

The 10 Biggest Mistakes Physicians Make After a Licensing Board Complaint Has Been Filed Against Them

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Executive Summary

Licensing board complaints may be filed by patients, their family members, other healthcare providers, employees, or anyone who interacts with a physician. Increasing awareness of this fact, aided by consumer groups and state laws which require posting patient bills of rights in waiting rooms, has led to more medical board complaints being filed and sanctions imposed. Disciplinary action can include: a reprimand, restrictions on a physician's practice, continuing medical education or monitoring requirements, probation, license suspension or revocation. Moreover, the adverse consequences of a board complaint do not necessarily end there.

Doctors generally are required by contract to report disciplinary actions to their professional liability carriers, managed care plans and patients' health insurance plans. Federal law also requires that discipline be reported to the National Practitioner Data Bank, which hospitals must check before granting or renewing medical staff privileges. Thus, a cascade of negative effects may flow from a single board complaint. Depending on the alleged offense and the board's conclusion, a physician's reputation and livelihood may be destroyed. So the importance of properly responding to a licensing board complaint cannot be overstated. Nonetheless, many physicians make crucial mistakes after a board complaint has been filed, which needlessly expose them to additional professional risk.

Mistake #1 Taking the Complaint Lightly or Going Into Denial-Mode

Upon receiving a licensing board complaint, physicians often dismiss the allegations (regardless of merit) as frivolous, groundless, or the fabrications of a delusional patient. Or, they go into "denial-mode," pretending nothing has happened. A doctor may be outraged at being wrongly accused of unprofessional conduct. He may assume that once he explains what happened, the medical board will see the complaint as not worth the paper it's written on. But even in situations where this is true, physicians are well-advised to take the complaint seriously.

Action Step Treat any formal complaint as a serious matter, warranting immediate and thoughtful action. Immediately plan a thorough and respectful response.

Mistake #2 Ignoring or Missing the Response Deadline

When a complaint is filed with a licensing board, the board generally sends a notice of the complaint to the physician. In that notice, there almost always is a deadline for the doctor to file a written, narrative response to the allegations, and a deadline to produce all of the patient's records. Physicians are busy people. And gathering the relevant information, obtaining the necessary advice, and preparing an appropriate response are time-consuming tasks, most of which cannot be delegated. It is also human nature to put off dealing with unpleasant tasks. Consequently, the deadline

for producing records and filing a response often creeps up on the physician, before she has done what is necessary to prepare a proper defense. However, failure to timely respond can at best harm the physician's credibility, and at worst result in sanctions being imposed when they otherwise wouldn't be.

Action Step Diary the due date for your response immediately. Determine as soon as possible whether an extension of time to respond will be needed. If so, request an extension well *before* the deadline arrives. Promptly gather and obtain certified copies of all the patient's records. See that they are furnished to the medical board on time, consistent with HIPAA's privacy regulations and state privacy laws.

Mistake #3 Failing to Promptly Consult With Counsel & Fully Disclosing All Important Facts
It is important to find an attorney licensed to practice in your state, who is familiar with your state's licensing board procedures. Because of pride, cost concerns, professional rivalry, or a belief they can handle the matter themselves, physicians frequently do not consult legal counsel. Or, they wait until significant damage has been done to their professional reputations before doing so. Seldom are the adages "penny-wise and pound-foolish," and doing "too little, too late," more apt. Knowing how to practice medicine, and even being a superior doctor, does not mean a physician is equipped to defend himself in a licensing board proceeding, where legal rules of procedure and evidence apply. Even attorneys abide by the maxim that "a lawyer who represents himself in a case has a fool for a client." This is because even the best advocate can wear only so many hats or fill so many roles, without losing effectiveness. In all but the simplest of cases, it is far better to have someone *else* defend the physician and (if necessary) criticize the complainant, than have the doctor -- who himself is the target of the complaint -- be his only advocate. The damage that can be done to a physician's reputation and livelihood by a professional complaint far outweighs any legitimate concerns he may have about retaining the services of an attorney experienced in this area of the law.

