



Medical Boards: Part 1

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I have been practicing medicine for nearly 30 years. I have received countless letters from law firms for records requests and notifying our group or me of an impending issue. I'm kind of numb to it. Conversely, anytime I get a letter from the medical board, I go into SVT. I am sure it is the same way with the physician assistant and nursing boards. You just start thinking, "What good can come of this?"

Fortunately, but for the grace of God, I have not had to personally respond to accusations in front of the medical board – the day is still young. However, in my law practice, I have represented a few providers who, for some obvious and some not so obvious reasons, have found themselves on the wrong side of the table.

In Part 1 of this two-part series, using the Arizona Revised Statutes¹ as an example, we will look at ways providers end up in front of their respective medical boards. In Part 2 we will discuss what to do if you receive a summons or if your presence is "requested."

Before we get started, I advise you to go to your state's respective medical, nursing (if you are a nurse practitioner) or physician assistant (often part of the physician medical board) board website and review the rules and statutes. You may be surprised. Things that you thought were benign may in fact be problematic.

According to the Federation of State Medical Boards, fewer than 1% of physicians are sanctioned in any given year. A sanction can range from a nondisciplinary letter of concern to revocation of your license. Check with your board to review the various levels of action the board may take.

Generally speaking, being a "negligent provider" gets you into trouble far less often than issues revolving around "unprofessional conduct." Acts of unprofessional conduct are, at least in Arizona, listed under Definitions in the Statutes and Rules Section of the Arizona Revised Statutes for Medical Doctors.



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Unprofessional Conduct, at least in my state, is a catchall for a wide variety of conduct. Below is a partially redacted list of areas upon which the medical board takes issue, along with some comments in bold. Note the bold underlined area "in this state or others." This means exactly what it says. If you receive a DUI while on vacation in Ireland, you will likely be sanctioned by your state's Medical Board

27. "Unprofessional conduct" includes the following, whether occurring **in this state or elsewhere**:

(c) False, fraudulent, deceptive or misleading advertising by a doctor of medicine or the doctor's staff, employer or representative. **"At XYZ Urgent Care you will be seen in 15 minutes or less" could be construed as deceptive or misleading if you miss the advertised time.**

(d) Committing a felony, whether or not involving moral turpitude, or a misdemeanor involving moral turpitude. In either case, conviction by any court of competent jurisdiction or a plea of no contest is conclusive evidence of the commission. **One of my favorites. You are on a hike and urinate in the woods or while walking down an alley at 3 am because your car was towed. If are cited, it will likely be for indecent exposure. You see where I'm going with this? Pun intended!**

(e) Failing or refusing to maintain adequate records on a patient. **You get behind, you forget, you're sloppy, and you violate the Statute. I've seen this one often when a Board**

requests records and an office produces less than adequate charting. Or worse, charting that is completed after the Board's request.

(f) Habitual intemperance in the use of alcohol or habitual substance abuse.

(g) Using controlled substances except if prescribed by another physician for use during a prescribed course of treatment. **Here is the latest one I've seen. A physician on a remote locums assignment broke his ribs mountain biking. He went to the ED he was staffing and received appropriate treatment, including a script for narcotics. He was discharged at 1 am Sunday morning. All the pharmacies were closed, so a nurse said, "Here are five Percocets that I did not use which were given to me after surgery. Take them and write me a script for five so that in case I need them I am not out." The physician saw the logic in that and did exactly as the Good Samaritan nurse suggested. What had he done? He had used narcotics meant for someone else, prescribed by a provider with whom he had no relationship, and he had written narcotics for someone who was not his patient on whom he had not performed an exam. That ridiculously benign transgression has followed him from state to state.**

(h) Prescribing or dispensing controlled substances to members of the physician's immediate family. **Your significant other breaks a bone and is in pain. You are traveling home from skiing and call in a script so that your spouse doesn't suffer needlessly during the 3-hour drive.**

(j) Prescribing, dispensing or administering any controlled substance or prescription-only drug for other than accepted therapeutic purposes. **Giving your body-building friend a script for Lasix so that he or she "looks more cut" for the competition.**

(k) Signing a blank, undated or predated prescription form. **You go to lunch and sign a few scripts for your physician assistant who does not yet have a DEA number to use in case a patient presents.**

(l) Conduct that the board determines is gross malpractice, repeated malpractice or any malpractice resulting in the death of a patient. **If you are unlucky enough to have a couple of events or one event with a very bad outcome, after the trial or settlement, you will have to answer again to the Board.**

(o) Action that is taken against a doctor of medicine by another licensing or regulatory jurisdiction due to that doctor's mental or physical inability to engage safely in the practice of medicine or the doctor's medical incompetence or for unprofessional conduct as defined by that jurisdiction and that corresponds directly or indirectly to an act of unprofessional conduct prescribed by this paragraph. **Sanctioning in one state means that you will likely be sanctioned in all states and**

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have to go through the process repeatedly. Double jeopardy does not apply. Also, if one jurisdiction has some weird provision like, "It is unprofessional conduct to give your pet a medication prescribed for a human," and your state does not have a similar provision, you could still be sanctioned.

