

## **BATTLING A SEXUAL MISCONDUCT COMPLAINT**

One of the quickest ways a chiropractor can lose his or her license with the State board is to engage in any sort of sexual harassment or misconduct with a patient or even an employee. The Texas Board of Chiropractic Examiners takes complaints regarding sexual misconduct very seriously, leaving little room for error. Obtaining information about the TBCE and its disciplinary procedures can be difficult, so we have utilized our experience in defending a chiropractor for sexual misconduct to compile this article to assist you in understanding the process and to be prepared in the event that a complaint is ever filed against you.

### **TCBE Background**

The Texas Board of Chiropractic Examiners, created in 1949 by the Texas Legislature, is a regulatory agency. The functions of the agency are: (1) to oversee the state Board examination given to qualified applicants who wish to practice chiropractic in the State of Texas; (2) to annually register chiropractors holding a Texas license; and (3) to aid in enforcing the laws of the state regulating the practice of chiropractic.

The Board of the TBCE consists of 9 members appointed by the government with the advice and consent of the Senate as follows: 6 chiropractors who are reputable practicing chiropractors and who have resided in Texas for at least 5 years preceding appointment; and 3 members who represent the public. The Board then appoints an Enforcement Committee (EC) to oversee and conduct the investigation of complaints. The committee consists of 3 Board members – two chiropractors and one public member.

### **Complaint Filed**

Anybody can file a written complaint with the TBCE for any reason. Once a written complaint is filed, the TBCE will acknowledge receipt of the correspondence and provide you with a copy of the complaint with a request for a written response. At this point, it would be very wise to obtain an attorney. Many of you believe that you can submit a response that will show the Board there was no wrongdoing. However, this is usually not the case. Simply submitting a response denying the alleged wrongdoing is insufficient. Though the process may seem informal, the Board takes these complaints extremely seriously. It is very important to obtain an attorney's expertise early in the process. Attorneys will be able to present the information and defend your case in a very persuasive manner.

Many chiropractors do not realize that what may appear to be innocent flirtation or a consensual adult relationship, can easily be construed by the Board as a violation of the Chiropractic Act, which could lead to harsh penalties and/or loss of license and ability to practice. The Texas Administrative Code, Title 22, Part 3, Chapter 75, Rule §75.1, Grossly Unprofessional Conduct, prohibits "engaging in sexual misconduct with a patient within the chiropractor/patient relationship." Sexual misconduct is defined as:

1. Sexual impropriety, which may include:
  - A. Any behavior, gestures or expressions which may reasonably be interpreted as inappropriately seductive or sexually demeaning;
  - B. Inappropriate sexual comments about and to a patient or former patient including sexual comments about an individual's body;
  - C. Requesting unnecessary details about sexual history or sexual likes and dislikes;
  - D. Making a request to date;
  - E. Initiating conversation regarding the sexual problems, preferences or fantasies of the licensee;
  - F. Kissing or fondling of a sexual nature; or
  - G. Any other deliberate or repeated comments, gestures, or physical acts not constituting intimacies but of a sexual nature.

Though the code describes situations occurring within a doctor/patient relationship, it is strongly advised that any sexual improprieties taken place within the professional facility or with the staff/employees may be subject to punishment under these guidelines. For our client specifically, it was a consensual relationship with a former employee that led to the complaint being filed against her, charging unprofessional and sexual misconduct. The complainant in our case made a detailed list of encounters and conversations between him and our client.

### **Investigation**

It can take anywhere from thirty days to years to resolve a complaint, depending on when it is filed, the complexity of the investigation, and whether or not there are other factors involved (criminal proceedings, etc.). The majority of complaints are resolved in approximately six months. Once a complaint is filed, you will receive a notice letter requiring you to submit a response. After the Board receives a formal response from you, the Director of Enforcement will begin to investigate the complaint and recommend a disposition to the Executive Director or the EC. In our case, the time between receiving the complaint notice letter till the informal conference was exactly six months.

At anytime during the investigation period, the Board may conduct an on-site inspection of your office facility without prior notice. In addition, the Board has the right to examine and copy your office records pertinent to the investigation as well as obtain statements from various parties without your knowledge. The Board will not share this information and you may only learn of it at the hearing. You will be notified by mail when the informal conference date is set.

Since the Board's main concern is patient safety, they want to be assured that no one is in danger and that the type of alleged conduct will not happen in the future. We found this investigation period a key timeframe for our client. The few months prior to the informal conference was her time to implement and make significant changes in her lifestyle and chiropractic practice, to affirmatively demonstrate to the Board that any further indiscretions would never occur.

