



HEALTHCARE PRACTITIONER

DISCIPLINARY WORKGROUP

FINAL REPORT

JANUARY 2004

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EXECUTIVE SUMMARY

As a result of rising malpractice insurance rates and the decline in the number of medical malpractice insurance carriers, there was a crisis in the availability and affordability of medical malpractice insurance. As part of a multi-facet approach to the problem, there was concern expressed about the regulatory controls over practitioners who had malpractice judgments filed against them but who were not disciplined by their respective licensing board. CS/SB 2D established the healthcare practitioner discipline workgroup to review the current disciplinary process for health care practitioners in the State of Florida and suggest changes as deemed appropriate to improve efficiency, enhance consumer involvement, promote speedy resolution, and improve health care quality by focusing on prevention and reeducation not retribution.

The healthcare practitioner discipline workgroup met four times in four months and reviewed Florida's existing health care practitioner enforcement process, the enforcement system for physicians in New York, the enforcement system for dentists in Louisiana, the enforcement system for lawyers in Florida, and the enforcement system for accountants in Florida. The workgroup also heard from a consumer and the Division of Administrative Hearings' Chief Judge as well as reviewed statistics on the effectiveness of the current systems, portions of the Governor's Select Task Force on Healthcare Professional Liability Insurance, and were briefed on the implementation plans for CS/SB 2D developed by MQA.

The healthcare practitioner discipline workgroup made several findings and recommendations. The recommendations include greater communication with licensees and consumers; better use of technology; increased training for staff, board members and experts; greater use of board members (current and former) in investigations and settlement negotiations; creation of performance measures for those parts of the enforcement process which do not have them; increase staff retention for attorneys; and increase the use of alternative dispute resolution.

The healthcare practitioner discipline workgroup concluded that effective discipline of health care practitioners has to be a partnership among all parties involved, including the practitioners, the boards, the department, and the public. It must seek to aggressively eliminate bad practitioners from the profession while focusing on re-training those practitioners who need it. The process must instill a sense of confidence in both the practitioners and consumers. It must promote a healthy Florida and lead the nation in quality health care through effective regulation. The findings and recommendations contained in this report are another step in achieving those goals.

PURPOSE

The purpose of the healthcare practitioner discipline workgroup is to review the current disciplinary process for health care practitioners in the State of Florida and suggest changes as deemed appropriate to improve efficiency, enhance consumer involvement, promote speedy resolution, and improve health care quality by focusing on prevention and reeducation not retribution.

BACKGROUND

In 1988, at the conclusion of a medical malpractice crisis gripping the state, the Division of Medical Quality Assurance (MQA) was created in an attempt to better regulate and discipline health care practitioners. At that time it was a part of a division in the Department of Business and Professional Regulation which included general contractors, engineers and many other non-health care professionals. After being created, MQA remained in the Department of Business and Professional Regulation until 1993 when it was transferred to the Agency for Health Care Administration. It remained in the Agency for Health Care Administration until 1997 when it was transferred to the Department of Health on July 1. In that transfer however the enforcement sections remained in the Agency for Health Care Administration until July 1, 2002, when they were also transferred to the Department of Health.

The thrust of the 1988 changes were to focus the division's energies on the sole task of overseeing the regulation of health care practitioners. At that time all the health care practitioners were joined together under a single umbrella division, MQA. The plan was

to maximize efficiency by consolidating functions and using scarce resources for centralized enforcement for the various health care professions. In addition, professional disciplinary standards were strengthened with an eye toward consistency among and between professions. Over the years additional changes have been made to enhance enforcement and regulation of practitioners including specific courses for continuing education, creation of citation authority for minor offenses, and a re-emphasis on mediation as a tool to deal with disciplinary cases.

The success of this has been demonstrated over the years in a number of ways. The number of complaints and disciplinary actions has increased. In 2002, the Federation of State Medical Boards ranked the Florida Board of Medicine number two and the Board of Osteopathic Medicine number one among large states for their disciplinary actions. From 1998, the Board of Medicine progressed from 9th among the 15 large states with more than 15,000 practitioners to number 1 in 2001

During the 2003 medical malpractice debate, there was a renewed focus on health care practitioners. There were a number of changes made to the disciplinary statutes in an effort to promote efficient use of resources, streamline the process, enhance alternative dispute resolution methodologies, and improve the information available to consumers about their health care practitioner. These changes allow the department to focus its resources on the more severe standard of care cases and enhanced information for consumers.

Part of the 2003 legislation was the creation of the health care practitioner discipline workgroup. The statutory charge for the group is found in section 38 of CS/SB 2D. It states:

No later than September 1, 2003, the Department of Health shall convene a workgroup to study the current healthcare practitioner disciplinary process. The workgroup shall include a representative of the Administrative Law section of The Florida Bar, a representative of the Health Law section of The Florida Bar, a representative of the Florida Medical Association, a representative of the Florida Osteopathic Medical Association, a representative of the Florida Dental Association, a member of the Florida Board of Medicine who has served on the probable cause panel, a member of the Board of Osteopathic Medicine who has served on the probable cause panel, and a member of the Board of Dentistry who has served on the probable cause panel. The workgroup shall also include one consumer member of the Board of Medicine. The Department of Health shall present the findings and recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives no later than January 1, 2004. Each sponsoring organization shall assume the costs of its representative.

An influential impetus behind the workgroup was an interest in improving the health care disciplinary system by considering some practices used by the Florida Bar to discipline lawyers. The discussions particularly focused on the role of the grievance panels used by the Bar to resolve complaints and consumer involvement in that process.

