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The Florida Board of Medicine

Part I: An Introduction for the Physician

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Most physicians in practice today have limited knowledge of the Florida Board of Medicine's responsibilities or the potential impact the Board could have on their professional lives. Little, if any, formal education occurs during medical school or other graduate medical training programs on the statutes and regulations that govern the practice of medicine. Unfortunately, it is often only after a notice is received from the Board of Medicine that a complaint has been lodged that physicians become aware of these laws. Once a complaint is filed, physicians must undergo the formal disciplinary process, which can result in multiple years of legal expenses, professional evaluations, fines, travel and time away from their practice. Board actions may be reported to healthcare facilities where the physician has privileges, insurance companies and third party payers to which they are contracted, professional societies to which they belong, current and future employers, and to any other US jurisdiction where they may be licensed to practice, potentially further amplifying the initial fines, legal costs, and regulatory discipline imposed.

It is too common that physicians do not know what they do not know. Never a good situation in healthcare, and certainly not in the area of healthcare regulatory law.

This article is a general review of this experience.

While the Board of Medicine regulates many types of healthcare providers, this article is focused solely on physicians. It is presented in three parts. The first is a brief review of the Florida Board of Medicine; the members and staff, its responsibilities and common types of actions. The second part presents examples of the Florida Statutes which regulate the practice of medicine and form the basis of the prosecutorial action by the Department of Health. As such, it is not a complete review of Florida Statutes, rather it is a selection representative of cases commonly brought before the Board of Medicine. The third part presents examples of some of the actual violations brought before the Board of Medicine. I am optimistic that these examples will provide a basic education to the general provider so that hopefully there is less that physicians do not know when it relates to medical practice regulations.

Part I: An Introduction for the Physician

The Florida Board of Medicine (BOM) is an entity within the Division of Medical Quality Assurance within the Florida Department of Health (DOH). It is composed of 12 physicians and three non-physician consumer advocates, appointed by the governor and confirmed by the state Senate, who volunteer their time for terms of up to 4 years. The BOM is supported by a



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dedicated staff and works with DOH prosecutors. Legal input is provided by senior attorneys from the Attorney General's Office.

The BOM is responsible for overseeing the behavior of allopathic physicians (MDs)¹, physician assistants, anesthesiology assistants, dietitians, nutritionists and electrologists. The BOM is charged with protecting the health, safety and welfare of the people of Florida, through licensing, disciplining, monitoring, educating and, if needed, rehabilitating practitioners. Additionally, BOM duties include the promulgation and application of relevant rules of the Florida Administrative Code. These rules often include the implementation of Standards of Care. Recent examples include developing the medical marijuana informed consent, accreditation and registration of office-based surgery and chronic pain clinics, and telemedicine rules.

Committees of the Board of Medicine

The full BOM is supported by several standing committees which operate as a normal process of the business of the Board. These include: Credentials, Probation, Rules and Legislative, Surgical Care and Quality Assurance, Council on Physician Assistants, Anesthesiologist Assistant, Finance & Process Accountability, Medical Marijuana, and the Physician Certification Pattern Review Panel. A full review of all of these committees is out of the scope of this article, however, a brief description of the Credentials and Probation committees is provided as these are the two committees a physician is most likely to interact with should they have business before the BOM. Additional information can be found at the Board of Medicine Website: <https://flboardofmedicine.gov>.

1. The Florida Board of Osteopathic Medicine oversees osteopathic physicians in a manner analogous to the Florida Board of Medicine and allopathic physicians.

Physicians applying for a Florida Medical License must satisfy requirements provided by Florida statute relating to prior testing, post graduate training, clinical experience, health and criminal histories, and actions by other jurisdictions. Approximately 90% of applicants successfully meet these requirements and their licenses are processed directly by the DOH. The remaining 10% (approximately 600 in 2019) lack certain statutory information, or otherwise contain histories precluding the administrative issuance of a license. These are brought to the Credentials Committee for further review and are individually considered for licensure. Often, applicants are asked to attend the meeting to present their case and to address questions by Committee members. Applicants before the Credentials Committee may be granted an unrestricted license, a license with conditions (supervision, training, testing, evaluations), or denied licensure.

