

## **THE DOMINO EFFECT OF BOARD COMPLAINTS**

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For a licensed health care professional, receiving a complaint from their licensing board (“Board”) can truly be an unnerving event which can set into motion any number of other events, i.e., the domino effect. The goal of this article is provide licensees with a general outline of the various factors to consider when deciding how to respond to a Board complaint.

In Nevada, each of the health care professional Boards have their own statutes and regulations which, in varying degrees specificity the standards and procedures governing the complaint and its process. Obtaining and reviewing the relevant statutes and regulations should be the starting point when beginning to address how to respond to a Board complaint.

The first question usually asked by a licensee is whether they need an attorney to respond to the complaint. Hiring an attorney can be a very expensive proposition. Sometimes, however, a licensee’s malpractice insurance will cover, to one extent or another, representation and defense of a Board complaint. A licensee should carefully review their insurance policy and/or speak with his or her agent about such coverage. If coverage is available, it usually will not cover reimbursement to a complainant or reimbursement of the Board’s attorney’s fees/costs incurred by the Board during the course of the investigation.

If coverage is available, the licensee should consider requesting the insurer to assign one attorney to address the Board’s complaint and another to address any related civil malpractice case, if any. This consideration is suggested because both types of matters have their own goals, claims, standards, procedure, and the like. Sometimes, these goals might be seen as coming in conflict with one another. For example, in a civil malpractice context, the attorney may be very leery of the licensee making any admission but, in the administrative context before a Board,

an admission may be required to resolve a pending investigation. The effects of any such admission in one arena need to be carefully considered in another arena.

If insurance coverage is not available, various factors come into play when deciding whether to hire a private attorney to assist in responding to a Board complaint. Such factors include the licensee's past history with the Board, whether the licensee has had prior complaint with the Board, whether the Board has taken prior action against the licensee, the relative seriousness of the complaint, the relative complexity of the complaint. If the Board's complaint appears to only address a relatively simple matter and the licensee has no history with the Board, a licensee may decide hiring a private attorney may be unnecessary. It is suggested, however, when in doubt, do not be penny wise and pound foolish. At a minimum, a licensee may want to consult an experience administrative law attorney to have the attorney review the complaint and answer prepared by the licensee. In the end, it probably is always in the licensee's best interest to have experienced legal counsel in dealing with Board matters.

In crafting a response to a Board complaint, whether with or without an attorney, it is critical to understand that trained investigators and Board members – most of whom are also trained licensees in the applicable field – will be the ones reviewing the matter. Overstating a position or responding as if the targeted reader were a lay person simply will not be effective. The Board personnel reading the response are general experts in the licensee's field. If a licensee thinks they will be able to fool the Board or dazzle them with their credentials or jargon common to the field, they should be disabused of that position sooner rather than later. The Board is generally comprised of the licensee's peers who will know whether a response is truly warranted and/or cannot be justified.

Before addressing the allegations in a Board's complaint, a licensee is probably best served by telling the Board about his/her background, education,

awards, community service, experience, years in practice, other licenses, etc. If the licensee has had no prior Board actions, he/she may want to consider addressing the years of exemplary service provided to the community. A copy of the licensee's curriculum vitae should be attached to any answer submitted to the Board.

If it is reasonable to assume the result of the investigation could result in either revocation, suspension, probation, restriction of practice, or a fine then the licensee should seriously consider engaging an expert sooner rather than later to assist in preparing the response to the Board. It is generally more advantageous to provide the Board with an expert's opinions at the earlier stages of the process, as opposed to waiting until the latter, i.e., a formal board hearing. Like in a civil matter, the expert should be provided all available material to review. If possible, a licensee may want to retain an expert who is also licensed in Nevada and who is readily familiar with the applicable standards of care.

What can the licensee expect after submitting the written response to the Board's complaint? Initially, shortly after submitting the written response, the licensee or attorney should consider contacting the Board to make inquiry if any additional information or documents are needed. Such an innocuous inquiry may garner tremendous benefits in that it may open channels of communication which might be helpful in satisfactorily resolving the matter. If there is a reply to the licensee's response, most Boards will provide the licensee with a copy. Sometimes, the licensee may be able to provide a supplemental response. After the complaint, response and any supplemental responses are evaluated by the Board, a number of options are available to the Board, including dismissing the matter, entering into a stipulated agreement, or proceeding to a formal hearing.

Licensees obviously seek to have the complaint dismissed. In determining whether to dismiss the complaint, Boards take various matters into consideration,

including the licensee's prior history with the Board, the severity of the complaint, standard of care, documentary evidence, whether the licensee acknowledged any wrong doing which may be of import to allay any concerns raised in the complaint. Instead of dismissal, some Boards may remand the matter with or without concern to the licensee's file and in doing so; the Board may also indicate what matters, if any, raised in the complaint that may be revisited in the event the licensee should receive future complaints.