What are some of the changes she implemented? There are several different activities and programs she participated in. She began by seeing a psychologist or therapist on a weekly basis at least. We discovered that there are many therapists who conduct therapy with the use of polygraph tests, requiring complete candor. Utilizing this medium would be a bold step towards ensuring the safety and well being of your patients to the Board. In addition, our client joined group therapy sessions for people with sexual addictions and a 12-step program in which she had a sponsor who held her accountable for attending and participating in the group sessions. Furthermore, she took the initiative to explore other options or persons who could help her implement changes in her lifestyle. Our client was highly involved in her church and found meeting with her Pastor on a weekly basis to be the most helpful.

The more activities and programs you participate in, the better. The Board will take notice of your aggressive actions towards changing your life and practice. Another great type of program to participate in is a boundaries and ethics counseling course. The Board has high regards for these types of programs and seeing you take the initiative to attend, would be a huge benefit to you. There are various programs throughout the country, in ethics and boundaries as well as counseling in sex addictions, including: Santé Center for Healing in the Argyle, TX, near the Dallas area; Pine Grove Behavioral Health and Addiction Services in Hattiesburg, Mississippi; Psychological Counseling Services in Scottsdale, AZ; and Vanderbilt's Center for Professional Help in Nashville, TN.

In addition to counseling, our client took precautionary measures and made changes within her office. She reorganized and rearranged her office space and furniture to have less closed, private spaces. Other changes you could implement are putting safeguards to ensure that this type of behavior will not be repeated such as always having another employee present when you are with a patient. Another possibility would be to have another professional or reputable authority come in once a week to "check up" on you and your practice and ensure that the office is running in a smooth and professional manner.

Furthermore, while the investigation period is going on, you may submit any other documentation that you find helpful to your case. We gathered various letters of support from our client's therapists, counselors, sponsors, accountability partners, co-workers, pastor, patients, and staff. All the letters discuss their knowledge of the complaint and discuss the changes they have seen implemented. We tried to get as many letters as we could from those relevant to the situation and those who were present during the supposed misconduct. We submitted all our client's attendance logs from the various meetings and programs she chose to attend. Finally, our client also wrote apology letters to the complainant as well as other parties involved.

It is extremely important to show the Board acknowledgement and recognition of the inappropriate behavior. It is not a defense that the relationship was consensual; the Board wants to see that you have taken responsibility for your actions and have made significant changes to office policies and procedures to ensure that no further indiscretions will occur in the future.

## **Informal Conference**

You are not required to appear at the informal conference, however, it would be very wise to attend. This is your chance to apologize and speak to the Board, accept responsibility for your actions, and show and explain what steps you have taken over the past few months. The complainant may also appear, though you are never in the room at the same time and do not get to hear each other's testimony. If the complainant does appear, they are called up first.

When you receive notification of the informal conference via mail, only a date is given, with no specific time. The doors of the TCBE open at 8:00am and hearings are on a "first-come", "first-heard" basis. It is strongly recommended that you arrive and sign in as early as possible, to prevent having to wait for several hours. On our day of the hearing, we signed in at 8:15am, being fourth on the list, however, were not called nor heard until 1:00pm. Additionally, you may ask your case investigator ahead of time as to who the committee panelists will be.

At the informal conference, the EC will review the complaint and any additional information/evidence furnished by the complainant. They will also review the response and any additional information/evidence supplied by you, or admitted on your behalf. Finally, they review and discuss any other pertinent information obtained by the Enforcement Division during the course of the investigation.

After reviewing your case, you will be called up to the conference room with the EC. In the room, there are several people including 3 Board members consisting of 2 doctors and one civilian member. On the day of our conference, the civilian member was an attorney. In addition, two assistant attorney generals were present when the case was reviewed. Due to time constraints, any additional witnesses are normally not heard. In fact, many times, no additional witnesses are even allowed upstairs. Only your attorney and spouse are allowed to accompany you.

The Board will begin asking you questions and will allow you to provide additional information. Our client already had a statement prepared for the Board, which was a great idea. You must be prepared to answer difficult questions. Remember, the Board is not required to disclose evidence obtained through their investigation prior to the conference. They may present evidence that you have never seen nor heard about before and you must be ready to answer any questions they may pose.

Once the questioning has been completed, the Board will then ask you to leave. You do not get a response or decision at that point; rather you will be notified by letter of the EC's decision at a later date. In our case, we received a letter exactly one month after the informal conference. If the EC finds a violation of the Chiropractic Act or Texas Administrative Code exists, the EC may take a number of actions ranging from a reprimand to revocation of your chiropractic license. If the EC finds that there is no jurisdiction or no violation has been committed, your case will be closed. Those cases where the EC finds no violation, or no jurisdiction, will be closed.

