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State board is inconsistent, doctors say

By Mitch Mitchell
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Doctors who have taken too much time responding to information requests have received harsher discipline from the State Board of Medical Examiners than doctors who have removed the wrong organs from patients.

Such rulings have triggered an outcry from physicians who say that board decisions are often arbitrary or inconsistent and leave doctors with no avenue for appeal.

Board administrators say that the public -- including the physicians regulated by the agency -- is better served by the board than at any time in the past.

Lee Anderson, board chairman, said the agency has struggled through an immense case backlog dating to the late 1990s, shortened the length of time it takes to complete investigations and reorganized staff to put more emphasis on patient-care issues.

And while the number of disciplinary actions handed out by the board has decreased compared with those of last year, Anderson argues that the board's effectiveness is not accurately reflected in those numbers.

"I don't think we're slacking off any," said Anderson, a Fort Worth ophthalmologist. "I think the Legislature and the public should be pleased with the product. And I think that we are at a plateau here for a while. I think there has been an awakening effect among doctors in Texas that aberrant behavior is not going to be well received by this board."

But some physicians say it is the board that is behaving badly, and they point to the John Oswalt case in Austin and the Steven Ash case in Grapevine as examples.

According to a June 6, 2003, board order, Oswalt, a physician, removed the wrong lobe of a patient's lung because of a record-keeping mistake. Oswalt was supposed to remove the left lower lobe, but the patient's record instructed him to remove the left upper lobe. Oswalt recognized the mistake while still at the hospital and later removed the lower left lobe. He also put procedures in place to stop similar mistakes from recurring, said his lawyer, David Davis.

The board assessed Oswalt a \$2,500 administrative penalty.

Eight months later, the board assessed a \$5,000 administrative penalty against Dr. Wayne Fortson of Kilgore for failing to provide it with information within 24 hours.

In April 2003, the board ordered Grapevine urologist Steven Ash to pay a \$3,000 penalty and take 20 hours of training in medical-error prevention. Ash had removed the wrong kidney from Nelda Miles, 75.

Some physicians who have examined board orders say they have questioned their appropriateness in some cases. Other physicians have accused the board of investigating doctors who don't deserve it, while failing to investigate the mistakes of other doctors.

"The issue is whether or not the board will investigate properly and have due process," said Richard Willner, president of the Center for Peer Review Justice in Metairie, La. "The pendulum now swings too far. A good system will right its wrongs. As quick as they are to destroy, they should act when something is obviously wrong."

Willner analyzes medical-board and peer-review decisions nationwide. Under peer review, a physician may be monitored or evaluated by a group of doctors or health professionals and may be removed, suspended or otherwise disciplined.

Peer review, like board discipline, can trigger a report to the National Practitioner Database. Once a doctor's name is on

the list, it can have adverse effects on what health insurance groups will work with him or her, what hospitals will allow operating privileges or what malpractice carriers will insure him or her.

The results can be devastating to those physicians and their families, Willner said.

"I've had men call me after their children have tried to commit suicide, and I've cried with them in the middle of the night," Willner said. "These men are born doctors. They spend their entire lives thinking of it. After these people are destroyed ... they cannot find work. After their license is gone, they are finished in life."

There are mitigating factors that accompany the cases some use as examples of the board's inconsistency, Anderson said. Oswald had had an exemplary career, and the board believed that he was not a danger to the public.

In the Ash case, clinical factors made it difficult to determine which organ was diseased, Anderson said. Ash did not have a significant history of malpractice cases and did not have a significant history with the board, Anderson said.

"We have to assume that physicians are human and not perfect and put those cases in their proper context," Anderson said.

Once the board makes a decision to take a doctor's license, it is not obligated to follow direction from the State Office of Administrative Hearings. The board requires some physicians to go through a lengthy appeals process regarding state district court decisions concerning their licenses.

A delegation of TMA physicians will testify in Austin today and Wednesday about the board's decisions, before the Sunset Advisory Commission, which is reviewing the agency's performance.

"At the end of the day, what we really want is the best patient care," said Paul Handel, chairman of the Texas Medical Association's Ad Hoc Committee on the Medical Practice Act.

IN THE KNOW

State Board of Medical Examiners

- In 2003, the board had 48 cases go before an administrative law judge and had 11 appealed.
- The board took recommended action in nine cases. In one case, the physician died before the process was completed, and in one case, the board disagreed with the judge and refused to reinstate the physician's license.
- In 2003, nine cases were filed in Travis County District Court seeking redress concerning board decisions.
- Two are pending, and the court affirmed six and reversed one, sending it back to the board. One other case from a previous year has gone to the court of appeals.

SOURCE: Texas State Board of Medical Examiners

ONLINE: Texas Sunset Advisory Commission, www.sunset.state.tx.us; Texas State Board of Medical Examiners, www.tsbme.state.tx.us
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