Action Step Pick up the phone. If you know an attorney in your community who has handled these types of cases successfully, call him or her immediately. If you do not know one, contact colleagues and physician organizations for referrals. Then promptly provide your counsel with all pertinent information and documents, and any known grounds for defending the allegations. Do not omit any important or potentially damaging information, because you hope it will not come out. Include the good, the bad, and any "ugly" facts which may be relevant, so your attorney is fully informed and not unpleasantly surprised by damaging facts when it is too late to minimize their impact. Consider asking your attorney to retain a consulting expert, so you can get an objective opinion after a full discussion of the matter protected by the attorney-client privilege or work product doctrine.

Mistake #4 Failing to Notify Your Malpractice Insurer or Risk Manager
When a complaint is filed, most physicians are not anxious to broadcast that fact. Especially if the charges include serious or embarrassing allegations, a doctor may

avoid notifying even those who may help him. This can be a big mistake for several reasons. First, under most malpractice insurance policies, physicians have a duty to notify the carrier of any claim or potential claim which might require coverage as soon as practicable. Second, unless the physician is a sole practitioner, she often is required by contract, bylaws or organization policy to notify a risk manager or someone within the organization of the claim, no matter how embarrassing or meritless the charge. Failure to provide timely notice of formal complaints to such parties can jeopardize insurance coverage, a physician's employment or ownership interest in an organization, or career. Moreover, the malpractice carrier or entity with which the physician is affiliated may provide or pay for assistance, including experienced counsel to represent the physician before the board. Therefore, keeping a board complaint secret from these parties is not in the physician's best interest, professionally or economically.

Action Step Review your malpractice insurance policy. Determine whether you have a duty to notify the carrier, and whether there is coverage for board complaints. If so, notify your carrier of the complaint as soon as possible. Also notify appropriate risk management personnel in the facility where you practice, and provide pertinent documents. Request any legal and other assistance which may be available under the policy, contract or organization bylaws.

Mistake #5 Contacting the Complaining Party & Trying to "Talk Them Out of It"
This almost *never* works. Worse, it can lead to damaging evidence being admitted against you. And it may be portrayed as your having tried to intimidate the complaining party. So don't do it. You also should not assume upon receiving a letter announcing the initiation of an investigation, followed by a phone call from a seemingly friendly investigator, that you can simply explain the complaint away. Although some complaints can be resolved quickly without adverse action, you shouldn't be lulled into a false sense of security by what may initially be a friendly or supportive approach by a board investigator. Often, the investigator's attitude will change. And statements you make at the outset, without adequate reflection, can come back to haunt you. Also avoid having conversations with third parties, including potential witnesses, which may damage your defense, and which are not protected from disclosure by the attorney-client privilege or some other legally recognized privilege. In short, saying the wrong thing or something in the wrong way to *anyone* (except your attorney) can significantly inhibit your defense and lead to unfavorable consequences.

Action Step Involve legal counsel in all substantive discussions about the case. If asked, politely decline discussing the matter with anyone without your attorney present. This will help ensure that your counsel is fully informed, and that your conversations are protected under the attorney-client privilege or work product doctrine.

Mistake #6 Responding Angrily or Emotionally
Either because of righteous indignation or fear about the effects a complaint may

have on his practice, a physician's first reaction may be to respond angrily or emotionally. Physicians also may be inclined to blame or point fingers at other healthcare providers for less than optimal outcomes, or for getting them into "this mess" with the board.

Action Step Before writing or speaking to the medical board, think, take several deep breaths, and think again. Bear in mind that board members are, like you, medical professionals. They know that many complaints are brought without merit, and that physicians can be falsely accused, no matter how competent or ethical they are. On the other hand, licensing boards are under increased scrutiny by the press and consumer groups, with boards often graded on the percentage of doctors they discipline. Their job is to police the medical profession and protect the public. Thus, while they should not be predisposed to find against you, board members are unlikely to be impressed by shrill or emotional protestations of persecution, or a physician who blames the patient or other providers for every problem. So resist any temptation in that direction. Omit extraneous information and personal attacks which are irrelevant to the stated charges. Take the high road, no matter how infuriating the allegations. If appropriate, indicate how the patient or complaining party might be mistaken (rather than mean-spirited or deranged), and demonstrate sympathy or understanding for how such a mistaken impression might be formed. Be factual, responsive and persuasive. Address the board's concerns, express your willingness to cooperate, and reaffirm your intention to comply fully with all applicable laws and ethical rules. In short, show complete respect for the board and the important job it does.

