Shifting trends and new laws cause rise in medical board actions against physicians

According to the Federation of State Medical Boards (FSMB), disciplinary actions against physicians have risen 6.8% nationwide. The number of prejudicial actions (including license suspensions, revocations, and probations) rose 4.1%, from 4,798 in 2010 to 4,996 in 2011, while nonprejudicial actions (such as letters of reprimand) rose 21.5%, from 854 to 1,038, during the same period. What's behind this trend and how does it affect the practice environment for physicians?

Disciplinary actions on the rise

Humayun Chaudhry, DO, CEO of the FSMB, says that the trend can't be traced back to a single influence. "The trend has been going on for about a decade; overall actions by boards are up since 2002. It is not one factor or set of factors that contributes to the upward trend. There are systemic improvements that have been made."

For example, some states have received more funding and resources, and are thus better able to investigate complaints. Some states have passed legislation giving the medical boards greater authority to take action. There's also better communication between state medical boards, which helps prevent physicians whose licenses are revoked in one state from setting up shop in another. The FSMB's Disciplinary Alert Service proactively alerts all states in which a disciplined physician is licensed within 24 hours of a state taking a disciplinary action and reporting it to the FSMB.

The FSMB has been working to improve the flow of information from health care entities such as hospitals, criminal courts, and medical malpractice insurance providers to state medical boards, which can lead to an increase in disciplinary actions taken. For years, the reporting of actions taken by some hospitals to state medical boards has been inconsistent. During the last two years, the FSMB and the federal National Practitioner Data Bank (NPDB) have successfully collaborated on several pilot projects to facilitate more consistent reporting by hospitals of sanctions they've taken to state medical boards.

Another trend that has resulted in an increase in board actions is boards' use of preponderance of the evidence, rather than clear and convincing or beyond a reasonable doubt, as a burden of proof. Preponderance of the evidence allows decision-makers to weigh the details of the evidence rather than the amount, while beyond a reasonable doubt requires enough evidence to erase any doubt about the alleged wrongdoing. "Beyond a reasonable doubt is much harder to enforce, and we find that the boards are more effective using preponderance of the evidence. That is an example of a rule change that allows boards to better protect the public," says Chaudhry.

The drug connection

In Florida, state laws that crack down on physicians who overprescribe opioid medications are enforced by the medical board. Thus, the Florida Medical Board has seen an increase in actions against physicians from 215 in 2010 to 332 in 2011, according to FSMB statistics. Texas has also implemented laws that require the certification and regulation of pain clinics, which led to a 90.6% increase in board actions, from 371 in 2007 to 707 in 2011.

According to **George F. Indest III,** president and managing partner at The Health Law Firm in Altamonte Springs, Fla., the state medical board's quest to take action against physicians who inappropriately prescribe opioids may not actually be targeting the right individuals. Many non-licensed individuals open and operate pain management clinics and prey on physicians who are unfamiliar with the state's laws. Thus, when the illegal pain management clinic is uncovered, the physician gets in trouble, while the real criminal sneaks away unscathed.

"I believe much more must be done to identify and prosecute the unlicensed individuals who are operating

these clinics and profiting from them, rather than just targeting the physicians," Indest says.

Although the intent of Florida's legislature is to stop inappropriate prescribing of controlled drugs, a consequence is that it leaves patients with legitimate need for these drugs, and the physicians who treat them, in a bind.

"I have been contacted by many patients with serious, debilitating, chronic pain problems from back injuries and other accidents who are unable to find a physician to treat them for pain. I have also read a number of articles and blogs by physicians claiming that such selective prosecution of physicians is leading to a severe shortage of physicians willing to treat pain management patients, having a chilling effect on doctors," says Indest.

The good, the bad, and the ugly

The increase in board actions is a good thing and a bad thing. It's a good thing because more disciplinary actions mean that incompetent or unethical physicians will be removed from the field. "Practicing physicians, as well as organizations that represent practicing physicians, appreciate the fact that state medical boards practice due diligence and do an effective job of protecting the public. They make sure that only those who are competent to practice medicine are practicing," says Chaudhry.

But it's a bad thing because medical boards don't want to take actions against physicians; they take action when necessary, but it is only part of what they do. "The goal of medical boards is not to take licenses away," says Chaudhry. "The state boards would prefer not to see any board actions but do so when necessary to protect the public." Boards would rather spend time proactively teaching physicians about issues, such as appropriate opioid prescribing patterns, than revoking a physician's license for allegedly running a "pill mill."

This can get ugly when physicians feel persecuted or afraid to practice because of rigid state laws or a seemingly overzealous medical board. For example, physicians in Florida aren't exactly getting warm fuzzy feelings from actions such as the pill mill crackdown, Amendment 7 (which makes peer review documentation discoverable to the public), and the Three Strikes Rule (which automatically revokes a physician's license after three malpractice findings). In fact, many have relocated to other states, particularly those in high-risk specialties such as OB-GYN.

"There are both good and bad consequences. If you're worried that a doctor is a criminal and is practicing medicine, this prevents that from happening. On the other hand, if you have a shortage of physicians like Florida does, then this could contribute to the shortage," Indest says. "Increased regulatory, licensing, treatment, and documentation requirements, as well as disciplinary actions, increase the administrative burden for physicians and increase their cost of doing business."

In addition, certain laws in Florida have removed the medical board's discretion to tailor discipline to the facts of the case and the physician involved. Similarly, Maryland previously decided cases on an individual basis, but a recent overhaul of its medical board has established new protocols that guide the penalties for various infractions, according to a June 4 AMedNews.com article, "Medical boards get more tools to investigate physicians."

"When the legislature enacts laws that take away the board's discretion to tailor the discipline to the facts of the case and the physician before it, one must become concerned about violating constitutional due process rights," Indest says.

When state laws increase board actions but limit the board's authority, the state appears unfriendly toward physicians—and the physicians are more likely to request formal contested hearings on cases, thus driving up the costs of enforcement for the state and the costs for physicians and their insurers to defend themselves, Indest explains.

The long and the short of it is that an increased number of board actions doesn't necessarily indicate that one board is doing a better job than another. The political climate in the state; statutes, laws, and regulations; limits on the board's authority; and other factors contribute to the number of board actions. So, as some extol medical boards for stepping it up, and public advocacy groups claim that boards aren't doing enough, it's important to weigh all the factors and do the math. ■