

FLORIDA DEPARTMENT OF HEALTH
DISCIPLINARY ACTIONS

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FLORIDA HOSPITAL
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SCOPE OF SEMINAR

It is probably safe to say that most physicians' greatest fear is the threat of a medical malpractice lawsuit against them. However, many physicians fail to recognize that a complaint against their medical license can have far more reaching implications than an ordinary civil claim. This seminar is intended to provide osteopathic residents and medical students with an introductory look into the disciplinary process used by the Florida Department of Health, how to defend such a complaint, and many of the future implications that a complaint against your license may have. Please be aware, this lecture and the information submitted with it applies to Florida only. Every state has its own rules and regulations, which may differ significantly from the information offered herein.

OBJECTIVES OF SEMINAR

At the conclusion of this presentation, the participant will:

- (1) Understand the disciplinary process used by the Florida Department of Health when investigating and prosecuting a licensure complaint;
- (2) Be aware of the discipline the Department of Health may impose against a physician along with the future implications that such discipline may create; and
- (3) Ultimately, understand how best to defend yourself against such a licensure complaint.

WHAT IS THE FLORIDA DEPARTMENT OF HEALTH?

The Florida Department of Health ("DOH" herein) is the state agency charged with "regulating healthcare practitioners, to the extent authorized by the Legislature, as necessary for the preservation of the health, safety, and welfare of the public." Most health care professions are regulated by boards whose members are appointed by the governor. These boards make rules regarding the practice and regulation of their profession, make decisions on applications for licensure, and make determinations in disciplinary cases.

HOW IS A COMPLAINT FILED?

Unfortunately, DOH Complaints are common and may originate from a variety of sources. Disgruntled patients or family members may write the DOH, coworkers or competitors may make reports, or a complaint may be brought by another state agency. The DOH is required to investigate any filed complaint so long as it is writing and contains facts that show a violation of the laws governing osteopathic physicians. Moreover, anonymous complaints or complaints filed by a confidential informant may be investigated if the alleged violation is substantial and the DOH, after preliminary inquiry, has reason to believe the complaint is true. Furthermore, the DOH may initiate investigations, even without a complaint, if the agency has reasonable cause to believe that a physician has violated applicable statutes or rules.

THE INVESTIGATION

In most instances, the physician will be notified of the initiation of an investigation by a letter from the DOH that includes a copy of the complaint which caused the investigation. The letter is generally sent certified mail and delivered to the physician's address listed on file with the DOH. The notification letter generally introduces the DOH investigator and invites the physician to submit a written response in response to the complaint. **DO NOT SUBMIT A RESPONSE OR SPEAK TO THE INVESTIGATOR WITHOUT SEEKING LEGAL ADVICE FIRST!** Any statement you make will become part of the investigation and will likely be used against you. A physician is not required provide a response to the investigation and is not required to submit to an interview.

In addition to information received from the physician and complainant. The DOH investigator has subpoena authority and may obtain information which might otherwise be confidential. For example, the investigator may subpoena patient or personnel files. Furthermore, the investigator may interview others involved in the care at issue. The investigation may last for many months, especially in complex cases. Once the investigation is complete, the investigator will prepare a detailed report, which will be forwarded to a prosecuting attorney.

THE PROBABLE CAUSE PANEL

The Probable Cause Panel (PCP) is a subcommittee of the Board of Osteopathic Medicine. It consists of two two or three members of the Board. The PCP will review the investigation and any additional material that you have submitted. It will determine whether there is probable cause to believe that the physician has violated any Florida statutes or rules and whether or not disciplinary action is warranted. It will take a majority vote of the PCP to find probable cause.

If there is a finding of no probable cause, the case will be dismissed and the file is sealed. The contents of the file cannot be revealed or disclosed and the matter will remain confidential. However, if the PCP finds that there is probable cause, formal legal charges against the physician are prepared. This formal charge sheet is called an "Administrative Complaint."

