Rate of State Medical Boards' Serious Disciplinary Actions: 2002-2004*, HRG Pub #1737 (April 19, 2005), available at <http://www.citizen.org/publications>; Frances H. Miller, "Medical Discipline in the Twenty-First Century: Are Purchasers the Answer?," 60 *Law & Contemp. Probs.* 31 (Winter 1997).

Legislative Developments

In concert with this national trend, the New Jersey Legislature has heightened its scrutiny of the BME as some legislators are concerned that it is not taking enough disciplinary actions against physicians. In January 2004, Senator (formerly Assemblywoman) Loretta Weinberg (D-Teaneck) introduced a bill (A-1913) establishing a Health Care Professional Regulation Study Commission (Commission) to study and recommend the most effective means to oversee health care professionals practicing in New Jersey. The Commission will consider whether to transfer the boards from the Division of Consumer Affairs to another agency and how to provide for more effective and timely disciplinary actions.

Under A-1913, the licensing boards would be mandated to issue an annual report stating the number of complaints filed, closed and opened at the time of the report and the number of disciplinary sanctions imposed (including revocations, suspensions, voluntary surrenders, limitations or restrictions, applications denied and licenses reinstated). The boards would also be required to report the number of consent agreements entered into. Most significantly, the boards would be required to initiate an investigation within 30

days of a complaint. At present, the time between a physician being notified of a complaint and disposition of the matter may exceed a year or more.

Possible Actions

When representing a physician throughout the disciplinary process, a thorough knowledge of the BME's procedures for handling disputes as well as an understanding of the line between an error and "gross negligence or gross malpractice" is essential. N.J.S.A. 45:1-21 (c) and (d). The BME may discipline a physician for misconduct, incompetence, gross malpractice or gross negligence; and the elements of those offenses have been delineated in case law. See *In re Jascalevick*, 182 N.J. Super 455, 467 (1982); *In re Heller*, 73 N.J. 292, 304 (1977); and *In re Kerlin*, 151 N.J. Super. 179, 185-87 (App. Div. 1977), and numerous administrative law decisions.

Unlike a civil action, damages are not necessary when the negligence standard is used. Indeed, the Board has repeatedly held that "findings of gross and repeated negligence in the context of disciplinary hearings need not be accompanied by proof of actual harm to any patient." *In re Caragine*, 2000 WL 1899789 (N.J. Admin.2000), quoting *In re Rodriguera*, 93 N.J.A.R.2d (BDS) 33, 83, aff'd, 95 N.J.A.R.2d (BDS) 39. On the other hand, "medical malpractice alone is not a basis for the Board of Medical Examiners to interfere with a physician's license to practice." *In re Diater*, 2003 WL 23912234 (N.J. Admin. 2003), citing *State BME v. Weiner*, 68 N.J. Super. 468, 483 (App. Div. 1961).

Complaint Process

A disciplinary action is initiated when the BME receives information from a source such as a court clerk (reporting criminal convictions), other health care practitioner, patient or health care entity or insurer. After a complaint is filed against a physician, he will typically receive a letter from the BME requesting a written response. Upon receipt of such a letter, the physi-

cian should consider contacting experienced counsel to represent him in drafting a response, since many disputes can be resolved by submitting a detailed explanation of the facts and the applicable regulations or standard of care.

The BME is permitted to conduct a comprehensive, ongoing investigation with experienced investigators, with which a physician has a duty to cooperate. N.J.S.A. 45:1-18. The BME may inspect a physician's office, subpoena medical records, demand a statement under oath or require the physician to appear before a Preliminary Evaluation Committee (PEC) to respond to questions if it is not satisfied with the written response to its inquiry. When he testifies, the physician is under oath and all hearings are transcribed. The BME relies heavily upon comments made before the PEC in deciding whether to bring a formal charge. Many physicians do not understand the significance of this hearing, thinking that they can "explain" the situation and that the BME will "see it their way." Unfortunately, they often end up calling an attorney after the hearing, when served with a complaint.

The BME has several options in pursuing the matter. In the best case, the BME may find that there is no cause for disciplinary action when a physician is well prepared, cooperates fully and provides the PEC with information explaining why the complaint did not violate the law. On the other hand, the BME may immediately file a complaint for a temporary license suspension should it determine that a physician is an imminent danger to the public.

If the BME determines that the complaint warrants corrective action but is insufficient to meet the minimum proof requirements for initiating a public disciplinary action, it may issue a letter of warning, reprimand or censure pursuant to N.J.S.A. 45:1-22. This letter is confidential and is maintained in the physician's file. N.J.S.A. 45:9-19.3.

If the BME finds sufficient cause to instigate a disciplinary action, it may direct a deputy attorney general to negotiate a consent order prior to the filing of a formal complaint. A consent order is an agreement between the state,

the BME and the licensee that adheres to parameters set by the BME and the attorney general. Typical consent orders include a stayed or active period of suspension, attendance at an ethics or record-keeping course, proof of clinical competence, participation in the Professional Assistance Program (for physicians with substance abuse issues) and assessment of costs and penalties. Although all consent orders must be reported to the National Practitioners Data Bank, they usually still leave the physician in a more advantageous position than if a complaint were to be formally filed.

When the matter is not settled, the BME takes formal legal action by filing a complaint that is transmitted to the

Office of Administrative Law as a contested case for a hearing. The Administrative Law Judge (ALJ) makes findings of fact and conclusion of law and recommends disciplinary and financial sanctions. The BME prevails if it proves its case by a preponderance of the evidence. *In re Polk*, 90 N.J. 550 (1982).

The BME adopts, rejects or modifies the ALJ's recommendation in a formal order, after reviewing the record and considering any exceptions, objections and replies filed by each party pursuant to N.J.S.A. 52:14B-10(c). While the licensee has the right to appeal an adverse decision to the Appellate Division of the Superior Court, the scope of review is extremely

narrow.

Conclusion

Any complaint filed against a physician is a serious matter, made increasingly frequent by the ease of public access to information regarding physicians. However, even though the public is most familiar with the cases in which a physician's license is revoked for improper sexual relations with a patient or other egregious offenses, many matters can be resolved with a consent order. Although negotiating a consent order that is satisfactory to both parties can be a costly and time-consuming process, it usually offers better results for the physician. ■