Licensed physicians who are disciplined may be required to appear before the Probation Committee for formal assessment that discipline has been successfully completed. Discipline ordered by the BOM can include various obligations for the physician to fulfill, usually within a set time limit. Once all imposed discipline is satisfied, the Probation Committee makes a formal recommendation to the full Board for modification, termination, or other actions relating to the prior ordered discipline.

The Path to the Board of Medicine

Formal complaints are mostly generated by patients, their families, peers, healthcare facilities, attorneys, and other jurisdictions where physicians are licensed to practice medicine. These are initially reviewed by various units in the DOH, often starting with the Consumer Services Unit to which the claim is reported. The Investigative Services Unit then interacts with police, federal authorities, other witnesses, and complainants to





gather additional facts. The file is then passed on to the Prosecution Services Unit composed by DOH attorneys who evaluate the complaint with regards to possible violations of Florida Statutes. Complaints passing this scrutiny are escalated to the Probable Cause Panel.

The Probable Cause Panel

The Probable Cause Panel (PCP) is the last step in the process before the complaint goes to the full BOM. The PCP is composed of at least one current, one past, and one non-physician consumer member of the BOM. Several times a year, the PCP members review cases being considered, then meet via telephone conference to hear these cases, many of which are presented by DOH prosecutors. If it is concluded that probable cause does not exist, the complaint is dismissed, sometimes accompanied by a Letter of Guidance to the physician (this is not considered disciplinary action). If dismissed, the regulatory process to this point remains confidential. If probable cause is found, the DOH files a formal Administrative Complaint based on the alleged violations, and it is escalated to the full BOM for action.

Not every action will result in a complaint, and not every complaint will rise through the process to the level of the Board of Medicine.

Complaints at the Level of the Full Board of Medicine

Proceedings at the level of the full BOM are similar to court proceedings. The physician (now known as the respondent) may represent their case on their own (pro se) or may engage the services of an attorney. Respondents have been represented by their personal, corporate, civil, defense, and other legal advisors, but often are best served by engaging the legal services of an attorney well

versed in healthcare regulatory law, with experience representing physicians in front of the BOM.

By the time an Administrative Complaint is presented to the BOM, it has been reviewed by DOH prosecutors, and, depending on the specifics of the action, prosecutors have had prior extensive communications with respondent's team.

All parties are sworn in by the court reporter, and all testimony is provided under oath. Respondents may have witnesses present to support their defense. All hearings before the full BOM are open to the public, and transcripts are made available in accordance with Florida Sunshine Laws.

Department of Health Prosecutors

The attorneys from the Prosecution Services Unit are responsible for providing legal services such as recommending actions including, but not limited to, Emergency Orders, Expert Reviews, Closing Orders, Administrative Complaints, and representing cases in front of an Administrative Law Judge in the Division of Administrative Hearings. These young professionals are bright, dedicated, and closely interpret Florida Statutes. While they are sensitive and considerate to the defendant physician, they are very serious and committed to their role as prosecutors.

During the BOM hearing, prosecutors will present the facts of the case following which respondent (or respondent's counsel) will have an opportunity to respond. Members of the BOM may question the prosecutors and respondent and/or counsel further, and then the Board votes on what action to take with the case.



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Actions Commonly Addressed by the Board of Medicine

Board actions include probable cause determinations, disciplinary decisions, practice standards, and licensure discipline. The following are selected examples of some of the more common actions brought before the BOM.

