Texas Medical Board investigations revisited

Russell G. Thornton, JD

In 2004 I discussed proceedings before the Texas Medical Board (TMB), referred to at that time as the Texas State Board of Medical Examiners (1). While the guidelines, procedures, and standards related to TMB proceedings are relatively the same, the approach, attitude, and demeanor of the TMB has most definitely changed, particularly in the past year or so. The landscape is very different and even more stacked against the naive, unprepared, and unrepresented. Major differences need to be appreciated in relation to the timeline for the process, TMB's aggressiveness in reviewing complaints, the seriousness of the process, TMB's apparent presumption of guilt, and the professionalism of some panels.

REVIEW OF THE COMPLAINT PROCESS

To briefly review the process itself, everything begins with the receipt of a complaint by the TMB. The first step involves determination of whether or not the TMB has jurisdiction over the complaint. For example, if the complaint is about the actions or conduct of a nonphysician in a physician's office (and there is no issue about the physician's supervision of that individual), the complaint will likely be dismissed since the TMB does not have jurisdiction over these individuals. If not, the claim is investigated to determine if evidence exists to support a violation of the Texas Medical Practice Act (2) and/or the TMB rules (3). This process is performed by the TMB investigations section.

If the TMB has jurisdiction and investigation of the complaint establishes evidence sufficient to support a violation of the Medical Practice Act or the TMB rules, the matter is referred to TMB's litigation section for an informal settlement conference (ISC). The TMB refers to the ISC as an "informal" process to assist it in the evaluation and disposition of complaints. The ISC process provides the physician an opportunity to respond to the complaint and show that his actions were proper. At the conclusion of the ISC, the ISC panel either recommends dismissal of the complaint or finds that a violation has occurred. If the latter, it recommends punishment and/or remedial action. The physician can elect to accept TMB's finding and proposal or force the TMB to file a complaint with the State Office of Administrative Hearings.

TMB'S LONGER TIMELINE

In the event you are investigated by the TMB, you need to accept that the process will take a very long time, and odds are

that you will need to appear before an ISC panel in Austin to discuss and respond to the complaint at issue. ISCs now appear to be almost a matter of routine, regardless of the credibility, nature, or severity of the complaint at issue. Earlier, we usually knew within about 6 months after a complaint was filed whether or not the complaint would be dismissed or an ISC appearance would be required. Now, this process may take a year or longer, again, regardless of the credibility, nature, or severity of the complaint. Thus, the total timeline for a TMB complaint is not that unlike the total timeline for a malpractice claim filed in court.

TMB'S AGGRESSIVENESS IN REVIEWING COMPLAINTS

TMB's published enforcement statistics support anecdotal opinion that it is currently much more aggressive in its approach to complaints. While the total number of complaint calls and complaint forms received by the TMB is down about 19% in 2009 as compared to 2004 (4), the number of matters referred by the investigations section to litigation (primarily for ISC referral) went up from 495 in 2004 to 732 in 2009, a 48% increase (5). In fact, in 2009 the TMB conducted 737 ISCs, an 83% increase from the 402 ISCs conducted in 2004 (4). While investigations did resolve 498 more complaints in 2009 than it did in 2004, it also opened 899 more investigations in 2009 and has 852 more investigations pending (4).

However, it is the substance rather than the number of matters that go to ISC that really supports the opinion about TMB's aggressiveness. Now even picayune complaints frequently result in an ISC. For example, one matter sent to ISC involved a complaint by a facility nurse that a physician was abusive and yelled at her during a phone conversation. One might debate the merits of an ISC related to a complaint of this nature against a long-practicing physician with no prior legal or board issues. One could not debate that the documented objective facts were contrary to the complaint made. The documentation from both the facility and the physician's office unequivocally showed not only that the complaining party was not personally involved in

From Stinnett Thiebaud & Remington LLP, Dallas, Texas.

Corresponding author: Russell G. Thornton, JD, Stinnett Thiebaud & Remington LLP, 4800 Fountain Place, 1445 Ross Avenue, Dallas, Texas 75202 (e-mail: rthornton@strlaw.net).

the conversation at issue (she allegedly heard this “complaint” from an unidentified coworker), but the documentation objectively showed the absence of any abusive or improper conduct. Even the ISC panel members were taken aback at the fact that this “complaint” was before them. The investigations section and TMB’s “expert” apparently did nothing more than take the complainant at her word without even carefully reviewing the records subpoenaed from those involved. Similarly, the litigation section simply scheduled an ISC without objectively looking at the evidence surrounding the complaint. Thus, when you receive notice of a complaint from the TMB, expect that the matter will be referred to an ISC.