Members of the nine-member group are Hal Haering, D.M.D., from the Board of Dentistry; Michael Ragan, D.M.D., from the Florida Dental Association; Francesca Plendl, Esquire, from the Florida Medical Association; Joel Rose, D.O., from the Florida Osteopathic Medicine Association; Ronald Kaufman, D.O., from the Board of Osteopathic Medicine; Lisa Nelson, Esquire, from the Administrative Law section of the Florida Bar; and Allen Grossman, Esquire, from the Health Law section of the Florida Bar. The Board of Medicine is represented by Laurie Davies, M.D., and consumer member, Monique Long, Esquire.

METHODOLOGY

The methodology used by the workgroup to study health care practitioner discipline consisted of educational presentations followed by group discussions coupled with statistical information. Group meetings were held in Tallahassee, Florida on September 22, 2003; November 3, 2003; December 15, 2003; and January 5, 2004.

Presentations were made by Kenneth Marvin, Esquire on the disciplinary system of the Florida Bar. Charlene Willoughby, Tom Hannah, and Wings Benton made presentations on the current disciplinary system in the Division of Medical Quality Assurance. Mr. Dennis J. Graziano, Director of the New York Office of Professional Medical Conduct, and members of his staff presented a detailed overview of the New York disciplinary process for physicians. C. Barry Ogden, Esquire made a presentation on the disciplinary process for dentists in the State of Louisiana. The workgroup also

heard from a consumer, Gary Blankenship, a prior complainant who had experienced the current disciplinary process. In addition, they heard from the Chief Judge Bob Cohen in the Division of Administrative Hearings. Staff presented information regarding specific aspects of the disciplinary process used by the Florida Board of Accountancy. The group also reviewed statistics on the effectiveness of the current systems, portions of the Governor's Select Task Force on Healthcare Professional Liability Insurance, and were briefed on the implementation plans for CS/SB 2D developed by MQA.

It should be noted that the timeframe for completing this work was very compressed due to the bill's passage in September 2003 with an effective date of September 15, 2003.

It was originally envisioned that this would be a six-month study but it has been compressed into a little over three months, thereby limiting somewhat the scope of review.

The report is organized around the enforcement functions in the current process with ancillary issues following. Each section includes a discussion section followed by findings and recommendations.

INTAKE

Discussion

The current healthcare practitioner disciplinary process begins with receipt of a complaint by the Consumer Services Unit (CSU). The intake process is the first contact that the public and the practitioner have with the enforcement process for MQA. Attached is a flow chart depicting the steps in the life of a complaint as it works its way through the enforcement system. (See attachment 1)

Briefly, when a complaint is received it is sent to the intake section of the Consumer Services Unit. This intake process is currently paper driven. Complaints can be received by email, mail, and by telephone with a named or anonymous source. A complainant can download the complaint forms from the MQA website and submit them, contact the office and request the forms, or make a verbal complaint. Complaints are also received from the Department of Insurance on closed malpractice claims as well as adverse incident reports from health care facilities and the Agency for Health Care Administration.

The complaint process is a patient/client driven system. By that it is meant that MQA investigates complaints involving an individual patient or client. As a general rule, a general allegation that a health care practitioner is practicing below the standard of care absent a specific patient or client cannot be investigated. As a result, access to patient or client records is critical, requiring a signed consent form for legal release of the

records by the practitioner. This somewhat limits the use of technology for an online complaint system.

The intake section will use the complaint information to determine legal sufficiency. Legal sufficiency means the facts as alleged, if taken as true, demonstrate a violation of the practice act. Many complaints received are dismissed because they do not rise to the level of being a violation of the practice act. These may include complaints about billing and costs, complaints about rudeness, complaints about refusal of a practitioner to file insurance forms, and other non-jurisdictional matters. In addition complaints may be dismissed because the patients or clients fail to provide a release of their records or fail to follow up with any requested additional information. If a complaint is closed, the complainant is notified and afforded the opportunity to provide additional information. If the complaint does not involve a violation of a practice act, few options can be offered to the complainant. The determination of legal sufficiency is completed on average in about 5 days with the performance standard being 10 days and a compliance rate of 97.2% for FY 2002-2003.

Once a complaint is deemed legally sufficient, an investigation is initiated. An investigation can be a desk investigation for minor offenses which can result in citation or mediation, such as failure to maintain a current address or hearing aid offenses involving refunds to the client. Complaints involving more severe violations or those needing additional information which cannot be obtained by telephone or mail are sent to one of eleven field offices for a more thorough investigation.

When a complaint is received which involves a standard of care violation for physicians licensed under Chapters 458 (allopathic) or 459 (osteopathic), Florida Statutes, the intake officer can refer it to an in-house expert for review. When a complaint is received which involves a standard of care violation for dentists licensed under Chapters 466, Florida Statutes, the intake officer can refer it to an expert retained by the department. The expert will advise the department on whether the facts, if deemed true, constitute a violation. In-house experts are not available for all MQA regulated professions so the intake officers cannot always ask for an expert review to determine if there is a breach of the standard of care.

By contrast, the Florida Bar is a closed system involving lawyers disciplining lawyers. All complaints must be sworn and are reviewed by an attorney for the Bar to determine if a violation exists. Additional information may be requested from the complainant and the subject of the complaint. The complaint can be dismissed at this level or sent to a grievance committee. The Bar also has, within its discipline section, a consumer advocacy unit made up of lawyers which attempts to connect the parties and resolve the complaint immediately through an informal mediation process. If this is not successful, it is referred for discipline or formal mediation.