Many cases are presented as Settlement Agreements for the BOM's approval. In these situations, discipline has been agreed to by both the prosecutors and the respondent to resolve the case in an administratively efficient matter and is appropriate for the violations alleged in the Administrative Complaint. Both parties hope the BOM approves the joint recommendation. Sometimes the BOM accepts a Settlement Agreement outright, other times it wants to hear directly from the physician prior to deciding. The BOM can also reject or modify a Settlement Agreement, make a counteroffer which the respondent can accept or reject, or reject the agreement and dismiss the Administrative Complaint against the physician. When a Settlement Agreement is rejected, it is because the BOM believes the discipline is too lenient or too harsh.

Hearings Not Involving Disputed Issues of Material Fact involve Administrative Complaints where the respondent does not dispute the facts alleged in the Administrative Complaint, but appears before the BOM to offer legal considerations to support their defense, and to mitigate any penalties. This is presented to the BOM to as an "Informal Hearing."

The Board considers Determination of Waivers in cases where the physician has not responded to the Administrative Complaint within the required time frame and the DOH has been unsuccessful in its attempts to contact the physician. The BOM may find that the physician has

"waived" their right to elect a formal evidentiary hearing and may conduct a hearing not involving disputed issues of material fact in the physician's absence.

Physicians may elect to Voluntarily Relinquish their medical license during an active investigation in lieu of undergoing further disciplinary proceedings. Doing so during an active investigation is considered disciplinary action, is reported to the National Practitioner Data Bank, and carries other serious ramifications. Physicians electing this option often rely on a legal expert.

Physicians previously excluded from participating in any Agency for Health Care Administration program (i.e. Medicaid) may Petition the Board of Medicine for an Exemption. It is the physician's responsibility to provide "clear and convincing evidence that [they] will not pose a danger to the health or safety of healthcare patients or their property." Exemptions granted by the BOM allow the physician to apply to AHCA for reinstatement.

Physicians may file a Petition for Declaratory Statement. This is a formal process in a situation where a petitioner maintains that existing Florida Statutes, rules, or orders may be unclear in a matter specific to their medical practice and are looking for a formal statement of the BOM on this matter. Examples of such petitions include requests to clarify scope of practice, oversight of assistants, and referral practices. Decisions made by the BOM in a Declaratory Statement are restricted to and apply only to the specific petitioner. Final orders are not transferrable, nor can the holdings be extended to other practitioners in similar situations.



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Division of Administrative Hearings

Physicians who disagree with the BOM's final actions have the option of seeking review before an Administrative Law Judge (ALJ) in the Division of Administrative Hearings (DOAH). This provides the physician with an avenue to appeal the findings of the BOM. Petitions are filed by both DOH prosecutors and the physician, evidence is presented, testimony is taken, and a determination, known as a Recommended Order, is made by the ALJ. The ALJ may agree with the DOH or with the physician. The Recommended Order is returned to the BOM for review and determination on whether or not to accept the findings of the ALJ.

Appearing before the Board of Medicine and the Benefit of Legal Counsel

The full BOM agenda typically contains more than 50 items, of which at least 40 are disciplinary cases for review. All cases are reviewed by the BOM and staff prior to the meeting. While the BOM hearing provides an opportunity for a respondent to further support their case and answer questions, too often, physicians want to retell the whole story. Having legal counsel in attendance is of great benefit to help keep the discussion focused; especially important in the limited time each practitioner has before the Board.

Respondents should be intimately knowledgeable about the details of their case, should be professional, respectful, and when appropriate, should readily "own" their past actions and/or behavior which resulted in the initial complaint.

While there is no requirement that physicians have legal representation, proceeding pro se is a decision which should not be considered lightly. The downside of self-representation is exposure to serious career ramifications that legal advice might help minimize or avoid.

Certainly, physicians are brought before the BOM because of behavior inconsistent with the safe and prudent practice of medicine. Outliers exist in any studied population. However, others are brought before the BOM as a result of unfortunate circumstances resulting in "good" physicians getting caught up in the regulatory web. Still, some physicians find themselves entangled because of innocent omissions, lack of regulatory knowledge, or other misunderstandings. Examples of these situations will be presented in Parts II and III of this article.



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Part II: Common Disciplinary Actions



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