THE SERIOUSNESS OF THE ISC PROCESS

Do not be lulled into a false sense of security by characterization of the ISC as an “informal” process. While the process is informal in the sense that it is not governed by and subject to the same legalities as a trial or administrative process, it is definitely not “informal.” An ISC is a serious matter. The ISC is generally your first and best opportunity to resolve the complaint in your favor or on the best possible terms. Also keep in mind that the outcome of this “informal” meeting can have significant adverse effect on you financially and professionally. ISC hearings frequently result in a ruling that your medical license is restricted, that your medical practice is restricted, and/or that your practice is subject to proctoring or routine chart review. Substantial monetary fines can also be imposed. The only way that you can challenge these sanctions is to reject TMB’s proposal and fight the matter further through a public hearing before the State Office of Administrative Hearings. These proceedings are conducted very much like lawsuits and result in significant legal fees and expenses. The TMB knows this and tries to take advantage of it.

TMB’S PRESUMPTION OF GUILT

If an ISC arises from a complaint, you need to accept the fact that you will be presumed to have acted improperly. Do not dismiss out of hand the language contained in your “invitation” to an ISC, which states that the ISC “has been scheduled to give you an opportunity to show compliance.” This should be your first clue that no matter how trivial the complaint or how outlandish the allegations against you appear, the ISC starts from the premise that the complaint against you has merit and that you need to prove the appropriateness of your actions to avoid sanction.

The fact that the TMB appears to work from a presumption of guilt is also evident from the nature of what little information comes from the unidentified “experts” who review cases and submit “reports” on behalf of the TMB. First, you need to understand that physicians do not really receive what would be considered a report from TMB “experts.” Physicians subject to an ISC are given only a memo-form summary of the expert review prepared by litigation. Candidly, the physician and counsel have to “trust” that their opponent has accurately and truthfully represented the expert’s opinions.

In this format, TMB experts frequently use standard of care assertions based solely of the word of the complainant, do not consult or refer to applicable medical guidelines or references, and appear to not even review the records in a careful or objective manner. For example, in the “abusive behavior” example mentioned above, the TMB expert based the opinion that the physician acted improperly solely on the complainant’s complaint. The expert did not acknowledge the longstanding spotless history of the physician and did not appear to have determined or even noticed that the medical records showed the complainant had no personal knowledge of the incident and directly contradicted her story.

In a separate matter, a TMB expert criticized a physician, claiming that the patient should have been referred to a certain specialist for further evaluation. Incredibly, the physician’s most recent chart entry clearly documented that he recommended that the patient see that exact specialist. The TMB expert either did not carefully read the records provided or simply elected to ignore the clear and direct documentation that this referral had been made. Either alternative is unacceptable and unreasonable.

Another example comes from a complaint that a medication was not indicated. The TMB expert indicated that the medication, the doses prescribed, and the frequency and manner of monitoring the patient while on the medication were all within the applicable standard of care. The expert then gratuitously added that the physician’s documentation was in violation of the Medical Practice Act. This criticism came from the fact that on the one occasion in over 7 years of prescribing this medication where the physician increased the patient’s dose, he did not document in the record the specific reasons for that single dose increase. Aside from being an unreasonable criticism, how could someone on one hand say that the records indicated the medication was indicated, prescribed, and monitored properly, but then say that the documentation related to the reason for one isolated dose increase was lacking and in violation of recognized standards?

This apparent presumption of guilt or need to find a violation is also evident from the conduct of the ISC panel itself. The impression that ISC panels appear to be desirous of or tasked with finding a violation was clearly evident from a recent ISC hearing in which the facts before the ISC panel clearly did not establish the alleged violation of the Medical Practice Act. During the ISC, one of the panel members advised the physician that he really was not impressed with the “technical” defense that the facts did not support the complaint. In closing, the analogy was made to the ISC panel that one could not be guilty of speeding in a 70-mile-per-hour zone if they were doing 60 or even 69. When we reconvened to be advised that the complaint was going to be dismissed, the ISC panel member advised the physician he was “lucky” he had a lawyer to reinforce to the panel that the facts did not exist to support the alleged violation. The disturbing point here is the implication that if the physician did not have counsel at the ISC to strongly advocate this issue, the panel may have found that he violated the Medical Practice Act even though the evidence did not exist to support a violation.