In 2001, the Bar received 10,000 complaints but the number dropped to 8,500 in 2002. Roughly 2/3 of the complaints are dismissed at the staff level, and this is done in about four months 70% of the time. Judgment calls by lawyers where there are multiple ways

to address an issue are not subject to discipline. This is different from the health care professions as judgment calls with adverse outcomes may be subject to discipline. For the Bar, negligence is the biggest source of discipline with trust account violations being the most serious. (See attachment 2.)

In New York, within the Department of Health is the Board of Professional Medical Conduct which is responsible for disciplining 72,000 physicians, physician assistants, special assistants and unlicensed resident physicians. This is a 180-plus member board of which 2/3 are physicians and 1/3 are consumers. The Office of Professional Medical Conduct handles about 7,000 complaints a year with a staff of 200 at a cost of \$25,000,000 annually. Discipline is taken in about 330 cases annually. The complaint intake process is similar to Florida with staff doing the preliminary reviews and decision making as to legal sufficiency. (See attachment 3)

In Louisiana, all dental complaints are received by the Board of Dentistry's Executive Director, who upon receipt of the complaint obtains the dental record from the practitioner. There are about 2,500 dental practitioners in Louisiana. One hundred to one hundred and fifty complaints are received annually with approximately 20 being considered serious. The Executive Director submits the complaint and patient records for review by a 3-member panel of health care practitioners to determine what violation may have occurred, what action should be taken, and how the investigation should proceed. It is done currently by mail but will soon be done online. Panel members come from the 13-member Board of Dentistry which includes one dental hygienist and

no consumer members. If the panel does not have a majority opinion on the action to be taken, the Board President decides. If the panel finds a violation, it is investigated by contract investigators with the results being returned to the same panel. The panel can dismiss it, resolve it informally, or call for the filing of an administrative complaint. Most complaints are resolved in 90 days or less.

Findings

1. Paper driven system not using technology completely.
2. Subject matter experts are not as readily available in all disciplines.
3. Timeliness in determining that a complaint is legally sufficient and disposing of it is good.
4. Licensees are not always well informed regarding the disciplinary process and options for speedy resolution.
5. Early intervention or alternative resolution options for consumers are minimal.

Recommendations

1. Create a complaint form which can be completed online and explore including a medical release using an electronic signature.
2. Create a list of subject matter experts who can assist in determining if and what should be investigated using probable cause panel members and former board members particularly for the smaller boards.
3. Enhance communication with the licensee about the nature of the complaint, the disciplinary process, and what can be expected from the process, thereby

promoting cooperation and speedy resolution of the matter. This can be achieved by creating an informational brochure and education courses through professional associations.

4. Enhance consumer communication and alternative options when complaints are not the subject of discipline, including creation of an ombudsman liaison and referral to a professional association peer review process.

INVESTIGATIONS

Discussion

Investigations of disciplinary complaints are accomplished primarily through the Investigative Services Unit (ISU) which is comprised of eleven offices scattered throughout the state. Its primary function is to gather the evidence for prosecution of disciplinary actions. It accomplishes this in a number of ways, including obtaining and reviewing patient records, interviewing practitioners, reviewing hospital records, interviewing complainants, coordinating with law enforcement agencies, coordinating with other state agencies or regulatory bodies, and any other method available to ascertain the facts of a particular case.

ISU has 90 days to complete its investigation but the average time for completion of an investigation in FY 2002-2003 was 71 days from receipt in the field office with a 99.8% compliance rate. As one might guess some cases are very complex while other cases are relatively simple and straightforward. As a result of the investigation, the field investigators prepare a report of their findings and the evidence assembled.

During this process, investigators are in touch with the complainant in most cases but the process is informal and not documented in status letters. However, in some cases the complainant will not cooperate or cannot be reached during the investigative process. In addition, about 15% of the investigations are returned for supplemental investigations after review by an expert in the Prosecution Services Unit (PSU). Some

of these supplemental requests are due to the complexity of the case and the medical procedures involved, while some may be due to an incomplete investigation report. Experts are not readily available to these investigators during the course of the initial investigation. This may result in delays when a case is returned for further investigation after review by an expert in PSU.

Upon completion of the investigation, the case is forwarded to PSU for appropriate action. As the case continues, the investigators are called upon to assist the prosecutor by serving subpoenas, obtaining certified copies of records, conducting additional investigations, and testifying at hearings.

The Florida Bar does most of its investigations by telephone or mail from Tallahassee. It has a limited number of investigators but uses methods similar to ISU.

In New York, there are 70 investigators in six regional offices working for the Office of Professional Medical Conduct. Like Florida, they investigate cases using the same techniques, averaging 90 days to complete the process.

In Louisiana, the Board of Dentistry has no fulltime investigators. The Board contracts out for investigations having only about 50 investigations a year. Experts are available through a contractual arrangement to assist in the investigations if needed. During investigations, the practitioners are subpoenaed and their depositions are taken. If they are not truthful, additional charges are filed.

Findings

1. Subject matter experts are not as readily available in all disciplines during the investigation stage.
2. Timeliness is good but the percent of cases requiring supplemental investigation is a bit high.
3. The consumer sometime finds this part of the process frustrating due to a lack of formal communication.

