

BORIM's Enforcement Division: An introduction to the team and an overview of how complaints are investigated and resolved.



MAMSS Conference
October 18, 2024

Agenda

- **Overview of the Board, its committees, and internal staff**
- **Complaints: Where do they come from and what types of allegations does the Board have the authority to address?**
- **Investigations: What happens once a team is assigned to investigate a complaint or a statutory report?**
- **What materials are available to physicians and others during an investigation?**
- **Potential Dispositions: What are the possible outcomes and disciplinary sanctions?**

Who is on the Board ?

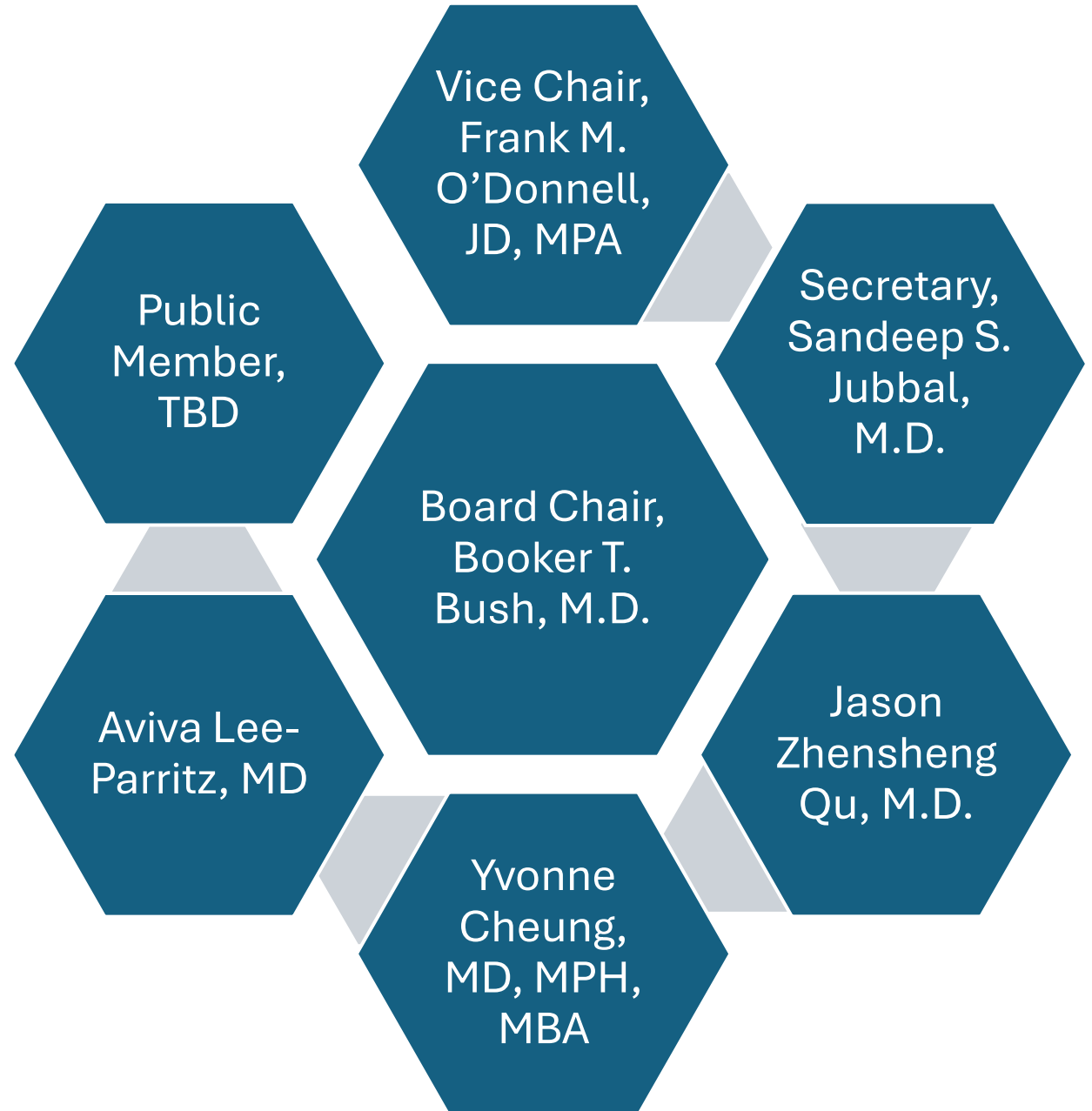
The Board is made up of seven volunteer members:

- five physicians
- two public members

Members are appointed by the governor for three-year terms.

