

# How to Respond to Unwarranted Medical Board Complaints

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Many physicians have received unfair complaints from medical licensure boards. The problem is sufficiently bad that merely reciting my difficulties here would be redundant and pointless. What I hope to do is to provide constructive guidance to anyone who receives an unjustified complaint from a medical licensure board, how to cope with the dismay and anger, and what to do to defend and fight back.

I am not a lawyer, and not everything I mention here has been done on my behalf with my complaint. I cannot accept any legal responsibility for the consequences of following my recommendations; I merely offer them in good faith. What follows is intended to provide a constructive attitude and to offer suggestions that may or may not meet your exact circumstances. It is possible, actually probable, that further instructions can be developed that greatly improve on my own.

## 1. Plan ahead.

Beware of social support that is conditional on subservience to organized medicine. If you feel pressure to avoid offending or disagreeing because you take pains to maintain the image of a conforming physician, then if something goes wrong with the image you will be trapped. Avoid the trap now. Peer pressure, or a mass exodus of friends from your life when you are attacked by a hospital or by a medical board, can be devastating—unless you have friends and loved ones outside the medical field. Seek out some friends who are not physicians and who do not perceive you simply as a physician; allow yourself to grow and develop and travel spiritually wherever your heart takes you. If your social circle includes only conforming physicians and there is a board complaint, then you have no defense for your self-esteem, however good your defense is legally. Friends outside the medical field can bolster you through your fight and, if necessary, or even if not, can help you find a job outside of medicine. The ultimate defense against a board complaint is a second career that you can begin instantly if you wish. If the medical board cannot threaten your livelihood because you are not dependent on a medical license, then you can walk away from the practice of medicine easily, the board cannot control you, and you win.

If you are unaffiliated with a hospital and in a solo practice, then some of this preparation is unnecessary. The rest of us should take precautions against sham peer review.<sup>1</sup> If you beat the board but acquire a databank report and are thrown out of a hospital, your victory is not worth much.

## 2. When you receive a complaint, don't stop work.

Open it, read it, expect to be disconcerted, and above all keep going. Sure, it will be difficult not to panic and cancel the day's appointments. But it is important to press on. At the end of the workday, you will say to yourself, "I can continue working while this nonsense is going on. And I did." You will not have the mindset of helplessness, which, once set in motion, is difficult to overcome. You will have the mindset of control and of ability to withstand the upcoming events, which fortunately is also difficult to overcome. Remember, there will be some nuisance and expense. There will be no allegation of preventable death or illness, no damages to pay a wronged patient, and no assault on your character by an honorable adversary. It's like a gang of ruffians shouting obscenities and perhaps spraying graffiti on your office window: an awful nuisance and a personal violation, but it's what ruffians do, and their behavior should not be surprising.

## 3. Terminate unnecessary hospital affiliations.

If you are on the medical staff of a hospital, you are bound by bylaws that may put you at legal risk, as by requiring you to report adverse findings uncovered by a medical board investigation. The complaint may be noted by a hostile hospital staff, which can in turn resurrect a long-ignored written promise that you may have made to follow various protocols that are interpreted at the discretion of hospital administrators. If you don't work regularly at a hospital but you have nevertheless promised to follow its bylaws, then the promise remains in effect until you formally say otherwise. An offended board member can ask a hospital administrator to attack you even if you do not work actively at a particular hospital. Bylaws are a setup for sham peer review, which can lead to databank reports or other adverse actions, however effectively you fight the board complaint itself. Be safe. Minimize vulnerability to bylaws until the danger is over. Do not leave yourself vulnerable to hospital-based peer review unless absolutely necessary. After the complaint is closed, and the danger is over, you can re-apply to those hospitals if you wish.