Recommendations

1. It is recommended that the field office coordinate with the respective board to create a list of subject matter experts in the local area who can assist in investigations where technical questions arise. This includes a recommendation that the boards more actively participate in this effort.
2. The field office should continue to identify ways to shorten the investigation time for non-complex cases, including the additional use of technology and subject matter experts to lower the percent of cases returned for supplemental investigations.
3. Enhance the current method of communication with the consumer and assure he/she is always interviewed if available. Reinforce the current system of communication with the complainant on the progress of the case and document it as necessary.

PROSECUTION

Discussion

When an investigation is complete, it is sent to the Prosecution Services Unit (PSU) for legal action in the case. It is received in PSU's intake section where it is reviewed and assigned to a lawyer. The lawyer will review the case file and make a recommendation as to whether or not probable cause should be found in that particular case. If the lawyer determines some evidence is lacking, an additional supplemental investigation is requested from ISU. The lawyer also request an expert opinion on the merits of the case. When the attorney is satisfied that the case file is complete, one of two courses of action can be taken. The attorney can recommend to the probable cause panel the case be closed or draft an administrative complaint and recommend to the probable cause panel that probable cause be found and the case proceed. At this point, the case is given to another attorney who works with the board for presentation of the case to the probable cause panel. Thus, all the attorneys handling cases in a particular profession need not be available for each probable cause panel meeting. The recommendation to the probable cause panel should be completed within 80 days of receipt of the case by PSU with compliance at about 60% for FY 2002-2003. PSU has just completed a formal process mapping initiative that when implemented should improve the compliance rate as well as eliminate some of the manual tracking systems.

Probable cause panels are generally made up of at least one current board member, a past board member for that profession and a consumer member of the board. The size

of the membership and the number of panels varies by profession and board size as well as amount of discipline in a given profession. For example, the Board of Medicine has two probable cause panels, a north panel and a south panel. Each panel has a consumer member and the south panel hears cases about northern physicians and the reverse for the north panel. In Dentistry there is one panel with three members, a current board member, a past board member and a consumer member. The panel is appointed by the board chairperson. Panel members are prohibited from participating in board deliberations on a disciplinary case where the member served on the probable cause panel, much the same way a grand juror in a criminal case cannot be a juror at the criminal trial for the same case. The rationale for this is the desire to maintain the board's objectivity in hearing disciplinary cases as the probable cause panel member has made a judgment about the case without the benefit of all the evidence that may be presented to the board. For small boards with a single consumer member, this can be problematic because at some point in the disciplinary process, the consumer member does not participate.

Once the case reaches the probable cause panel, the panel can direct that the case be closed, that the practitioner be given a letter of guidance, or it can find probable cause. If probable cause is found, within 10 days an administrative complaint is filed and subsequently served on the practitioner. Ten days after a finding of probable cause, the case loses its confidentiality except for the health care records.

Upon receiving the administrative complaint the practitioner may request a “formal hearing” by disputing issues of material fact or can request an “informal hearing” where the facts are not in dispute. If a formal hearing is requested, the case is referred to the Division of Administrative Hearings (DOAH) within 45 days of receipt of the hearing request. Until the passage of CS/SB 2D, it was a 15 day referral period but it was extended to allow for settlement discussions without incurring the DOAH costs. If an informal hearing is requested, the case will proceed to the board for final disposition.

Approximately 95% of the disciplinary actions are concluded with a settlement agreement. A limited number of cases go to DOAH for a full evidentiary hearing on the facts. Whether the case has been resolved through a settlement agreement, an informal process or by an administrative law judge (ALJ) issuing a recommended order, the case will be presented to the full board for a final vote on the disposition of the discipline. Upon voting, a final order is issued and the case is resolved, but either party may appeal to the appropriate Florida District Court of Appeals. Appeals are handled by a specialized unit within PSU.

PSU has a series of forms and documents as well as processes that vary from profession to profession. While there is a forms data bank or uniform templates for like actions in its discipline cases, the workgroup noted that they are not being used by all PSU attorneys. This may create some time delays. Case tracking is also somewhat problematic because not all the case activities are being entered into the automated tracking system, creating some case management issues.

Complainants and consumers find the prosecution process to be somewhat perplexing. The litigation process confuses the complainant with its steps and legalities. Likewise, some complainants are dissatisfied with or do not understand the probable cause panel's or board's action in the final disposition of a case. As a result, consumers distrust what they do not comprehend. To address some of these issues, PSU has established an ombudsman position to work with complainants and consumers on a case-by-case basis. Good consumer relations continue to be an important goal for PSU.

In New York, there is a similar prosecution and probable cause panel system. Like Florida, prosecuting attorneys are staff positions independent of the Board. There are 30 attorneys assigned to handle discipline cases for the medical professions. There are 24 probable cause panels or investigation committees as termed in New York, comprised of two physicians and one consumer member. Collectively, they hear about 600 cases a year out of approximately 7,000 complaints annually. The committees can recommend closure, further investigation, administrative warning (150 per year), proceed to hearing (400 per year), or summary suspension (25-30 per year). The committee can also recommend consent parameters for settlement negotiations. All discipline in New York is confidential until final disposition.

In Louisiana, the same panel that determines legal sufficiency will review the case after the investigation is complete. The panel can resolve the case informally with the

practitioner by settlement or recommend the filing of an administrative complaint.

Before charges are filed, the licensee is given the opportunity to present his case to a single board member. The state offers no evidence and the board member can decide to dismiss the case, change the intended action, or let the case continue. All discipline in Louisiana is confidential until final disposition.