Members may serve on one or more committees.

Members may only serve two full consecutive terms; but they may serve as holdovers until a replacement is appointed.



Board Committees



- **Complaint Committee:** The Complaint Committee is comprised of two Board members who meet twice a month to review the evidence gathered by the Enforcement Division in all investigations. If the Complaint Committee determines disciplinary action is appropriate, it makes recommendations to the full Board regarding the type of sanction that could be imposed. When the evidence is insufficient to support disciplinary action, the Complaint Committee has the authority to close the investigation.
- **Licensing Committee:** Reviews license applications and makes recommendations to the Board in situations where issues are raised regarding the applicant's ability to meet the statutory requirements for licensure.
- **QPSD Committee:** Works with healthcare facilities to improve patient safety processes and strengthen medical quality assurance programs.
- **Committee on Acupuncture:** Reviews all complaints filed against acupuncturists and works with the Board to regulate the practice of acupuncture.

Internal Divisions of the Board



Enforcement

Investigates all complaints of physician misconduct and incompetence

Represents the Board at hearings.



Law and Policy

Drafts and presents policies for the full Board

Data Repository Unit

Physician Health



Licensing

Processes initial and renewal license applications

Affiliation Verifications



Operations

Call Center

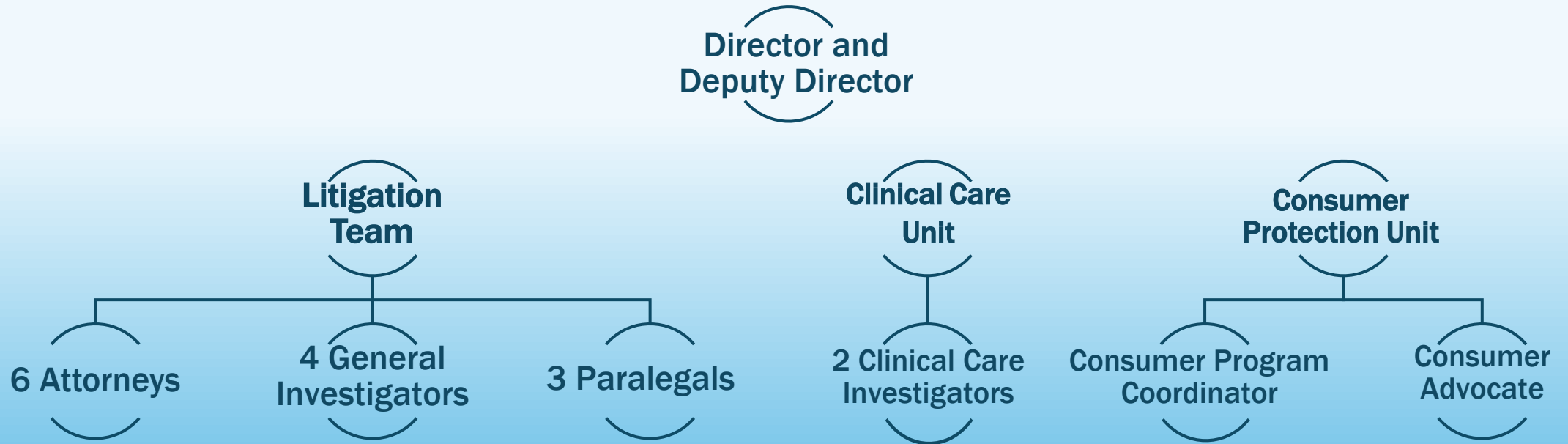
Physician Profiles



Quality and Patient Safety

Safety and Quality Review Reports

Enforcement Division



Who does the Board receive complaints from?