THE ADMINISTRATIVE COMPLAINT

A DOH Administrative Complaint resembles a lawsuit in a civil case. It will outline the separate counts or charges upon which the DOH will prosecute the physician. The administrative complaint will usually be accompanied by an election of rights form which will give the physician three options:

- (1) A physician can decline disputing any material facts or allegations and attend an informal hearing, where only mitigating evidence can be presented to the Board;
- (2) A physician can choose to not dispute the allegations in the administrative complaint and waive his or her rights to be heard; or
- (3) A physician can choose to dispute the allegations and request a formal administrative hearing before an Administrative Law Judge.

INFORMAL HEARINGS

Many health professionals believe that since it is called an "informal" hearing, there will be less technical procedure, fewer legal technicalities, and that they will be able to argue the merits of their case before their peers, their professional colleagues, who will surely understand, and will give them a fairer hearing than they could get from a formal hearing in front of an administrative law judge. **NOTHING COULD BE FURTHER FROM THE TRUTH.**

In order to obtain an informal hearing, the person requesting it must state that there are no issues of material fact to be determined. What this means is that you agree with all of the facts and conclusions stated by the DOH. In a licensing case or disciplinary case, you are agreeing that everything stated in the administrative complaint is true and accurate.

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What this means is that you are, in effect, pleading guilty. At an informal hearing, you are not allowed to introduce evidence showing you are innocent of the charges. You are not allowed to argue you are not guilty. The only issue at an informal hearing is the amount of discipline you will receive.

FORMAL ADMINISTRATIVE HEARINGS

If you elected to dispute the allegations, the case will be forwarded to the Division of Administrative Hearings ("DOAH") for the appointment of an administrative law judge to try the issues which are framed by the administrative complaint. DOAH is a state agency that employs full-time administrative law judges (ALJs) to conduct hearings in most cases which the substantial interests of a person are determined by an agency and which involve a disputed issue of material fact. When a state agency proposes to take some action that is adverse to a person, the affected person is normally entitled to request an administrative hearing to determine the matter.

A formal administrative hearing is similar to a civil trial without a jury. You will be able to call witnesses and present evidence. The ALJ will listen to the legal arguments from both sides and then prepare a written decision called a recommended order. This recommended order will then be submitted to the Board of Osteopathic Medicine where a written final order will be entered which typically adopts the findings, conclusions and recommendations of the ALJ. This final order may be appealed.

COLLATERAL EFFECTS OF DISCIPLINE ON YOUR MEDICAL LICENSE

1. A case involving an arrest or a conviction involving alcohol abuse (DUI/public Intoxication) or drugs (possession, diversion, theft, trafficking) will probably result in an emergency suspension order (ESO) until the entire licensure case is complete.
2. Physician may be required to be evaluated and probably enrolled in the Professionals Resource Network (PRN), which is usually at least a five year contract.
3. Action to revoke, suspend or take other action against the physician's clinical privileges and medical staff membership in hospitals, ambulatory surgical centers, skilled nursing facilities, or staff model HMOs or clinics.
4. Mandatory report to the National Practitioner Data Base (NPDB) (Note: Healthcare Integrity and Protection Data Bank or HIPDB recently folded into NPDB) which remains there for 50 years.
5. Must be reported to and included in the physician's DOH profile that is available to the public online, and remains for at least ten years.

6. Any other states or jurisdictions in which the physician has a license will also initiate action against him or her in that jurisdiction. (Note: I have had two clients who had licenses in seven other states).

7. The OIG of HHS will take action to exclude the physician from the Medicare Program. If this occurs (and most of these offenses require mandatory exclusion) the physician will be placed on the List of Excluded Individuals and Entities (LEIE) maintained by the HHS OIG.

8. If the above occurs, the physician is also automatically "debarred" or prohibited from participating in any capacity in any federal contracting and is placed on the U.S. General Services Administration's (GSA's) debarment list.

9. The U.S. Drug Enforcement Administration (DEA) will act to revoke the physician's DEA registration if he or she has one.

