

Episode 18 – Demystifying the NCMB Investigative Process

Intro music: 0:00

Podcast introduction: 0:10

Do you ever catch sight of a police car while driving and feel a silent alarm, go off in your brain? You check your speed set up a little straighter. Maybe make sure your hands are in the recommended 210 position on the steering wheel. Now, imagine you're a doctor or a P.A., and this time it's not a glimpse of a police car setting off your internal alarm. But a letter from the North Carolina Medical Board addressed to you. It's your license to practice medicine. Your livelihood at stake. And just like that, your picture in the end of your professional career. I'm Jean Fisher Brinkley, Communications Director for the North Carolina Medical Board. And this is MedBoard Matters. Thanks for joining me. I call that involuntary shiver of fear that some of us experience when faced with authority the law enforcement response. And I've been with the North Carolina Medical Board long enough to know that quite a few licensed physicians and PAs are prone to it. A lot of licenses would just as soon never hear from their medical board. That's a challenge for us because NCMB frequently has information, guidance, and resources that it wants medical professionals to have so they can be successful in practice and avoid regulatory problems. A lot of our communication efforts are actually aimed at dispelling or at least reducing the fear that the medical board inspires. Which brings me to the topic of the day in this episode of MedBoard Matters. We are going to take on one of the most anxiety provoking situations a licensed medical professional can face, receiving that dreaded letter that says, "You are under investigation". I'm just going to cut to the chase and tell you that the thing licensees are most afraid of, that they will lose their license is actually the least likely outcome of a medical board investigation. I hope that after this episode, licenses will walk away understanding that the North Carolina Medical Board is really not out to get them. And if you don't happen to be a licensee, I hope you gain a better understanding of how the Board gathers the information it needs to decide how to resolve cases. First, it's important to understand that an investigation is not a board action, a decision. There is no finding of fault at this stage, only an allegation or some other information that the Board needs to understand to decide if there's a threat to patient safety. In a significant majority of cases, once the investigation is complete, there isn't sufficient evidence of a violation or a threat to result in regulatory action. If you remember nothing else from this podcast episode, remember this; The result of a medical board case depends on the evidence. Both patients and others who file complaints and licensees who are the subject of them should understand this. The most serious case resolutions, those that take away a licensee's authority to practice, are only taken in the most serious circumstances, and those sorts of cases are actually relatively infrequent.

Interview with Pat Berkmilller (Part 1): 3:06

JFB: To help me address some of the myths and truths about the investigative process, I've asked NCMB Chief Investigative Officer Pat Berkmilller to join me. Pat joined NCMB in October 2019 and he brings years of experience in law enforcement to his role. He retired from the Federal Bureau of Investigation as a Special Agent after nearly 30 years of service. And he's also worked with Blue Cross Blue Shield of North Carolina as an Investigator. Pat, Thank you so much for being here today. I appreciate it.

PB: Thanks, Jean.

JFB: I wanted to start by asking you to address a concern that seems to exist among medical professionals, which is that the medical board secretly investigates licenses. That one day a letter is

going to arrive that says 'Doctor So-and-so', your licenses revoked, and it's going to be the first time they've heard a thing about any sort of problem. OK, Pat, is that a myth or reality?

PB: Well, thanks for that question, Jean. That is definitely a myth. Any licensee that we investigate are provided a notice of information up front. A brochure that outlines our process and receives details of the actual allegation. So, we're very transparent in that in that entire process.

JFB: And how is that notice generally delivered?

PB: That notice is generally delivered via email to the email address that the licensee has on file with the medical board.

JFB: Okay, great. I do want to follow up and ask about an exception that I'm aware of. What about situations where the Board learns that a licensee may be an immediate threat to patients or public safety?

PB: So, in those types of scenarios, we have what's called an option of having a summary suspension where there is a special meeting of the Board to discuss that scenario. Usually, this is going to involve something quite serious where an arrest of a licensee has taken place for a felony. It's usually something that has occurred in some circumstance involving either a patient in the work environment where the licensee works or a direct threat to public safety.

JFB: Right, right. So those are situations where there's an immediate threat and the Board feels there's a need to get that person out of practice on an emergency basis.

PB: Correct. And it does not stop the fact that we still have due process, and the licensee will still have their opportunity to respond to that summary suspension. Within 30 days, a hearing will be scheduled for that matter.

JFB: Right. Thank you for mentioning that because that's really important. The licensee still has a chance to hear all of the allegations against them. To defend him or herself. And, you know, the Board considers all of the information once a complete investigation has been done and then makes a final decision.