- Patients and their families
- Statutory reports from healthcare facilities and peers referred by the Board's Data Repository Unit
- Self-reports referred by the Board's Licensing Division
- Other Government agencies
- Anonymous
- BORIM Initiated

Statutory Reports

- “Disciplinary action” reports by health care facilities (M.G.L. c.111, §§ 53B and 203, 243 CMR 2.07 (17) and 3.13);
- “Disciplinary action” reports by professional medical associations or organizations (M.G.L. c. 112, §5B);
- Allegations of physician misconduct by health care providers, referred to as “peer reports” (M.G.L. c. 112, §5F);
- Allegations of physician misconduct by government agencies and other governmental entities (including their officers or employees) who have oversight of medical or health services (M.G.L. c. 112, §5D);
- “Closed claim” reports by medical malpractice insurers (M.G.L. c. 112, §5C);
- Court reports of medical malpractice matters (M.G.L. c. 231, §60B); and
- Court reports of criminal convictions (M.G.L. c. 221, §26).

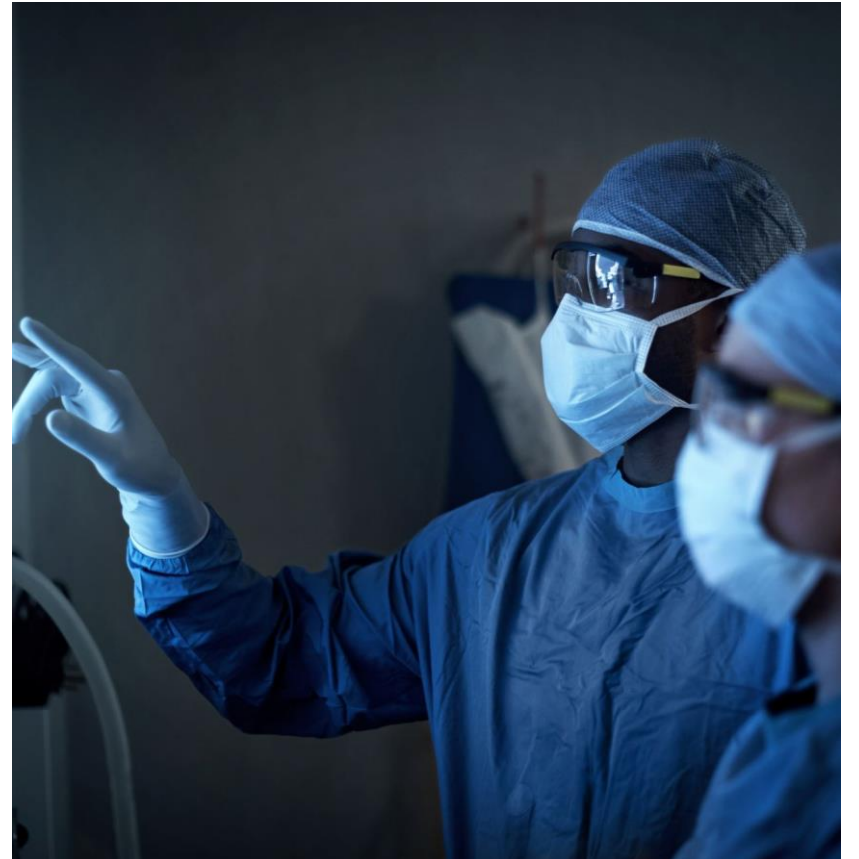
Healthcare Facility Report



- There are 3 types of HCFD reports and the form used depends on the reason for filing.
- All HCFD reports are time sensitive, e.g., HCFD-1 must be filed no later than 30 days after the date the disciplinary action was imposed, even if the physician is appealing the decision.
- Reports are filed with the Board's Data Repository Unit and can be emailed to borim.statutory.reports@mass.org
- Examples:
 - physician has their privileges revoked or suspended
 - disruptive behavior that impacts patient care including refusing to work with other staff members that results in a delay of treatment etc.