10. Third party payors (health insurance companies, HMOs, etc.) will terminate the physician's contract or panel membership with that organization.

11. Any profile maintained by a national organization or federation (e.g., American Medical Association physician profile) will include the conviction.

THE 25 BIGGEST MISTAKES PHYSICIANS MAKE AFTER BEING NOTIFIED OF A DEPARTMENT OF HEALTH INVESTIGATION

These are the 25 biggest mistakes we see in the physician cases we are called upon to defend after a DOH investigation has been initiated:

1. Failing to keep a current, valid address on file with the DOH (as required by law), which may seriously delay the receipt of the Uniform Complaint (notice of investigation), letters, and other important correspondence related to the investigation.
2. Contacting the DOH investigator and providing him/her an oral statement or oral interview. (Note: There is no legal requirement to do this.)
3. Making a written statement in response to the "invitation" extended by the DOH investigator to do so. (Note: There is no legal requirement to do this.)
4. Failing to carefully review the complaint to make sure it has been sent to the correct physician (Note: Check name and license number).

5. Failing to ascertain whether or not the investigation is on the "Fast Track" which may then result in an emergency suspension order (ESO) suspending the physician's license until all proceedings are concluded. (Note: This will usually be the case if there are allegations regarding drug abuse, alcohol abuse, sexual contact with a patient, mental health issues, or failure to comply with PRN instructions.)
6. Providing a copy of the physician's curriculum vitae (CV) or resume to the investigator because the investigator requested them to do so. (Note: There is no legal requirement to do this.)
7. Believing that if they "just explain it," the investigation will be closed and the case dropped.
8. Failing to submit a timely objection to a DOH subpoena when there are valid grounds to do so.
9. Failing to forward a complete copy of the patient medical record when subpoenaed by the DOH investigator as part of the investigation, when no objection is going to be filed.
10. Delegating the task of providing a complete copy of the patient medical record to office staff, resulting in an incomplete or partial copy being provided.
11. Failing to keep an exact copy of any medical records, documents, letters or statements provided to the investigator.
12. Believing that the investigator has knowledge or experience in hospital procedures, medical procedures or the health care matters or procedures being investigated.
13. Believing that the investigator is merely attempting to ascertain the truth of the matter and this will result in the matter being dismissed.
14. Failing to check to see if their medical malpractice insurance carrier will pay the legal fees to defend them in this investigation.
15. Talking to DOH investigators, staff or attorneys, in the mistaken belief that they are capable of doing so without providing information that can and will be used against them.
16. Believing that because they haven't heard anything for six months or more the matter has "gone away." The matter does not ever just go away.

17. Failing to submit a written request to the investigator at the beginning of the investigation for a copy of the complete investigation report and file and then following up with additional requests until it is received.
18. Failing to wisely use the time while the investigation is proceeding to interview witnesses, obtain witness statements, conduct research, obtain experts, and perform other tasks that may assist defending the case.
19. Failing to exercise the right of submitting documents, statements, and expert opinions to rebut the findings made in the investigation report before the case is submitted to the Probable Cause Panel of your licensing board for a decision.
20. Taking legal advice from their colleagues regarding what they should do (or not do) in defending themselves in the investigation.
21. Retaining "consultants" or other non-lawyer personnel to represent them.
22. Believing that the case is indefensible so there is no reason to even try to have it dismissed by the Probable Cause Panel.
23. Attempting to defend themselves.
24. Believing that because they know someone on the Board of Medicine, with the Department of Health or a state legislator, that influence can be exerted to have the case dismissed.
25. Failing to immediately retain the services of a health care attorney who is experienced in such matters to represent them, to communicate with the DOH investigator for them, and to prepare and submit materials to the Probable Cause Panel.

DISCLAIMER

This outline and the information it contains is for educational and informational purposes, to promote discussion and analysis. It is not legal advice. Every case and set of circumstances is different. You should always consult extensively with your own personal attorney and follow his or her advice. This outline and information cannot be used against its authors and clients.

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