If the complaint is not dismissed, the licensee should seriously consider or reevaluate hiring experienced administrative counsel, if not done already. If the complaint is not dismissed or remanded to the licensee's file, then the complaint will continue to be processed by the Board and further action will be forthcoming. Boards, however, are generally amenable to entering into stipulated agreements, sometimes referred to as consent orders, to resolve complaints.

If at all possible, the licensee should attempt to resolve the complaint at this stage (i.e., shortly after it is learned the complaint is not being dismissed or remanded to the licensee's file) pursuant to a stipulated agreement. It is probably safe to say that should the licensee proceed to a full Board hearing and the Board finds violations, the severity of the final Board action will exceed that of the terms and conditions earlier offered in a stipulated agreement. Further, a stipulated agreement will generally allow the licensee to avoid a public hearing and avoid having to provide testimony under oath which may be used in a judicial setting.

Generally, there are two types of stipulated agreements which may be offered to resolve a complaint. One requires the Board to report the action taken to the National Practitioners Data Bank (NPDB). This type of stipulated agreement is sometimes referred to as a disciplinary stipulation. The other type of stipulated agreement is purely remedial and generally does not require the Board to submit an adverse action report to the NPDB. This type of stipulated agreement is sometimes

referred to as a remedial or corrective action stipulation. It is important to note both types of stipulations will be deemed to be a public record.

A remedial or corrective action stipulation will contain no provisions for revocation, suspension, probation, reprimand, fine, or restriction of practice. If any one of these provisions is contained in a stipulated agreement, it must be reported to the NPDB (i.e., a disciplinary stipulation). A remedial or corrective action stipulated agreement usually will require the licensee to obtain supplemental education, reimburse the complainant, and/or reimburse the Board's attorneys fees, costs, and/or investigative expenses. Lastly instead of probation, a licensee may consent to his practice being voluntarily monitored for a given period of time.

Short of dismissal or remand to the licensee's file, a corrective action stipulation should be pursued as it generally does not require an adverse action report to the NPDB, which could start other proverbial dominos to fall, as addressed below. It becomes critical in drafting a response and negotiating with the Board to not only address the Complaint, but also recognize and try and plan for the consequences of any resolution with the Board.

Board action, whether order or stipulation, could impact other areas of the licensee's professional life:

\* If the Board's action involves either revocation, suspension, fined or restriction upon practice, there must be an adverse action report reported to the NPDB. A Report to the NPDB can trigger a number of adverse effects. For instance, an adverse action report the NPDB can impact provider contracts with insurance companies. It is not uncommon for provider contracts to contain language allowing the insurance company to terminate the provider contract based upon an adverse action report.

\* In addition, an adverse action reported to the NPDB may also affect hospital privileges.

\* An adverse action report also may impact your membership in professional associations. For instance, certifying boards, national memberships, and local memberships, different professional associations.

\* Further, if an adverse action report involves the reporting of a felony conviction or plea, the Office of the Inspector General (“OIG”) may choose to issue an order restricting the physician’s ability, for a period of five (5) years, to render care to Medicaid and Medicare patients.

Clearly, it’s not just the action of the Board that a licensee must consider when deciding to proceed to a full-board hearing or enter into a stipulation with the Board. Depending on the action taken by the Board, it can create a domino effect which must be addressed by licensee. As one might expect, each of the above referenced entities have their own reporting requirements, procedures, timelines, regulations, terms and condition which must be reviewed, analyzed, and considered.

If the likely result is an adverse action, then the licensee, prior to the Board adopting any actions must be aware that most provider contracts, hospital privileges, and professional associations, as well as the OIG, require such action be reported to them within a given time-frame. It is critical for the provider to know the reporting requirements of the respective entities so as not to run afoul of them, which in some cases, may result in automatic termination of the provider contract, hospital privileges, professional association membership, or the ability to provide Medicare and Medicaid services.

Depending on the severity, if it is contemplated that eventually the Board is going to file an adverse action and it involves either a revocation, suspension, probation, restriction of practice or a fine, the licensee must consider taking a proactive approach and place insurers, hospitals, professional associations and possibly the OIG on notice about the anticipated Board action before it is finalized.

The licensee may also want to consider withdrawing from these entities prior to Board action if the contemplated action could result in the termination of the relationship between the licensee and the entity. Withdrawal prior to a final action by the Board usually will negate the necessity of the entity filing an adverse action report to the NPDB.

In closing it is hoped this article given some insight to the administrative complaint process. However the best advice of all to avoid a complaint in the first place is to always communicate positively with your patients. Bad bedside manners and failure to communicate is usually the countless basis for the initiation of complaints to the Board which otherwise would never have been filed.

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