

## The Board of Medicine's hospital resignation 'mouse trap'

By Andrew L. Hyams, Esq.

Any physician contemplating resignation from a position at a health care facility needs to be aware of a Massachusetts Board of Registration in Medicine "mouse trap" that can place him or her in professional peril.

Some historical context is necessary to understand how this "mouse trap" works. For many decades, health care facilities have been required to report any "disciplinary action" against a physician to the Board of Medicine. In the mid-1980's, health regulators became aware of the unfortunate practice whereby a physician, accused of a serious offense by a hospital, would quietly resign and go to another hospital or another state, before the hospital reached a final disposition of the accusation.

First Massachusetts, and then the National Practitioner Data Bank, put a stop to this by requiring hospitals to report such resignations as "disciplinary actions." While intuitively we understand that the physician's act of resignation is not the equivalent of the hospital affirmatively taking a final disciplinary action, the profession and its lawyers came to understand that "disciplinary action," as a term of art, could include a resignation in the midst of unresolved and often serious accusations.

The source of the "mouse trap" is the Board's erroneous interpretation of the phrase "disciplinary action" as defined un-

der the Board's regulation, 253 CMR 3.02. Although this is not stated in the regulation itself, the Board interprets the term "disciplinary action" to include a resignation submitted while an investigation is pending, even if the physician is unaware of the investigation. This is an expansive interpretation

even if the physician is unaware of a pending investigation is inconsistent with the instructions the Board provides to health care facilities when they complete the required disciplinary action report form. Those instructions state: "The Board assumes that the facility has afforded the

procedural due process."

Indeed, the irony here is that it is the Board's interpretation that translates into the physician's complete loss of due process rights at the hospital. The physician resigns, unaware of a pending investigation, the Board labels the resignation a "disciplinary action," and then the physician is unable to claim a right to a due process hearing because he or she is no longer on staff at the hospital.

This particular type of "disciplinary action" throws the physician into a professional horror show. The Board reports publicly on its physician profile website that the hospital has "imposed discipline," even though the hospital, independent of the Board's interpretation, would say that it had not. The physician never got a hearing and cannot appeal at the hospital level.

Further, the Board launches a disciplinary investigation, which can go on for months or even years, and the physician is kept in the dark because, lacking the hospital hearing and being no longer on staff, the physician has no access to documents, medical records or witnesses. And with a disciplinary report posted on the website and a pending Board investigation, it can be impossible to find employment.

The Board's interpretation is inconsistent with its own regulation, which requires a "disciplinary action" resignation to be either "related to competence" or related to a bona fide complaint of a regulatory or bylaw violation. The Board's disciplinary action form

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that not only goes beyond the regulatory language, but also goes beyond the intent behind it, and at the same time sets up the unaware physician for harsh and surprising consequences.

A reported disciplinary action is posted as part of the physician's profile on its website, regardless of whether the Board actually investigates the initial allegations. Calling this type of resignation a "disciplinary ac-

tion" even if the physician is unaware of a pending investigation is inconsistent with the instructions the Board provides to health care facilities when they complete the required disciplinary action report form. Those instructions state: "The Board assumes that the facility has afforded the physician procedural due process, when applicable, unless otherwise notified."

If a health care facility reports a disciplinary action based on an investigation the doctor didn't know about, then the doctor could not have received procedural due process, which would include notice of the allegation and the opportunity to respond. With no notice, there can be no due process. The Board is thus in no position to "assume that the facility has afforded the physician

any pending complaints against you or whether your professional conduct is subject to any investigation. If there is anything pending, seek legal advice from an attorney well-versed in hospital reporting requirements before resigning.

2. Regardless of whether a complaint or investigation is pending, include in your resignation a "due process reserve" clause. Individual legal situations are unique and you should rely on your own attorney for legal advice. I have recommended to physicians that they include something along the following lines: "This resignation is void if, at the time it shall otherwise be effective, there is any pending complaint or investigation regarding me (regardless of whether I am aware of such complaint or investigation) which might result in the health care facility

filing a disciplinary action report at the Board of Registration in Medicine. For avoidance of doubt, this resignation is void if it limits my due process rights to answer and otherwise resolve a pending complaint or investigation."

It is regrettable that the simple act of resignation forces a physician first to run to a lawyer for advice, but until the Board can be convinced that its interpretation of its regulation is erroneous, I see no alternative. **MMLR**

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1985-1990. As the attorney who drafted the definition of "disciplinary action" under 253 CMR 3.02, I can state unequivocally that the current Board's interpretation of the regulation is at odds with the Board's intent at the time the regulation was promulgated. The Board's purpose then was to shut down the unfortunate practice of allowing an incompetent or unethical physician to submit a "quiet resignation," only to pop up at another unaware hospital. The purpose was not to set a "mouse trap" for the unsuspecting physician, as the current Board has done.

Unless a court overrules the Board, any physician contemplating resignation from a health care facility should take the following precautionary steps:

1. When contemplating a resignation, affirmatively inquire as to whether there are

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states: "In addition, the Board interprets 'related to competence' as including situations in which a physician withdraws an application or agrees to the imposition of a disciplinary action while the facility is conducting an investigation, even when the facility does not make a final determination on the subject(s) of the investigation."

If the physician is unaware of the investigation, it is impossible for the physician to "agree to the imposition of a disciplinary action," and thus under this Board instruction, the resignation cannot be "related to competence." Yet, the Board ignores its own form and insists that the physician who resigned while unaware of an investigation must be reported to the public as disciplined by his or her former hospital.

I was general counsel at the Board from