



## What to Expect When You Are Not Expecting

By Paul-Michael La Fayette, JD

**No one ever really expects to be investigated by a licensing board. However, it is critically important to recognize the seriousness and gravity of an investigation and the stakes of a formal licensing board action.**



In 2018, there were over 7,000 adverse actions taken by licensing boards against physicians.<sup>1</sup> Adverse actions include revocations, surrenders, suspensions, restrictions and probations. Although there is no single report that identifies the total number of investigations conducted, each state licensing board maintains annual reports on the number of investigations and enforcement actions.

Moreover, the number of adverse actions that result in discipline is only a fraction of the number of investigations conducted. Even less serious discipline, such as warnings or probation, carry serious consequences.

Most health insurance carriers require the licensee to have unrestricted licenses to participate in their plans. With a majority of plans, probation is a sufficient basis to contractually exclude a healthcare provider from participation.

### Basic Concepts

Although every state has adopted its own administrative processes, there are fundamental commonalities with every board to keep in mind.

Once a license is issued, it becomes a constitutionally protected property

right. As such, you are entitled to due process of law before your license can be sanctioned or revoked. Throughout the investigative process and any administrative proceeding, you have the right to due process and the right to counsel.

Your due process rights include your right to:

1. Know the details of the charges against you.
2. Be able to hold a hearing in which you can present witnesses and evidence to defend against the charges.

It is also important to keep in mind the board's role in an investigation and administrative proceeding. The board serves to protect the public—not the licensee. Thus, it is important to remember that the board and its investigators are not your allies in the process.

### The Complaint

Every investigation starts with a complaint. It can originate from a patient, a fellow practitioner, a disgruntled employee or an insurer who questions practices such as billing. It is important to keep in mind that most boards have

a statutory obligation to investigate a complaint. Thus, even meritless complaints are investigated, and the vast majority of investigations are closed with no action taken.

While complaints trigger the investigative process, states vary on whether you are permitted to review the complaint. In fact, most states have policies, regulations or statutory provisions that require the investigative process be kept confidential. As such, you are not permitted to know who complained or the contents of the complaint.

Among the common complaints are:

- Standard of care
- Infection control
- OSHA
- Advertising
- Billing
- Recordkeeping
- Substance abuse

Most state licensing boards have the authority to immediately suspend, without hearing, a license if the board determines that there is a “clear and imminent threat” to public safety. Such summary suspensions generally arise in instances of evidence of clear and continuing

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substance abuse, sexual misconduct or criminal acts of violence.

## The Investigation

Investigations are not limited to what is alleged in the complaint. Typically, a complaint will relate to patient care. An investigator will subpoena not only the patient chart for the treatment at issue, but also the complete record of all treatment rendered to the patient including all electronic and paper records of treatment, imaging, billing and insurance records.

The investigators and any licensed professional on staff or retained by the board will review the entire record. While the investigation may have been initiated as a result of a very specific complaint, the scope of what is investigated is far broader and could lead to concerns unrelated to the original complaint. It is not uncommon for a patient care issue to evolve into a coding or billing issue or a question about recordkeeping or other treatment.

The investigator may contact you to schedule a time to meet, or they may make an unannounced visit. Your natural instinct will be to answer any questions. You cannot imagine that you did anything wrong, and having a conversation with the investigator to dispel any concerns seems reasonable. You must resist this urge.

**Your natural instinct will be to answer the investigator's questions. After all, you did nothing wrong and you want to dispel the investigator's concerns.**

Investigators are usually seasoned professionals and often former law enforcement officers. Their objective is to obtain the information that they seek. Whatever you say can and will be used against you.

At this early stage, you will have no reasonable idea what they are looking for and what you say would likely be damaging. At this point, you should contact your professional liability insurer

to consider representation of counsel. If you respond to the investigation on your own, you do so at your own peril. Whatever statements you make to the investigator on your own cannot be undone—and may compromise the ability of an attorney to help you later.

Advising the investigator that you wish to retain counsel does not indicate your unwillingness to be cooperative or reflect your guilt or wrongdoing. Simply advise the investigator you are happy to cooperate but you need to first consult with your attorney. Be calm, polite and reasonable. You can then tell them your attorney will be in contact to make arrangements for a mutually convenient meeting time.

During the investigation phase, you will be asked for records and interviews. In some instances, you will be required to submit to an investigative deposition or to provide responses to written questions (interrogatories) from the board. Again legal assistance is advisable for these matters.

## Subpoena

A board request for records will generally be by subpoena—as authorized by the investigatory member of the board and served by an investigator. It is important that you provide a complete and accurate response to the subpoena request and provide the records in an organized manner. Investigators are constantly evaluating you and drawing conclusions based on your statements, actions and how you run your practice.

No client of mine has been absolutely comfortable with their patient records. There is always some detail or subtlety that is missed. For those reasons, when dealing with a request for a specific patient record or records, I prepare a letter under my signature, providing a more detailed summary of the treatment provided. This fills in any details omitted from the record and provides details of surrounding circumstances that may not have been apparent.

The idea is to ensure a full picture of the treatment rendered and not leave the reader to make assumptions about what did or did not occur. The letter is written under my signature because it is only to assist the review and not to provide evidentiary material to the board (as would be the case if the letter were written by the licensee).

## Written Responses—Depositions

Most boards have broad authority to conduct depositions. Written requests for information, what are known as interrogatories, are a tool used in investigations that solicit responses to specific questions that must be provided under oath. The responses are sworn statements that can be used in the investigation and, if it occurs, an administrative hearing. Similarly, boards will use depositions in which the licensee is put under oath for questioning to secure testimony that can be used to pursue a formal investigation.