In another matter, an ISC panel member went beyond the criticism expressed of the physician by the TMB expert report to establish a violation. While one could argue the general utility of ensuring adherence to applicable medical standards, the concern here was the fact that the physician was a general practitioner treating chronic pain, as was the TMB expert. The panel member, however, had specialized training and experience in that area. It seems unreasonable and unfair for a specialty-trained ISC panel member to go beyond the requirements set by a physician's true peers to establish a violation.

The absence of counsel also appears to have an adverse impact on the sanctions imposed in the event of a violation. In two similar fact scenarios that involved claims of nontherapeutic prescribing of habit-forming/narcotic medications, the physician without counsel was given a sanction that included 3 years of physician monitoring, the routine submission of patient charts to the TMB compliance division for review, and continuing medical education. In contrast, the recommendation to the physician with counsel was limited to continuing medical education.

PROFESSIONALISM OF THE ISC PANELS

Finally, the overall demeanor and professionalism of the ISC panels has deteriorated. While the vast majority of the ISC panel members are still respectful of the process and the physicians appearing before them, some of the newer members and non-TMB members that often serve on ISCs have consistently displayed respect for neither the process nor those in attendance. This is evident by a consistent attitude that the physician is presumed guilty of a violation and must prove he is not guilty of the complaint alleged. Further, one panel member has been observed and been consistently reported to be relatively rude during the process; this member also routinely checks for phone or e-mail messages during the ISC, even while the physician is speaking to the panel in his defense. I used to routinely advise my clients that ISC panels were not only fair and reasonable, but respectful and professional. Unfortunately, I am no longer able to do so.

There is no question that the investigation, litigation, and enforcement arms of the TMB have tough tasks and that the nature of their tasks can make them unpopular, just like the internal affairs division of a police department. The concerns expressed about the current state of affairs with TMB proceedings appear to me to arise in part from the fact that the ISC panels now function as the prosecutor, judge, and jury.

In essence, the TMB is the entire law enforcement mechanism for the medical profession. Each of the elements involved has a function analogous to an element of the criminal justice system. In theory, the investigation section functions as the police department, the litigation section functions as the district attorney, and the ISC panel functions as the judiciary. While the apparent default of most complaints to ISC might be a rational and reasonable response to criticism of the TMB's ability and willingness to police its licensees, the ISC's assumption of the role of prosecutor, judge, and jury is not appropriate. Like a prosecutor or judge, ISCs represent all citizens of Texas, including the physicians that appear before them. I doubt that any ISC member accused of a crime would think it was fair to have the functions of prosecutor, judge, and jury all wrapped into one or two individuals at their trial. Fairness would dictate that at least the role of prosecutor would be separate, just like in criminal proceedings. I also doubt that the physician ISC panel members would think the ISCs panel's fulfillment of these three functions would be fair if they were across the table as the individuals under scrutiny. Unfortunately, though, that is not the current reality.

Given the current demeanor of the TMB, as manifest through the current ISC process, it is more important than ever to obtain the assistance of counsel early on in the process if you are subject to a TMB investigation. The fact that matters are routinely submitted to ISC, the power of the ISC panel, and the fact that the ISC panel now routinely acts as the prosecutor, judge, and jury make it even more necessary that you have legal representation—not only to best posture your case, prepare you for the ISC, and protect your interests, but also to make sure that the ISC plays by the rules, meets its burden of proof when it accuses you of improper conduct, and acts fairly in the event it rules a violation has occurred.

1. Thornton RG. Handling investigations of the Texas State Board of Medical Examiners. *Proc (Bayl Univ Med Cent)* 2004;17(3):374–377.
2. Tex Occ Code, §§151.001–165.008.
3. Tex Admin Code, Title 22, §§161.1–200.3.
4. Texas Medical Board. Enforcement statistics. Summary of complaints and investigations, fiscal year 1999–fiscal year 2009. Available at <http://www.tmb.state.tx.us/agency/statistics/enforce/inv.php>; accessed November 3, 2009.
5. Texas Medical Board. Enforcement statistics. Summary of litigation, fiscal year 1999–fiscal year 2009. Available at <http://www.tmb.state.tx.us/agency/statistics/enforce/lit.php>; accessed November 3, 2009.