The Florida Bar has a probable cause panel system embodied in its grievance committees. The grievance committees are made up of 9 – 12 members, 2/3 lawyers and 1/3 consumers. Members are selected by a member of the Board of Governors who is elected by lawyers from each judicial circuit. Committee members serve a three year term. They meet monthly and are monitored by the Board of Governor member in that judicial circuit. When a case is received, one committee member is assigned to investigate the case. The offending lawyer must cooperate or plead the Fifth Amendment. The grievance committee has flexibility to send the lawyer to a diversion program like drug treatment, send a lawyer to a bar management training program, issue an admonishment for a minor violation, find no probable cause, find no probable cause but issue a letter of advice, or find probable cause with an administrative complaint filed in the Supreme Court. The Supreme Court has original jurisdiction in these cases. All discipline in the Florida Bar is confidential until after the grievance committee action.

Findings

1. Timeliness is problematic in PSU in light of the 180 day requirement for a probable cause recommendation.
2. Customer relations and complainant communications need additional emphasis in the prosecution process.
3. PSU lacks uniformity in its processes and documents which can result in time delays.
4. Manual systems have not yet given way to technology.
5. Probable cause panels are limited in the role they play in disciplinary cases.

Recommendations

1. PSU should continue its work to improve its processing time in light of the 180 day requirement for a probable cause recommendation.
2. Enhance consumer communication and satisfaction by instituting a system of correspondence to the complainant updating the complainant on the status of the case every 60 days and develop an informational brochure on the process that can be used to inform both consumers and licensees.
3. PSU should continue to identify ways to create more uniformity in its processes and use of its forms databank and to streamline its process to improve efficiency.
4. PSU should maximize its use of technology to manage its cases.
5. The role of probable cause panels should be expanded and alternative mediation pathways established as described in the section on alternative dispute resolutions.

FACT-FINDING

Discussion

Florida's disciplinary actions are conducted in accordance with Chapter 120, Florida Statutes, the Administrative Procedures Act. It establishes the procedural frame work and substantive rights of a person who is the subject of agency action. Among many aspects of the Act, it creates the Division of Administrative Hearings (DOAH) which has a quasi-judicial function (s.120.65, F.S.) One of the purposes of DOAH is to provide administrative law judges (ALJ) to serve as triers of fact in disciplinary actions where there are disputed issues of material fact. When there are disputed issues of material fact, a hearing is conducted presided over by an ALJ. It is conducted much like a non-jury civil trial, but some of the procedural and evidentiary rules are not strictly applied. Upon conclusion of the hearing, the ALJ issues a recommended order with findings of fact and conclusions of law.

Under Chapter 120, Florida Statutes, a recommended order in health care practitioner discipline cases is then sent to the agency for entry of a final order. The agency in these cases is either the board or the department when there is no board. In issuing its final order, the agency cannot alter an ALJ's findings of fact, even when the agency believed a standard of care had been breached, unless the findings were clearly erroneous from the record. (See s. 120.57(1)(l), F.S. below) Until passage of CS/SB 2D, standard of care decisions were a finding of fact not a conclusion of law. As for an ALJ's conclusions of law, s. 120.57(1)(l), F.S., provides:

“(l) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action.”

Generally, the qualifications for an ALJ are limited to being a member of the Florida Bar in good standing for the preceding 5 years which are the same as a circuit court judge.

In September 2003, the Legislature created s. 120.651, F.S., which reads:

“The Division of Administrative Hearings shall designate at least two administrative law judges who shall specifically preside over actions involving the Department of Health or boards within the Department of Health. Each designated administrative law judge must be a member of The Florida Bar in good standing and must have legal, managerial, or clinical experience in issues related to health care or have attained board certification in health care law from The Florida Bar.”

The rationale for the statutory change was based in part on the belief that ALJs lacked health care expertise sufficient to make standard of care determinations, that decisions by ALJs were inconsistent, and that the dismissal rate at DOAH of standard of care charges in disciplinary cases was too high. In the presentation by Chief Judge Cohen, he indicated he had appointed seven ALJs to hear health care practitioner disciplinary cases.

Many boards were very unhappy with the factual findings in cases where the respective board believed a standard of care violation had occurred but were unable to support it in a final order due to the ALJ's findings of fact. In CS/SB 2D, this may have been resolved because standard of care violations are now a conclusion of law not findings of fact. This will allow the boards to exercise their professional judgment as to what constitutes a standard of care violation.

The funding methodology of DOAH also presented problems for the workgroup. DOAH is funded by the agencies using its services. The methodology is based on an hourly

assessment including charges for filing the case, pre-hearing actions, hearings cancelled within 30 days of the scheduled hearing date, hearings, and time spent drafting orders. The bulk of the charges to the boards were for cancelled hearings where a case was settled in less than 30 days from the scheduled hearing. The net result seemed to discourage settlement, not encourage it. The department was able to lower costs by negotiating with the licensee an extension of time for referral to DOAH to settle a case. In the presentation by Chief Judge Cohen, he indicated the methodology was changing so agencies would not be penalized for settling cases.

In both New York and Louisiana, findings of fact and conclusions of law are made by a panel of like professionals with an administrative law judge presiding over the formal hearing much like a judge in a civil jury trial. The ALJ rules on procedural and evidentiary issues while keeping the hearing moving but has no role in the final decision. In Louisiana, the disciplinary process for physicians and dentists is exempt from most provisions of Louisiana's administrative procedures law. In disciplinary cases before the Florida Bar, the hearing is held before a judge who is a lawyer and an order is entered after he/she hears all the evidence. Thus, like New York and Louisiana, disciplinary decisions for lawyers are made by a like practitioner not an independent fact finder who does not practice in the profession of the licensee being disciplined.