Again, it is highly advisable to seek counsel before responding to





introducing exhibits. When the board has completed presentation of its case, the licensee then presents his or her case. The vast majority of boards require the finding of a violation to be made within a “preponderance of the evidence,” which is the same as would apply in a civil case. However, some jurisdictions require that a violation must be established by the heightened standard of clear and convincing evidence.

Ultimately, a decision is made that in many states will be a “report and recommendation” or a “findings of fact and conclusions of law” made by a hearing examiner. Findings are then provided to the board and the licensee will have the opportunity to file objections with the board.

The board will then consider any objections, and in some instances, permit an oral presentation and make a decision that either adopts, rejects or amends the proposed report or findings of the hearing examiner. Once that occurs, most states permit an appeals process that proceeds to the civil courts. However, it must be noted that the civil courts will generally give heavy deference to the decision of the board.

## Sanctions

An adverse decision by the licensing board carries a wide range of sanctions. Sanctions include: permanent revocation, suspension, probation, fines, private or public reprimands and letters of concern.<sup>2</sup>

The vast majority of states impose fines, regardless of the level of sanction. If there are multiple violations asserted, the fines are correspondingly higher. Also, most states will require payment of costs related to the prosecution of the board’s case regardless of the level of sanction imposed.

**A sanction against your license has a cascading effect. It will be reported to the NPDB and any other states in which you are licensed.**

interrogatories or submitting to a deposition. Once sworn testimony is obtained by the board, you cannot “un-ring the bell.” That is, if you later are formally charged and a hearing ensues, you are stuck with the testimony that was provided absent your ability to withstand impeachment for changing your testimony.

## Conclusion of Investigation

Once the pertinent information has been collected and disseminated, the board will decide whether further action is appropriate or whether there is no violation of regulatory requirements. If they decide to close the investigation, most boards will issue a letter to the licensee. This letter will advise that the board has completed its investigation, no violations were found and the investigation is closed.

If the board finds that a violation exists, then it will proceed with a formal administrative proceeding. You will be served with a “notice” advising you of the board’s decision to charge and identifying the charges. The “notice” will also provide the “opportunity to be heard.” In other words, the notice sets the hearing or gives the opportunity for the licensee to request a hearing. If you have not contacted your professional liability insurer by this point, now is the time to do it.

## Hearing

State boards vary in who presides over an administrative hearing. Regardless, the person or persons who preside over the case serve as the judge and jury. They hear and weigh the evidence and make the decision. In a majority of states, the decision is rendered as a recommendation that the board may affirm, amend or reject.

Each state has its own hearing procedures. However, to allow for a “meaningful” opportunity to be heard and satisfy due process requirements, most states require that the parties exchange exhibits, witness lists and expert reports. Most will also permit the issuance of subpoenas to compel testimony of witnesses.

The original complaint is often considered as part of the confidential investigative file maintained by the board. Many states will not permit the disclosure of the complaint or the complaining party at any point and others will permit disclosure at the time that the board decides to proceed with charges. The opportunity for the licensee to subpoena documents, take depositions and otherwise conduct discovery akin to a civil malpractice case is entirely dependent on the jurisdiction.

The hearing itself proceeds as would a civil trial. The board presents its case first, calling lay and expert witnesses and

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Suspensions and probations generally carry some form of continuing education requirements or other conditions that are required to return to practice without restrictions.

A sanction against your license has a cascading effect. All licensing board sanctions are reported to the National Practitioner Data Bank (NPDB) and any other states in which you are licensed. Through inter-state compacts, this results in what is referred to as “boot-strapping” actions by other licensing boards against your license in those jurisdictions. Most state licensing boards will also require you to voluntarily disclose any adverse licensing action.

Generally, any jurisdiction where you hold a license will provide a notice and opportunity for hearing in that jurisdiction predicated on the sanction issued in your home jurisdiction. Those other jurisdictions will then, most often, adopt the sanction that was originally issued. Thus, if you are suspended for 30 days as a result of a hearing, other state licensing boards where you hold a license will adopt the same 30-day suspension.

Additionally, the NPDB report is provided to federal agencies with whom you hold a license or certification (DEA, Medicare, etc.), as well as national and state credentialing organizations and health care plans and liability insurers. Accordingly, suspensions and other restrictions will result in action by other agencies and entities that may impact your ability to provide care, privileges, or to participate in healthcare plans.

## Alternatives to Hearings

All states have alternative dispute resolution available. Every state permits licensees to enter into agreements or consent decrees to avoid a formal hearing. These are negotiated agreements that usually require some form of admission to the charged conduct.

In cases involving substance abuse, many states utilize stepped agreements that generally require substance and/or psychiatric evaluation, mandatory treatment at a board approved facility and testing before the board considers reinstatement.

Once reinstatement is available, the board will likely require an additional agreement that imposes strict probationary terms. These may include testing, participation caduceus, AA, NA or similar entities, and mandatory professional counseling. The services of an attorney in that state who is familiar with negotiations with licensing boards is essential in these instances.



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## References

<sup>1</sup> Data is compiled from the United States Department of Health and Human Services, National Practitioner Data Bank. <https://www.npdb.hrsa.gov/analysisstool/>. The statistics do not include warnings and reprimands.

<sup>2</sup> *Ibid.*

**Paul-Michael La Fayette, JD,** concentrates his practice on professional liability defense, including the defense of dentists, physicians, real estate agents and attorneys. He represents several professionals in administrative licensure proceedings before their professional boards. Mr. La Fayette served as the director of legal and legislative services for the Ohio Dental Association and has testified before the Ohio General Assembly on reforms of the Ohio Dental Practice Act. He also lectures to the Ohio State University College of Dentistry, as well as dental student organizations and local dental societies.

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