Peer Reports (M.G.L. 112, §5F)

- A physician or other healthcare provider must file a report (5F) with the Board when he or she has a reasonable basis to believe that a physician is in violation of M.G.L. c. 112, §5, or any of the Board's regulations.
- If a report is filed in good faith, state law protects the reporter from discrimination/retaliation by an employer.
- 5F reports should be filed with the Board's Data Repository Unit at:
Borim_DataRepositoryUnit@mass.gov



Examples of Conduct That Needs to be Reported

Prescription violations

Substandard care

Sexual misconduct/ other boundary violations

Practicing while impaired

- Exception for physicians who have entered into a board approved mental health, drug or alcohol program after an incident of practicing medicine while impaired.
- To qualify for an exception:
 - 1.No other violations of Board law is alleged;
 - 2.No allegation of patient harm is involved;
 - 3.The reporter obtains direct confirmation within 30 days of forming belief that the physician is practicing while impaired, from a Board-approved mental health, drug or alcohol program the physician is in compliance with the program.

What types of allegations does the Board investigate?

G.L. c. 112, §5; 243 CMR 1.03(5)

Conduct which places into question a physician's competence to practice medicine (gross negligence, repeated instances of negligence, practice outside the authorized scope, fraudulent practice, gross misconduct) (3)

Practicing medicine while impaired (drugs, alcohol, medical or mental instability) (4)

Knowingly permitting, aiding/abetting unlicensed practice of medicine (6)

Conviction of any crime; (7)

Continuing to practice while your license is lapsed, suspended or revoked; (8)

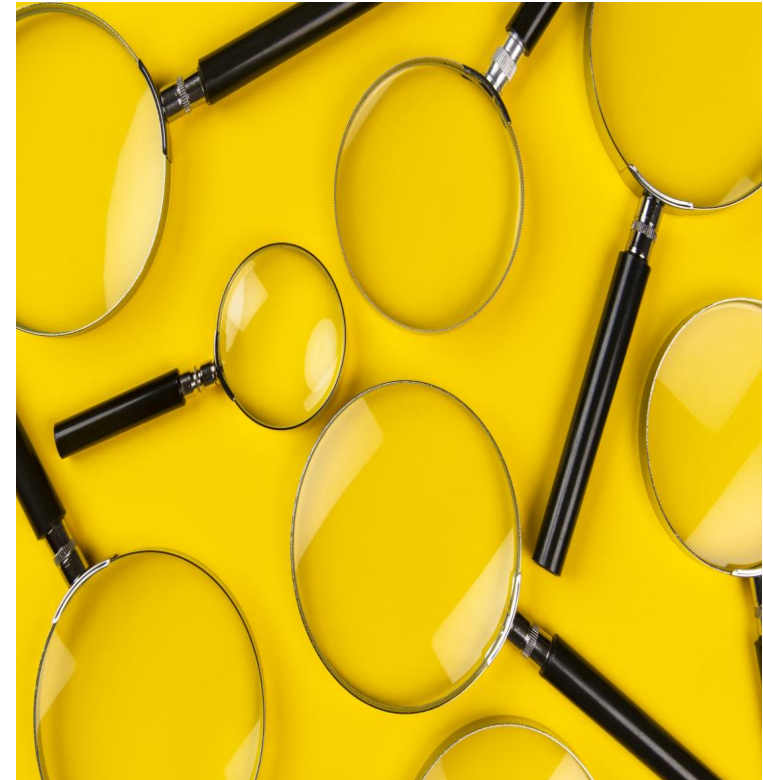
Practicing medicine deceitfully/ engaging in conduct which has capacity to deceive (10)

Violation of any rule or regulation of the Board (11).



Types of Misconduct Continued

- Having been disciplined in another jurisdiction for reasons substantially the same as those set forth in 112, § 5
- Failure to report to the Board, within the time period provided by law or regulation disciplinary action taken by another licensing jurisdiction, any health care institution, any professional or medical society or association, by any government agency, by any law enforcement agency or courts for acts or conduct that are substantially the same as conduct that would constitute grounds for a complaint
- Failure to respond to a subpoena or to furnish the Board, its investigators or representatives, documents, information or testimony which the Board is legally entitled to receive
- Malpractice as defined in 112, 61
- Misconduct in the practice of medicine
- Conduct that undermines the public confidence in the integrity of the medical profession- Levy v. Board of Registration and Discipline in Medicine 378 Mass. 519 (1979)



What happens when a consumer complaint comes in?