The workgroup expressed strong interest in having disciplinary actions against health care practitioners evaluated by like professionals in the same manner as New York , Louisiana and the Florida Bar. Existing statutes should be reviewed for a determination

as to whether any statutory changes are necessary to facilitate options similar to those used in other jurisdictions. If necessary, appropriate legislation should be enacted creating for each board the option to establish a pilot project for specified violations and authority to develop rules for the process with a panel of professionals serving as the fact finders in the discipline cases. Currently, section 120.80, Florida Statutes, may serve as a barrier to this scheme as it provides in part:

(15) DEPARTMENT OF HEALTH.--Notwithstanding s. 120.57(1)(a), formal hearings may not be conducted by the Secretary of Health, the Secretary of Health Care Administration, or a board or member of a board within the Department of Health or the Agency for Health Care Administration for matters relating to the regulation of professions, as defined by chapter 456.

The workgroup considered two options. The first was to allow parties in administrative proceedings involving disputed issues of material fact to elect resolution via §120.57(4), Florida Statutes, by allowing the matter to be heard by a three member panel of the appropriate board. The panel would be advised on legal and evidentiary matters by a lawyer assigned as a “hearing officer” and after the conclusion of the hearing the panel would issue a final order that can be appealed pursuant to §120.68, Florida Statutes, similar to New York. In the second option, the boards would need to hold the formal hearing using like professionals as fact finders with a hearing officer merely managing the procedural and evidentiary aspects of the case. The panel would issue a recommended order with the final disposition being made by the full board.

Findings

1. Many of the issues raised in the workgroup were addressed in CS/SB 2D, including the ALJ qualifications and standard of care determinations, while the remainder were addressed by Chief Judge Cohen.
2. An evidentiary hearing before like professionals is not currently being used as an option in the discipline process for health care professionals.

Recommendations

1. Monitor the implementation of CS/SB 2D to determine if the goals of the bill are being met.
2. Monitor changes in the methodology for assessing charges to agencies using DOAH's services particularly as it relates to cancelled hearings where settlement has occurred.
3. Pursue statutory changes if necessary, to allow the boards, or the department when there is no board, to hold peer based fact finding hearings. If necessary, amend or repeal of section 120.80(15), Florida Statutes.
4. Attempt to implement a pilot project with the Board of Dentistry to evaluate its effectiveness.

BOARD ACTIVITY

Discussion

The health care practitioner boards, or the department when there is no board, are the final member of the enforcement team. Appointed by the Governor with confirmation by the Senate, the board members serve both on probable cause panels and as the judge in the final disposition of a discipline case. The boards operate with a quorum and the majority vote prevails. Under the Administrative Procedure Act, boards conduct their business in the public arena.

Because board members change routinely due to their staggered terms, consistency in procedures is an ongoing challenge for them. The workgroup discussed discipline cases deliberated before a board where the licensee being disciplined or the complainant was not allowed to speak. Boards often fail to follow a set procedure in its discipline process or deviate from its procedure without an explanation in the record. Boards, over advice of counsel, will on occasion ignore its own discipline rules in disposing of a case.

Likewise, boards have been reluctant to establish performance standards by which to judge their effectiveness. Instructive for the boards might be a system by which they could use previous discipline in similar cases to guide their decision in the case before them. It doesn't mean they must do the same thing but it would create greater consistency in their discipline actions. Also, boards need to study to see if the discipline it gives is effective in changing a licensee's behavior or that of the profession as a

whole. It should use disciplinary cases to guide continuing education courses and rule changes.

Communication between the boards and the department on disciplinary issues is always a challenge. As prosecutors, the department needs to know and understand a board's approach to or philosophy about discipline of its profession. Likewise, the boards need to be kept abreast of issues facing the department as it prosecutes cases including staff issues, procedural concerns, settlement parameters, and compliance with orders.

Findings

1. Boards are sometimes inconsistent in their procedures for discipline cases.
2. Boards have no routine mechanism for reviewing the effect of discipline on the practice of the profession.
3. Boards have no means to measure their performance.
4. There is no formal means of communication between the department and the boards on discipline issues.

Recommendations

1. Boards should establish routine procedures for handling discipline cases that are known to the public, licensees and board members. There should be an annual review where every board member participates in review of the discipline procedures.

2. Boards should be required to review their discipline cases every two years to determine their impact on the profession and adjust the practice rules accordingly.
3. Boards, in conjunction with the department, should establish performance measures to ensure discipline is timely and effective. This does not mean that performance of responsibilities should be made uniform so as to be in a “cookie-cutter” fashion. Review of cases should continue on a case by case basis, but with a more attentive eye toward consistency and efficiency.
4. The department should establish a discipline liaison committee made up of a representative from each board for the purpose of routinely reviewing the enforcement process and to identify ways to improve it.

STAFFING AND TRAINING

Discussion

One of the issues identified in the discussion was a very strong need for staff compensation and training particularly as they pertain to the prosecution services unit. In PSU, staff retention of lawyers continues to be of great concern particularly as to litigation. Currently, there are 108 positions in PSU, of which 43 are attorney positions. The average salary has historically been barely over the base of \$48,000 for a senior attorney and \$37,000 for an attorney. The turnover rate for lawyers in PSU is approximately 45% annually with many lawyers leaving after 18 months to two years. Since its transfer to the Department of Health on July 1, 2002, DOH has added an additional \$144,000 to attorney salaries to enhance retention.