Mistake #7 Needlessly Admitting Fault

In medicine, as in everything else, things do not always go as they should. In some cases, a frank acknowledgment that a mistake was made, an apology or expression of remorse, and a promise to do better next time is the best response one can provide. In most cases, however, the issue of fault is not clear-cut. Rare is the case where a physician's conduct cannot be explained, or at least cast in a better light than is done in a complaint or investigator's report. Therefore, except in irrefutable cases, it is a mistake for a physician to simply admit fault, and hope the board will reward the doctor's candor with a slap on the wrist or minor sanction. In general, unqualified admissions are likely to lead to more severe sanctions being imposed, greater exposure to malpractice liability, and fewer career options.

Action Step Be candid and forthright with the board. Express concern for the patient's problem, if appropriate. But do not needlessly fall on your sword or accept blame when your conduct is defensible, can be explained, or can be characterized in a less blameworthy fashion. Consistent with the truth, a physician and his counsel should carefully analyze all possible ways of defending or explaining the doctor's conduct, before simply admitting fault. Even if an admission is the only credible option, the best possible terms should be sought before conceding.

Mistake #8 Responding as if Speaking to Physicians Fully-Versed in Your Specialty

Although medical board members are usually physicians or healthcare professionals, they are not trained in every medical specialty. Therefore, an individual member or panel may know little about the particular medical specialty in which the physician who is the subject of the complaint practices. Consequently, the physician responding to a board complaint should not respond in so technical a manner, or with such specialized jargon, that only an expert in her particular field would understand the response. Conversely, the physician should not respond as if educating people with no medical training or background whatsoever, or in a condescending manner that insults the board.

Action Step Strive to achieve a middle ground between these two extremes. Respectfully inform or educate board members about unique or peculiar aspects which may be involved in your particular practice or specialty, or the procedure at issue. This should be done without talking down to anyone. Especially in cases where medical records are voluminous, it also is a good idea to cite key portions of the records which support your defense, rather than expect the board to wade through the records and find what's important. If the medical records don't clearly and obviously support your position, consider retaining an expert witness to render an opinion. Also cite medical treatises, other treating or consulting physicians, and experts whose findings or opinions support the diagnosis, care or treatment at issue, to demonstrate that your position is supported by other authorities.

Mistake #9 Failing to Respond to Every Charge in the Complaint

Often, a physician's written response will address some, but not all, of the charges made in a patient's complaint. While the response should be no longer than necessary, it is a mistake to ignore an allegation or assume the board will, on its own, deem a charge so lacking in merit that it does not warrant even a denial by the responding physician.

Action Step A physician's narrative response should address each and every allegation or charge made in the complaint. Otherwise, an inference that the allegation or charge is true may be drawn. On the other hand, a physician's narrative response should say no more than is necessary to address each allegation and the board's stated concerns.

Mistake #10 Hiding, Altering or Destroying Records

This is perhaps the easiest way for a physician to lose his license. Under *no* circumstances should a healthcare provider ever hide, alter or destroy a medical record -- even if he or she believes such an alteration will make the record more accurate.

Action Step Don't *ever* do it! Instead, promptly gather or obtain certified copies of all the requested records, and see that they are furnished to the medical board, consistent with HIPAA's federal privacy rules and state privacy laws. To the extent there may be material errors or omissions in an original record, the record should be supplemented -- but only in accordance with previously established record-keeping

policies. The date and reason for any supplementation, amendment or addendum should be clearly noted, and the original record in its unamended form should also be produced. The physician and her counsel must be prepared to explain the reasons for any omission or error in a record, and any amendment, supplementation or addendum which might be added.

Conclusion

Physicians who avoid the mistakes above, and take the steps suggested, will be best able to ward off disciplinary action and other adverse consequences which may result from a licensing board complaint.

Additional Resources

- *Defending Doctors in Disciplinary Proceedings*, F. Zeder, Arizona Attorney, January 2004
- *What to Do if You Receive a Licensing Board Complaint*, J. Perrin, Ph.D., The North Carolina Psychologist, January/February 2003
- *Defending a Licensing Board Complaint: Financial Devastation?*, B. Welch, Ph. D., J.D., Insight, Edition I, 2002
- *Licensure Discipline*, S. Lindgard, J.D., Jacksonville Medicine, April 1997

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