Reviewed by the Consumer Advocate and triaged with Director and/or Deputy Director

If the complaint does not allege a violation of a Board rule or regulation and falls into certain categories, it may be administratively closed

If the complaint does not allege a violation, it may be presented to the Complaint Committee directly without first getting a response.

Administrative Closes

- Billing practices, i.e., the physician does not accept checks (excluding allegations of fraud)
- Conduct of others, i.e., rude front desk staff at group practice or hospital
- Office policies with respect to office hours, appointment availability, wait times and acceptance of new patients provided the limit set on availability of services complies with 243 CMR 2.07(9) and are based on non-discriminatory criteria
- Medical record amendment request, i.e., patient disagrees with diagnosis in their chart and wants it removed
- Isolated instances of poor bedside manner/communication do fall under the Board's jurisdiction but may be closed if it appears the physician would benefit from being provided educational resources to bolster his/her practice in this area.

Docketed CPU Cases

- The complaint is assigned a docket number, and a copy is sent to the physician with a request for a response.
- Physicians are asked to submit a written response within 30 days and have the option of having their response prepared with the assistance of counsel.
- Once the response is reviewed by Enforcement staff, the matter may be presented to the Complaint Committee for review or staff could request additional relevant medical records, assign a litigation team or seek expert review depending on the specific facts and circumstances.



Investigations by Litigation Team

(some consumer complaints and all statutory reports)

Request Documents:

- 1) Credentialing Files
- 2) Relevant Medical Records/ Images
- 3) Patient Portal Communications
- 4) Response from physician under investigation including CV, current scope of practice



Interview Witnesses

- 1) Patient(s) at issue
- 2) Staff with relevant information
- 3) Physician under investigation
- 4) Witnesses with information about related events



Experts:

- 1) Retain an expert in substandard care cases who specializes in the relevant field
- 2) Work with expert to get materials, review the case and draft a report with an opinion on standard of care provided



Presentation:

- 1) Review all materials and relevant regulations
- 2) Draft memo to Complaint Committee with recommendation
- 3) Confer with counsel and/or physician regarding recommendation

Actions that can be taken during investigation

Voluntary Agreement Not to Practice Medicine (VANP)

- If the physician under investigation is unable to practice medicine safely, they may enter into a VANP while the investigation is pending.
 - Reportable but not disciplinary
 - Does not end the case but takes the physician out of practice
 - Example- impairment cases

Summary Suspension: 243 CMR 1.03 (11)

- Physician poses “an *immediate and serious threat* to the public health, safety, or welfare, the Board may suspend physician’s license, pending a final hearing on the merits of the Statement of Allegations. (11)(a).
- Physician “*may be a serious threat* to the public health, safety or welfare,” the Board may order the physician to file opposing affidavits or other evidence within three business days. (11)(b).
- Reportable; disciplinary measure
- Doesn’t end the case but moves it immediately to DALA.

What information is available during the investigation?

- Pursuant to G.L. c. 112, §5,

The board, including but not limited to the data repository and the disciplinary unit, shall keep confidential any complaint, report, record or other information received or kept by the board in connection with an investigation conducted by the board pursuant to this section, or otherwise obtained by or retained in the data repository; provided, however, that, except to the extent that disclosures of records or other information may be restricted as otherwise provided by law, or by the board's regulations, investigative records or information of the board shall not be kept confidential after the board has disposed of the matter under investigation by issuing an order to show cause, by dismissing a complaint or by taking other final action.

What does this mean?