## 4. Do not use an administrative attorney unless you are truly in the wrong.

Administrative attorneys who interact with government officials and boards must do so in ways that foster cooperation

with such officials and boards, and that do not elicit acrimony. To do so, they must sacrifice some potentially aggressive tactics that, if used, would win one case with the licensure board, but weaken their credibility when they attempt to bring subsequent cases to the same board. The board, after all, is likely to use its discretion to impede matters out of retaliation if an administrative attorney has offended the board on a prior case. Conversely, it will tend to use its discretion to facilitate a quick and merciful end to a complaint if the attorney is easy for the board to work with. Such an administrative attorney can be expected to forgo aggressive legal tactics, but work toward a simple conclusion more rapidly than otherwise. This arrangement is ethical only if it is disclosed to the client. Whether it is likely to hurt you or help you depends on the situation. If you are in the wrong, having genuinely violated a law or regulation, it is prudent to expect a punishment; but the punishment is likely to be less severe if an attorney well known to the board and liked by the board uses conciliatory words and gentle legal activity on your behalf.

To the extent that an administrative attorney is needed and legal expense is preventably high, this process is similar to racketeering.

If you are in the right, and you want to fight (and why not?), prefer an attorney who could lose less than 1 percent of his income by antagonizing the medical board, not 50 percent. Get a fighter. If you must pay for five hours of study time so that the attorney learns administrative law well enough to fight for you, pay it. Lack of specific knowledge can be corrected by study (and we all have studied; we know this well). Lack of the right attitude can never be corrected.

#### **5. If you are in the right, prefer a criminal attorney.**

There are several reasons for this seemingly wrong decision. First, you are doing something unexpected, not complying with the expected response of a defendant. A bully can succeed only if his victims behave not only with submissive fear generally, but also predictably. Be unpredictable; let the enemy worry. Second, a criminal attorney will not be dismayed if the licensure board becomes upset; no administrative law work will be lost due to a bad relationship with the board, and some gain in reputation may occur if you have a dramatic win. Third, with the exposure to prison gates and handcuffs and leg irons and lockdowns and rough prison guards, the attorney is likely to develop a demeanor that derives nonverbal cues from obvious stimuli, and will be less responsive to subtle shades of social-interaction language. This blindness to subtle social-interaction language is in your favor. You don't want your attorney to be intimidated into backing down on a demand by a raised eyebrow or a change of a tone of voice. Fourth, the board will not know what your attorney is going to do in response to various forms of harassment and may itself be thereby deterred. A defender of accused murderers is a

plus; such attorneys are very good at locating and exploiting technicalities. If this skill is used on your behalf, you benefit.

#### **6. Prefer an attorney who is often in court.**

Board members can lord it over their defendants at disciplinary board meetings without fear of immediate retaliation. But if they are accountable to a judge, with a stenographer present and findings of fact being ruled on, they must be more careful. Contrive to not be afraid of appearing before a judge. An attorney with a good trial-court manner is favorable for you—and may scare off a hostile board. An appeal after the board decides on your case will worry the board more than it will worry you. Fortunately, it is easy to determine the skill of an attorney in court. Criminal court trials are open to the public. Sit in on a few, and if you like the attitude of a defense attorney, introduce yourself and ask about hiring him to defend you. Have some copies of the complaint and your business cards ready in case an outstanding attorney is identified and is interested, but can spare you only a few seconds right then.

#### **7. Tell your patients what is going on.**

First, if they like you, then they can be fierce allies. If you get too vociferous, then you can be accused of mental instability and your license will be further attacked. If patients act on your behalf, they are not restrained in this way because (unless they are physicians themselves) they have no license to attack. When the Maine board demanded records of 10 of my patients, all 10 refused, and some wrote angry letters to state representatives and senators. The board backed down. Second, you are not only deviating from the expected bully-victim response of whimpering quietly in a corner so as to encourage further mistreatment, but also you are making the obvious business decision that you are better known as someone being harassed by the board than as someone who is presumably not being harassed. If the board discovers that being its enemy is a badge of honor and not a disgrace, its credibility disappears. That's its problem, not yours. My patients generally applaud my attitude and consider the board's complaining about me to be a point in my favor and not evidence of incompetence. Their attitude was a boost to my morale when I badly needed it, and still is.