PB: Correct, and these are actually quite rare. We may only have three to five summary suspensions per year.

JFB: Well, thanks. I just thought it was important because although typically your first word from the Board is not going to be that you're suspended, but there are these situations where that's necessary in the Board's view. Another thing that I think is really important for people to understand is that the medical board investigative process has rules, and you've referred to some of those already with some of your comments. But the Board does have written rules that spell out medical board processes and the rights of the medical professional who is under investigation. Can we talk about a few of those just maybe give some highlights?

PB: Sure, absolutely. So, you know, one of them is that, you know, at the onset of the investigation, we provide a notice of information. We're required to do that and that is again presented to the licensee, and it outlines again the investigative process. We also strive to complete all of our investigations within a six month timeframe. If we go over six months for, you know, there's a number of reasons that an

investigation would take longer, that is required by us to notify the licensee in writing that we're going to be extending that investigation beyond that six month timeframe. And another rule that we have is that if a licensee is going to be charged and disciplinary action would be considered, there is a conference that is scheduled for the licensee. And if they have an attorney, the attorney would be invited to that conference as well. And that outlines all of the charges and the process that would go forward as far as its next steps.

JFB: Great. We could probably go on forever talking about rules. We're not going to do that. We will post a link to the investigative rules on our podcast show page, which you can find at www.ncmedboard.org/podcast. Now, Pat, you mentioned attorneys just a little while ago. Does a licensee have to hire an attorney to represent them if they're under investigation by the Board?

PB: They do not. Most licensees actually do retain an attorney. Although we cannot make that decision for them, we do maintain a list of attorneys who are qualified to represent licenses before a Board matter. And if a licensee chooses to retain an attorney, we would just ask that they make sure that they communicate that with either the complaint section or with the field investigator directly. And to make sure that you have a letter of representation that's been provided by that attorney to us so that we can communicate all of the information that we need to through your attorney.

JFB: Right. And if you don't provide this information, then all of the communications are going to go directly to the licensee. Isn't that right?

PB: That is correct.

JFB: All right. So, another common question that the Board gets from medical professionals is what if the allegation or complaint is, in their opinion, just frivolous or completely baseless? Do they still have to respond?

PB: Actually, yes they do. As the regulatory agency for licenses, we have to follow the process. And if the allegation is within our jurisdiction, then we're required to open a case. We always follow the evidence. We are impartial to the information that is received. And oftentimes, you know, we do realize that sometimes allegations are found to have no merit or if they do have merit, there are many times where no disciplinary action is actually taken against the licensee. But we do need to respond to all of the allegations that we receive.

JFB: Right. And you know, a point that I'll make is that I'm aware that our complaint staff or our investigative staff actually screen allegations as they come in. And if they review an allegation and they make a determination that there's just nothing there, there's no basis for disciplinary action, then those cases are closed with no requirement for the licensee to respond in writing. Licensees are always notified that a complaint they're made, but they are not required to spend their time writing a detailed response. And I think that's important to know. Thinking back on the data, it's about from complaints received from patients in the public. I believe it's up to 20-25% that are just not within the Board's jurisdiction and would never conceivably lead to disciplinary action. So those are just closed. So, the Board really does have a process in place to try to avoid needlessly burdening the licensee with the need to respond. But if you do get a request for a response, then you do, of course, as you've said, have to respond. And the sooner you do that, the sooner the matter will be resolved.

PB: Yes, we always like to have a timely response. It makes the process go smoother for both the Board as well as for the licensee, and that helps us to be able to close these cases within that six month timeframe that we're trying to strive for.

Key Point Review: 10:46

Now we're going to take a quick pause to go over some fine print. You just heard Chief Investigative Officer Pat Berkmilller say how much the Board appreciates a prompt response to an investigation. Just to be clear, a response isn't just helpful, it's actually required. Remember, the staff of the Board has already reviewed the complaints and weeded out the ones where it's obvious there's no basis for action. In all other situations, if there's even a chance, a violation of law or professional ethics occurred under the law, the medical board has to investigate. Refusing to respond isn't constructive and it could actually make your situation worse. It's not common, but failure to cooperate with a Board investigation can actually lead to disciplinary action itself, separate from whatever misconduct is alleged in the complaint. So, if you're asked to provide a written response or to speak with an investigator, tell your story. Now, if you were just absolutely underwater personally or professionally and you truly cannot respond to the Board, you can request an extension. In that circumstance, you would need to reach out to your point of contact with the medical board, let them know the reason for the delay and get approval to provide your information at a later time.