(p) Sanctions imposed by an agency of the federal government, including restricting, suspending, limiting or removing a person from the practice of medicine or restricting that person's ability to obtain financial remuneration. **If CMS bans you from Medicare and Medicaid remuneration, you will be sanctioned in AZ.**

(q) Any conduct or practice that is or might be harmful or dangerous to the health of the patient or the public. **The major catchall. "Any conduct that might be harmful..." So, even if your conduct was not actually harmful, the fact that it could have been can get you sanctioned.**

(t) Knowingly making any false or fraudulent statement, written or oral, in connection with the practice of medicine or if applying for privileges or renewing an application for privileges at a health care institution. **"Knowingly" is the key. If you honestly forget to include something, you are arguably safe. If you purposely forget to put down that you received a DUI, not so much.**

(z) Engaging in sexual conduct with a current patient or with a former patient within 6 months after the last medical consultation unless the patient was the licensee's spouse at the time of the contact or, immediately preceding the physician-patient relationship, was in a dating or engagement relationship with the licensee. **Check your statutes. States view this differently and Arizona changed this. Here is what often happens. Your girlfriend with whom you are sexually active has a UTI and you write a script for Macrobid. You don't have a medical record. In some states, you just had sex with your patient and, as bad, your medical records are inadequate.**

(dd) Failing to furnish information in a timely manner to the board or the board's investigators or representatives if legally requested by the board. **More on this in the next issue. Bottom line: Don't delay but get a lawyer before complying.**

(ee) Failing to allow properly authorized board personnel on demand to examine and have access to documents, reports and records maintained by the physician that relate to the physician's medical practice or medically related activities.

(ff) Knowingly failing to disclose to a patient on a form that is prescribed by the board and that is dated and signed by the patient or guardian acknowledging that the patient or guardian has read and understands that the doctor has a direct financial interest in a separate diagnostic or treatment agency or in non-routine goods or services that the patient is being prescribed and if the prescribed treatment, goods or services are available on a competitive basis. **This one is tough. If you have a primary care practice and a separate urgent care practice, if your primary care practice refers to the urgent care after hours and the patients are not informed, you have violated the statute.**

(i) Adequate informed patient consent. **Another catchall. If something goes wrong, the argument is that the consent was "not informed." "I wouldn't have allowed this if I had known THIS was going to happen!"**

(ii) Lack of or inappropriate direction, collaboration, or direct supervision of a medical assistant or a licensed, certified, or registered health care provider employed by, supervised by or assigned to the physician. **Yikes. If you supervise mid-levels or other licensed providers and don't provide adequate supervision, you have committed unprofessional conduct.**

(jj) Knowingly making a false or misleading statement to the board or on a form required by the board or in a written correspondence, including attachments, with the board. **If you lie during the investigation or interview you are guilty of unprofessional conduct. Get an attorney, answer questions honestly and don't purposely mislead the investigators.**

(ll) Conduct that the board determines is gross negligence, repeated negligence or negligence resulting in harm to or the death of a patient. **If you are unlucky enough to have a couple of events or one event with a very bad outcome, after the trial or settlement, you will have to answer again to the Board. Even if you are successfully sued, the Board still can sanction you.**

(nn) Refusing to submit to a body fluid examination or any other examination known to detect the presence of alcohol or other drugs as required by the board pursuant to section 32-1452 or pursuant to a board investigation into a doctor of medicine's alleged substance abuse. **Over the years, I have collected a lot of amazing anecdotes on this issue, however, cathing yourself and injecting your dog's urine into your bladder may top the list. Take home point – NO ILLICIT SUBSTANCES should be in your urine, blood or hair. And, if you find yourself attempting to catch your dog's urine, you have bigger problems than substance abuse!**

(oo) **Failing to report in writing to the Arizona medical**

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board or the Arizona regulatory board of physician assistants any evidence that a doctor of medicine or a physician assistant is or may be medically incompetent, guilty of unprofessional conduct or mentally or physically unable to safely practice medicine or to perform as a physician assistant. This is a tough one. If your colleague tells you about a grievous error or action are you required to report them if they “may be” below the standard of care or “may be” guilty of unprofessional conduct.

(pp) The failure of a physician who is the chief executive officer, the medical director or the medical chief of staff of a **health care institution** to report in writing to the board that the hospital privileges of a doctor of medicine have been denied, revoked, suspended, supervised or limited because of actions by the doctor that **appear to show** that the doctor is or **may be medically incompetent**, is or may be guilty of unprofessional conduct or is or may be unable to engage safely in the practice of medicine. Danger Will Robinson! If you are a medical director and you terminate the relationship with a provider because you believe his or her care or interpersonal skills are below the standard, are you guilty of unprofessional conduct if you don't report that person? Even if the provider only “may be” guilty, you are still on the hook. It may come back to bite you when your previously terminated provider screws up again and the Board comes back to ask you why the relationship was terminated. When you say, “I fired the provider because of incompetence,” be prepared for the fall out.

(ss) Prescribing, dispensing or furnishing a prescription medication or a prescription-only device as defined in section 32-1901 to a person unless the licensee first conducts a physical or mental health status examination of that person or has previously established a doctor-patient relationship. The physical or mental health status examination may be conducted during a real-time telemedicine encounter with audio and video capability.

Now that you have a sense of the boundaries, in the next issue, I will discuss what to do if you are accused of crossing one of them! ■

Reference

1. <http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/32/01401.htm&Title=32&DocType=ARS>