#### **8. Keep the complaint details posted on your internet site.**

First, as noted above, you show no fear and attack the board's credibility. Second, there is the implicit threat of a class action lawsuit if several defendants against malicious harassment use the internet to find out about each other and can then start to work together. Third, someone else can read the details and intervene on your behalf, without your permission and even

without your knowledge. A message that further information about your complaint will be posted as it becomes available is a friendly statement to the curious public. It is also a stern warning to the board that further harassment will become public knowledge, too.

**9. For vigorous retaliation, consider an offshore internet site.**

Internet pirates have apparently verified that Sweden is a safe haven, immune from repression by the U.S. government.<sup>2</sup> Other nations may be similarly uncooperative with government repression. I have used Port Information Hosting, in Sweden, for years because of its good service, quite apart from any risk of such repression (domaininfo.com, ports.net), for my internet sites. For extra safety, arrange for an offshore attorney to be owner-in-name of the site, so that inquiry as to whom to harass will reach a dead end, both from inquiries about the site's owner, and about the site's hosting location.

**10. Consider having your attorney hire a second attorney.**

If the second attorney works only for the primary attorney and not directly for you, especially if the second attorney does not know who you are, then attorney-client privilege can be harnessed. Your attorney can engage another attorney to act on behalf of an undisclosed client (actually you, but that fact is not disclosed). Attorney II can, for example, be hired to use information that you have posted on your internet site to arrange for a demonstration in front of the medical board building, without your formal knowledge and consent. You will indirectly pay the demonstrators, but Attorney II won't be able to implicate you if a demonstrator is collared by police and tries to explain who arranged the demonstration. Nor can any demonstrators defame you. Similarly, one good thing about the recent economic downturn is that there are numerous closed businesses on city roadways with "For Lease" signs in front of them. Have Attorney II arrange with the appropriate realtors to put signs up that describe the malfeasance of the medical board and give the relevant website information. A frustrated commercial property owner may be willing to accept trivial rent rather than no rent at all, especially if Attorney II makes it clear that the sign will be promptly removed on request if a new tenant is found. If you are lucky, a property owner can be found who is sympathetic to your plight and will not charge you rent.

Using a second attorney requires a no-questions-asked billing arrangement, such that if you are subpoenaed and deposed, you can say you know nothing about Attorney II. Arrange with your attorney that you will get a reconciliation of expenses after the case is ended, not before. If handing out money without knowing why makes you uneasy, have an accountant proofread the expenses through an arrangement

that does not let you demand details. (Otherwise, a court order requiring you to demand details may be a problem.) Two attorneys appear more costly than one, but a strong counterattack may effect a quicker end to the complaint so that the otherwise lengthy process of passing legal notices to and fro will be aborted. Arranging for a quick, not delayed, dismissal of your complaint saves you money.

**11. Create the image of being harassed due to personal jealousy.**

Determine the specialty of the board physician most antagonistic to you (check the minutes of board meetings, if available) or the highest-ranking board physician. Find an unorthodox but scientifically valid theory or treatment approach relevant to that board member's specialty and post it on your website. (With internet searches, this is not difficult to do.) Now the board can be described as opposing you because you have an opinion that challenges authority but that is actually more constructive than what is generally accepted. I was lucky. The Maine board member who most strongly attacked me is an ophthalmologist, and I had a theory of how letter reversals in dyslexia can be partially explained by mistimings in eye muscle movements, which is now on my website.

**12. It is not over until you say it is over.**

When the case is dismissed, have your attorney obtain, through failure to disagree or otherwise, constructive admission that various forms of harassment have taken place. Write to legislators, to the governor, to whomever oversees the licensure board (perhaps a bureau of regulatory boards), and explain what happened and ask for legislative relief. Questions will be asked, and the board will probably decide against harassing you again.

**Conclusion**

These methods differ from ordinary defense methods. Ordinary methods unfortunately do not always work well. Most important is the attitude, the will to fight, the sense of not being crushed.

With the AAPS victory in Texas, there is hope that licensure board overhaul can occur elsewhere also. But at present, our profession is under attack, by medical boards and others, and we need methods of self defense.

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