This pattern of low salaries and high turnover is comparable to the Department of Business and Professional Regulation where lawyers are hired at or near the base salary, trained to discipline professionals, and then lost to private firms offering higher salaries. The Agency for Health Care Administration has a similar problem but to a lesser extent because Medicaid monies allow it to offer higher starting salaries so retention is better, at least as it relates to attorney positions funded with Medicaid monies. The positions prosecute Medicaid cases exclusively.

A similar situation exists with investigators in ISU. They are hired at the minimum salary in most cases, trained in health care investigations, and then are often recruited by

insurance companies at higher salaries to investigate health insurance and fraud cases. This is particularly true of the younger workforce, making seasoned investigators rarer each year.

Training is an important part of retaining staff. The need for additional training, particularly in litigation techniques including witness preparation, motion practice, settlement negotiations, taking and defending a deposition, evidence, cross-examination techniques, and effective use of an expert witness was discussed. In addition, a need was expressed that on-going training of investigative staff in the disciplines they are assigned to investigate would be beneficial. It might be helpful to have someone in each field office who is a leading expert in a particular discipline to ensure that investigations are done correctly.

Training is linked to performance which in turn should be linked to compensation. Training needs for each individual should be identified from an assessment of the staff's ability to meet measurable performance measures. Both CSU and ISU have objective, measurable performance standards which managers can use in supervising staff and in developing individualized staff training. PSU is just beginning to develop measurable performance standards by which to determine individualized staff training needs.

Training is also needed for experts used to review cases. Experts are used to review disciplinary cases to assist in determining if a standard of care has been violated, identify evidence needed in an investigation, write opinions, and testify at hearings.

These are skills that need to be developed and practiced in order to be effective.

Training is a key to that success, but it is currently lacking in some respects.

Findings

1. Staff retention is a problem in ISU and PSU.
2. Low staff salaries contribute to a high turnover, particularly among attorneys.
3. Strengths and weaknesses of each individual in the enforcement units need to be identified.
4. Current staff training is not individualized or discipline specific.
5. Training of experts in process issues is inadequate and sporadic in and among the regulated professions.

Recommendations

1. DOH should continue to find ways to increase staff retention, including salary increase, when earned, commensurate with the private sector or progressive increases based on performance; life style enhancements, including flexible work schedules and sharing positions; and service rewards through repayment of student loans for public service.
2. Objective performance standards should be developed for PSU staff.
3. Individualized training plans should be developed for enforcement staff after an assessment of their respective skill levels.
4. Discipline-specific training should be developed for enforcement staff.

5. All experts used in discipline cases should complete a mandatory training to improve their skills and effectiveness in process issues.

ALTERNATIVE DISPUTE RESOLUTION

Discussion

Currently, the alternate dispute resolutions system in MQA has three methods of dispute resolution. The first is the citation which is an informal traffic ticket type of approach to minor infractions. The second avenue for discipline is mediation and the third is a letter of noncompliance.

The infractions that are subject to citations are designated by the board of each profession. Citation violations are considered discipline and are those violations for which there is no substantial threat to the public's health, safety, and welfare. Violations for which a citation may be issued include violations of continuing education requirements; failure to timely pay required fees and fines; failure to comply with the requirements of ss. 381.026 and 381.0261, Florida Statutes, regarding the dissemination of information regarding patient rights; failure to comply with advertising requirements; failure to timely update practitioner profile and credentialing files; failure to display signs, licenses, and permits; failure to have required reference books available; and all other violations that do not pose a direct and serious threat to the health and safety of the patient. (See s. 456.077, F.S., 2002) In 2003, the statute was changed to exclude the first citation as discipline, but subsequent violations are counted as discipline.

Mediation is currently being used primarily in hearing aid cases to mediate a refund for the patient when hearing aids do not work correctly. It was very difficult to get the boards to adopt mediation rules or designate violations which could be mediated because it is limited to offenses that were economic in nature or that the licensee could remedy. For the most part mediation has not been aggressively pursued as an option in enforcement actions.

In 2003, the mediation statute, s. 456.078, Florida Statutes, was amended in an effort to encourage mediation. The statutory provisions for mediation are:

1. The board, or the department if there is no board, shall designate by rule which violations are appropriate for mediation.
2. Mediation is prohibited under three specific conditions specified in law:
 - a. If economic harm is caused by an act or omission involving intentional misconduct
 - b. If there is a standard of care violation involving any type of injury to a patient
 - c. If the actions of the licensee result in an adverse incident as defined in s. 456.078(2)
3. Mediation is appropriate only when the harm done is “remediable” by the licensee. This may consist of such actions as reimbursement of costs, offer of or payment for further services by the licensee or another licensee, or even simply an apology, if appropriate.

4. The department or any agent of the department may conduct informal mediation to resolve a legally sufficient complaint concerning a violation for which there is rule authority to mediate.
5. The complainant and the licensee must both agree to mediation within 14 days after notification of this option by the department.
6. After resolution, each party has 60 days to certify to the department his/her satisfaction with the agreement.
7. A successful mediation does not constitute discipline. It will not be reported to any national databanks or recorded as discipline in department or board records.
8. Conduct or statements made during a mediation proceeding are not admissible in any other proceeding, including if the mediation fails and the case proceeds through the usual disciplinary route. All records of mediation are confidential.
9. No licensee can use mediation more than three times without the approval of the department.
10. The department has the authority to adopt rules designating mediation offenses if a board has failed to do so.

The following states answered affirmatively when asked if they utilized mediation:

Arizona, California, Colorado, Illinois, Minnesota, New Jersey, Tennessee and Virginia.