Now is also probably a good time to put the NCMB investigative process in context. How often do investigations occur and how often do those investigations result in some sort of action against the licensee? To answer these questions, I'm going to refer to preliminary data from 2021. Once these numbers are finalized, they'll be published along with a lot of other information and NCMB's upcoming agency annual report. As we'll discuss in a few moments, NCMB has multiple pathways through which an investigation can be initiated. The most common source is complaints from patients in the public, but the Board also opens cases based on licensee arrests, malpractice payment reports and a lot of other sources of information. In 2021, all of these different sources of information led to about 2,200 licensees having some sort of investigation that had at least the potential to result in board action. At the end of December 2021, the North Carolina Medical Board had just over 55,000 licenses, so that works out to about 4% of the total licensee population having some sort of information under review. At the beginning of this episode, I said that loss of license was the least likely outcome of an investigation. What I meant was really that any public action, and by that, I mean, any action that other people know about that is adverse in nature, is the least likely result. Now, the numbers get a little tricky because the case isn't always opened and closed in the same year. But when we look at the number of cases closed, where the result is any public adverse action, it works out to be about 8%. Again, that's preliminary, but that result has been reproduced pretty consistently in recent years. The percentage of adverse actions that result in loss of license is actually not something that NCMB calculates, but it's not high. In 2021, it was perhaps 25 actions that resulted in at least temporary loss of license, or about 1% of all cases investigated. Before we get back to my discussion with Pat Berckmilller, I want to make something very clear. If the Board believes that taking a licensee out of practice is necessary to protect the public, it acts decisively. It just isn't that common. Again, it comes down to what the evidence shows. In this next segment, we're going to talk about the two main types of investigations licensees might be asked to respond to.

Interview with Pat Berkmilller (Part 2): 14:39

JFB: We are back with Patrick Berkmilller, Chief Investigative Officer of the North Carolina Medical Board, and we are talking today about the North Carolina Medical Board's investigative process. Now, Pat, I know that there are two types of enforcement cases. There are complaint cases and then there are field investigations. I wonder if we could spend a little bit of time talking about those two types of cases and how the processes differ slightly in each case. Let's start with talking about complaint investigations. How does a complaint investigation get started and how do those cases come to the board?

PB: Jean, typically a complaint investigation, we call them a paper complaint. They typically are received by us through our web portal, where either a patient, a family member or someone that has a particular complaint against a licensee will submit it. We'll also receive them not only through the portal, but through email, phone calls, fax and also through directly from a hospital health system, when they file, say, for example, a change in staff privileges. And that's how the complaint would actually be received by the medical board. The process as far as what happens next, is every complaint is addressed through an NOI or notice of information that is provided back to the licensee. And in that information, they receive a copy of the actual allegation. So, the licensee knows exactly what the allegation is. It's a very transparent process. Quite often when that information is sent back to the licensee, if it involves patient care in any way or what we call quality of care, there is a request that comes it's called an OTP or an order to produce for medical records of either the patient or patients. And once those medical records are received back by the medical board, they're reviewed by staff. And the staff that reviews them is not actually in the investigations department, but in our Office of Medical Director, and those records are reviewed by a clinician. If that clinician does not have a sufficient specialty that is qualified to review those said records, then those records may be sent out for outside review and that outside reviews is again a peer of the type of care that is received. And then once those records are reviewed, that information is then provided to the Board for a decision on whether that particular quality of care met the standard in the state of North Carolina.

JFB: OK, great. I just want to underscore one point, which is that when the Licensee receives that notice of information that says a complaints been received there will also typically receive a request for a written response at that time. Is that right? And that's going to be the licensee's primary opportunity to give their side of the story. There's not going to be an interview conducted.

PB: That is correct. That is a response with their facts of how the uh, the incident took place. Correct.

JFB: OK, great. Well, thank you for spelling that out. So that's pretty much it. You know, the Board goes through the process. Staff make recommendations. The Board reviews everything. They decide. Is there something here or not? If not, they close the case with no action. If there is, and they would pursue disciplinary action. Let's talk now about the field investigation aspect of this. So, what's a field investigation and how are those cases initiated?