- Physicians under investigation are entitled to know the basis of the allegations. They often receive a copy of the complaint (not statutory reports) and are asked to respond.
- The complaint and/or report are not subject to disclosure via public records requests or credentialing requests during the investigation.
- The physician's response is not subject to disclosure via public records request or credentialing requests during the investigation.
- None of the investigative materials are available to the patients, complainants, physicians under investigation or members of the public.
- "Any employee of the board who is found to be in violation of the confidentiality provisions of this section or any other confidentiality law or regulation which is applicable to the board shall be subject to a fine of not more than five hundred dollars. Said fine shall be assessed and collected by said board."

What is available after the case is resolved?

- It depends on a number of factors including the requestor's status, i.e., patient involved, member of public etc.
- All requests for information should go through the Division of Law & Policy: <https://www.mass.gov/forms/submit-a-board-of-registration-in-medicine-public-records-request>
- The Enforcement Division investigates and prosecutes complaints but does not provide documents in response to requests.

Initial Review by the Complaint Committee

- **When does the Committee meet:** Complaint Committee meets generally every other Thursday at 9:00 am before the Board meeting. The meetings are currently being conducted remotely pursuant to G.L. c. 112, §65C.
- **Who is present:** Two Board members who serve on the Committee; Director and/or Deputy Director of Enforcement; Paralegal from Enforcement; and Counsel to the Committee (from Division of Law & Policy).
 - The Committee may invite physicians to appear to answer questions or provide information.
 - Physicians are not entitled to an appearance at this early stage.
 - If the physician is invited to attend, the litigation team assigned to the case is also present.
 - The meeting is not open to the public, including patients, physician's family members etc.
- **What happens at the meeting:** In cases where an investigation is at or near its conclusion, the Committee reviews all the information available and can do any of the following:
 - Close the matter
 - Close the matter with a letter of comment
 - Defer the matter until completion of classes or an evaluation
 - Request the physician appear for a conference or the litigation team take some additional step, i.e. obtain a particular set of records.
 - Provide a preliminary recommendation on disposition that has to be reviewed and approved by the full Board
 - Refer the matter to the full board for further consideration

Potential Dispositions

Complaint is administratively closed, and the complainant and physician named in the complaint are notified in writing.

Complaint is closed with no action taken by the Board (often at the Complaint Committee stage)

Complaint is closed with a letter of comment (often at the Complaint Committee stage)

Complaint is deferred pending completion of CMEs or an evaluation, i.e. PHS evaluation.

Examples:

- 1) Allegations in complaint focuses on rude front desk staff person at a group practice (admin close).
- 2) Allegations of substandard care are not supported after expert review (closed no action).
- 3) Allegations the physician was late in producing medical records (closed with a comment).

Potential Dispositions (continued)

Physician resigns while under investigation

Board issues a Statement of Allegations and accepts a Consent Order

Board issues a Statement of Allegations and refers the matter for an adjudicatory hearing and later issues a Final Decision & Order

Examples:

- 1) Physician submits resignation before any action is taken; matter is then closed but resignation is reported/ treated as disciplinary and is final (no appeal).
- 2) Physician agrees to a reprimand for disruptive behavior.
- 3) Physician disputes allegations he was negligent during surgery and his case is referred for a hearing.

Adjudicatory Hearings

- Cases where the Board has issued a Statement of Allegations and the physician has declined to enter into a Consent Order are sent to the Division of Administrative Law Appeals (DALA) for a hearing pursuant to G.L. c. 30A.
- DALA assigns a magistrate who is responsible for making findings of fact and conclusions of law only (they do not decide sanction).
- The Board is represented by Enforcement staff who have the burden of proving the allegations by a preponderance of the evidence (51%)
- Witnesses including staff members may be called (remote or in person depending on case) to testify regarding treatment and care.
- At the end of the hearing the magistrate issues a Recommended Decision which is returned to the Board.

Disciplinary Sanctions

-Imposed by the Board as part of a Consent Order or as a Final Decision & Order following a hearing.

- Made public and available for review on the Board's website.

Fines (up to \$10,000 per violation);

Community service (up to 100 hours per violation in a manner determined by the Board)

Admonishment

Reprimand

Suspension

Indefinite suspension w/ Probation Agreement

Practice Restriction

Revocation

Questions?



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