In addition, Indiana, Iowa and Montana reported that they utilized mediation but in very rare instances. Hawaii reports that its investigative arm has the option of mediation, but

had not yet employed it. Massachusetts and Wisconsin reported giving mediation a try, but not continuing with it. Massachusetts further responded that the reason it discontinued mediation was because they “were resolving only complaints that would not lead to discipline anyway.” Also, although Virginia provides for mediation, it is most often utilized with professions such as contractors, land surveyors and other non-health care professionals. The closest field to health care that significantly utilizes mediation there appears to be cosmetology, although it is available to all professions under the umbrella agency.

The states that employ mediation generally use an initial screening process to determine whether a complaint is appropriate for mediation. Florida must also do so, in light of the revision to §456.078 providing that offenses involving intentional misconduct, patient injury or adverse incidents are to be excluded from the mediation process.

The State of California, as an example, advises that while they have no “formal” mediation process, the state medical board does informally mediate certain consumer complaints, limited to these few issues: (1) a physician’s failure to provide medical records to a patient; (2) failure to timely sign a death certificate; and (3) medical records abandonment by a physician.

In Arizona, a more formal mediation process is in place where the Office of the State Attorney General conducts the mediations and any agreement reached is subject to the approval of the profession’s licensing board at a regularly scheduled meeting. In New

Jersey—where complaints cannot be mediated if they involve “questions of medical care”—an Alternative Dispute Resolution (ADR) Unit of the Division of Consumer Affairs handles those cases that are appropriate for mediation.

In many jurisdictions, mediation is available through local professional society organizations, sometimes in affiliation with the state regulatory authority. For example, in North Carolina, a person wanting to file a complaint against a Dentist is told of the option of first pursuing the complaint through a “Peer Review” program of the North Carolina Dental Society. An attempt is then made to mediate the complaint to the satisfaction of both parties, and if that fails the complainant can then proceed with a formal complaint to the State Board of Dental Examiners. Here in Florida, the Palm Beach County Medical Society asserts that it has recently handled an average of 31 complaints a year through its mediation process. Other county medical societies and the Florida Medical Association also mediate complaints as do the Florida Dental Association, and the Florida Osteopathic Medicine Association. Typically, these professional societies are only willing to sponsor a mediation process if the practitioner involved is a member of that society. Also, as a rule, they stress they cannot mediate once a formal complaint with the regulatory authority or a civil lawsuit is filed.

For health care consumers nationwide, the most significant availability of mediation to resolve a health care complaint comes from the recent changes in the Medical Beneficiary Complaint Response Program. Following a successful pilot program, the Centers for Medicare & Medicaid Services (CMS) made mediation available to

beneficiaries' nationwide beginning in September 2003. If the parties reach an agreement, it is shared with the Quality Improvement Organization (QIO) for that state, which will follow up and insure that the terms of the agreement are implemented on behalf of Medicare or Medicaid. Mediation will not be available for cases where "significant quality of care problems," as well as "gross and flagrant issues" and a "pattern of substantial violations in the expected standard of care" are present.

The use of mediation has great potential for success in discipline cases. However, the boards need to embrace the idea and aggressively pursue it as a more efficient, less-costly and timelier means of resolving cases. Like the enforcement units, the performance of the boards in discipline cases should be measured by how well they improve in these areas.

In addition to citations and mediation, the probable cause panels provide another opportunity to resolve cases in a more efficient, less-costly and timelier manner. As exhibited by regulatory models established in other states, these panels can be successfully used to resolve cases with the practitioner directly. In Florida, the Board of Accountancy has adopted a similar model. Its process matches that of MQA up to and including probable cause except the probable cause panel meeting may be used to have the licensee appear and discuss the case with the panel in such a manner as to facilitate a settlement that is negotiated for adoption by the full board. The complainant is not involved but can appear at the full board meeting. The model seems to be effective because like professionals are negotiating discipline for the profession.

Findings

1. Alternative dispute resolutions are not being used to their fullest.
2. Boards have been reluctant to use these options for violations.
3. Processing times for discipline could be improved by using these options.
4. New options need to be explored to improve the effectiveness of timely discipline.
5. Probable cause panels are not being used to their full potential in alternative dispute resolutions.

Recommendations

1. Every complaint should be screened for diversion to one of these processes.
2. All boards' performance should be measured to determine the effective use of these processes by objective measurable outcomes developed jointly by the board and the department.
3. Complainants should be involved in the mediation and settlement process.
4. Probable cause panels should be used to settle cases or set parameters for settlement.

CONCLUSIONS

It is clear that effective discipline of health care practitioners has to be a partnership among all parties involved, including the practitioners, the boards, the department, DOAH, and the public. It must be a process that is fair, efficient, timely, understandable, and just.¹ It must seek to aggressively eliminate bad practitioners from the profession while focusing on re-training those practitioners who need it. The process must instill a sense of confidence in both the practitioners and consumers. In order to do so, the focus of the professional disciplinary system must have its focus narrowed to address significant conduct rather than wasting resources on the prosecution of minor issues that do not truly impact public safety. It must promote a healthy Florida and lead the nation in quality health care through effective regulation. The findings and recommendations contained in this report are another step in achieving those goals.

¹ Some members of the workgroup advocated that the regulation of healthcare professions for the protection of public safety is the duty of the state and comes with a financial cost. Fairness and due process should not be jeopardized in an attempt to reduce costs by shifting them completely to the regulated licensees.

ATTACHMENTS