PB: Jean, a field investigation is similar to what we referred to as the paper complaint process that we just discussed. At the onset of these cases, there are certain allegations that will automatically trigger the initiation of a field investigation versus a paper complaint, and typically some of those scenarios would be if the licensee were to be arrested for a felony, if there was a drug diversion allegation,

substance abuse allegation, some type of change in staff privileges where a licensee was removed from a hospital health system for some type of adverse or disciplinary action within that system. And these types of cases are assigned to a field investigator. So, that initial contact with the licensee we'll have might be an email or a phone call or directly from one of our field investigators. So that is the difference in the types of cases and how they would be initiated. And we do realize that there are a lot of scams that are out there. We have information that some people are posing as a medical board investigator. But keep in mind that the field investigator will always provide you the allegation of the notice of information, and we never threaten to take your license or ask you to pay money to a field investigator throughout that process.

JFB: Thank you for mentioning that. If you're concerned, if you're a medical professional and you're contacted by a board investigator or someone who says they are an investigator, how do you verify that?

PB: So, we would ask any licensee who was suspicious of a phone call that they've received or an email that they've received to call the North Carolina Medical Board directly at our main number and asked to have the identity and the purpose of a field investigator verified. And we will most certainly do that and verify that that person was reaching out to you.

JFB: That they're legitimate, right? Now, let's talk a little bit more about the role of the investigator. It's probably, I'm guessing, pretty intimidating if you're a medical professional to be contacted by an investigator. But again, you mentioned earlier, the medical board is an impartial regulatory body. Does the investigator go into a field investigation trying to prove the allegation?

PB: They do not. If you think of it this way that most of our investigators are all coming from, this is their second career. They've most of them have been in career law enforcement positions before, and they do understand that many times they are presented with information that is not accurate. So, they are in on a fact finding mission. So, when you think about this, the investigators approach this in a fair and impartial way. They understand that not all allegations have merit, and they are simply there to gather all of the facts and present those facts as they're received. And many times, again, because it's a field investigation, these facts are obtained through direct witness interviews, the interview of the licensee to obtain their side of the story and what has occurred here and anyone else that may have been involved or had participation in that what is alleged.

JFB: Right. It may go without saying, but no facts can rule out misconduct just as easily as they can rule it in or confirm it. So, there isn't any reason to be fearful that the Board is out to get you or the investigator has it in for you. That's just not the case. The other role that I'll mention that investigators play that I'm pretty sure licensees would not be aware of is that they can be a resource for somebody who is under investigation. Can you explain a little bit more about how that is?

PB: Sure, absolutely. So, when the process begins and it provided that notice of information from the field investigator, it outlines the process. But many times, licensees will have questions as they go through the process and the field investigators are there to provide any type of assistance or any questions or follow up information that may be asked by the licensee. So, they're always available. Their contact information is provided up front and use them as a resource for any questions that you have.

JFB: OK, great. I think that's all the questions I have about field investigations specifically, but I'll end just by asking you if there's anything I haven't asked about the investigative process that you'd like to add or that you think is important for licensees to understand.

PB: Well, I think that this is always a stressful position to be in when you are being investigated. We try to again make that process go as smooth and as seamless as possible. I think the important thing here is that it is entire process that we go through and that there is no disposition that's already been laid out. That anyone who's being accused of, we believe that they are guilty of anything. So, keep that in mind that again, it is a process that just has to go through its course and be patient in the process. And anything that is requested, try to be as responsive as possible to provide the information that we're asking for.

JFB: Thank you so much. I really, really appreciate your time, Pat.

PB: Thanks, Jean.

Podcast wrap-up: 23:21

I really hope that Pat and I have helped to demystify the NCMB investigative process at least a little. It occurs to me that we spent most of our time talking about the importance of the licensee response, but that's not the only thing the board bases its decision on. If the case involves quality of care, the Board will get copies of the medical records. In many cases, an outside review of those medical records is obtained. If there are witnesses who can provide information, they may be interviewed. Any relevant information that could help the Board understand what happened and why could be gathered as evidence. The bottom line is it's not going to be a situation where it's the patient's word against the medical professional's word alone. If you are interested in learning more about the North Carolina Medical Board's investigative process, visit the show page for this episode at www.ncmedboard.org/podcast. While you're there, check out our episode on the complaint process from last year. It goes into what the Board can and cannot address under the law, among many other things. As always, we want to hear your comments and questions. Email them to podcast@ncmedboard.org. And remember, if you thought this information was useful, your friends probably will too. Send them our way. Thanks again for listening, and I hope you'll join me again.