### **Disciplinary Powers of Board**

The Board has the power to: (1) revoke or suspend the your license; (2) place on probation a person whose license has been suspended; (3) if license suspension is probated, the Board may require license holder to report regularly to the Board on matters that are the basis of the probation or limit practice to the areas prescribed by the Board or continue/review professional education until license holder attains a degree of skill satisfactory to the Board; (4) reprimand a license holder ; (5) impose an administrative penalty which cannot exceed \$1000; and/or (6) require participating in a continuing education program – specify the programs and the number of hours that must be completed

In some cases, the EC will rule that there is not enough evidence at the time to make a decision and will order the investigation to continue to gather information and evidence. In these cases, the matter will be brought back to the EC at a later date for another review.

The decision will be drafted in the form of an agreed order that will be sent to you. If you agree with the EC's recommendation, you will sign the document and return it. It will then be presented to the full Board at the next scheduled meeting for formal approval. Should the board amend the proposed order, the Executive Director shall contact you to seek concurrence. If you not wish to accept the EC's recommendation, then you can request a formal hearing before the State Office of Administrative Hearings (SOAH).

Within 20 days after receipt of the agreed order letter, you may: (1) make a written request for a hearing on the occurrence of the violation, amount of penalty, or both, or; (2) accept in writing the enforcement committee's determination and recommended administrative penalty; or (3) accept the Board's determination and penalty, at which point they will formally approve it and impose the penalty issued against you.

No later than 30 days after the Board's final order, you are required to either pay the penalty or file a petition of judicial review contesting the fact of the violation, amount of penalty, or both, or both pay penalty and file petition.

### **Right to Appeal**

If an agreed order is not accepted by you or no agreed order is offered, the case will be referred to the SOAH for formal hearing. The Board staff will commence formal hearing proceedings by filing the case with the SOAH and by giving you notice. You are entitled to a hearing before the Board if the Board proposes to: (1) refuse the person's application for a license; (2) suspend or revoke the person's license; or (3) place on probation or reprimand the person. The hearing shall be held by an administrative law judge of the SOAH.

You are entitled to reasonable notice of a hearing of no less than ten days prior to the hearing. The notice will contain a citation to 1 TAC chapter 155 (relating to SOAH Rules of Procedure) and include the matters specifically required, as follows:

1. A statement of the time, place, and nature of the hearing;
2. A statement of the legal authority and jurisdiction under which the hearing is being held;
3. A reference to the particular sections of the Chiropractic Act, other law or rules which the respondent is alleged to have violated; and
4. A short and plain statement of the acts relied on by the board as a violation of the cited law and rules.

You, the respondent, must enter an appearance by filing a written answer or other responsive pleading with the SOAH, with a copy to the other party, within twenty days of the date on which the notice of hearing and formal complaint or petition was served to you. The failure to timely enter an appearance entitles the Board to a continuance at the time of the hearing for such reasonable period of time as determined by the Judge.

If you fail to appear in person or by legal representative on the day and at the time set for hearing, regardless of whether an appearance has been entered, the Judge, pursuant to the SOAH's rules, will enter a default judgment in the matter adverse to you.

In addition, if you appeal the Board's final decision, you must pay all of the costs of preparation of the original and any certified copy of the administrative record of the proceeding that is required to be transmitted to the reviewing court.

After complete review of your case, the Judge will make findings of fact and conclusions of law and will promptly issue to the Board a proposal for a decision as to the occurrence of the violation and amount of a proposed administrative penalty.

Thereafter, the Board will render the final decision of the case, including the denial of a license or registration, revocation, temporary suspension, reprimand, and/or administrative penalties. The final order of the Board will be in writing. The Board, with the advice of its legal counsel, will determine the form and content of the Board's final order.

It is the policy of the Board that it may change recommended findings of fact or conclusions of law in a proposal for decision, or vacate or modify an order issued by the Judge when the Board determines: (1) that the Judge did not properly apply or interpret applicable law or rules, Board policies or prior administrative decisions; (2) that a prior administrative decision of the Board on which the Judge relied is incorrect or should be changed; or (3) that a technical error in a finding of fact should be changed.

If the Board modifies, amends, or changes a recommended finding of fact or conclusion of law, or order of the Judge, the Board's final order shall state the legal basis and the specific reasons for the change. A copy of the Board's final order will be mailed to all parties.

## **Early Termination**

Once you agree to the final order and the Board formally approves it, after some time, depending on your punishment, you may write a letter to the Board requesting early termination of your order. There is nothing explicit in the rules regarding this; however, it seems to be in practice. You will have to let at least half the time of your punishment go by, before submitting a letter. Furthermore, to have early termination, something extraordinary must occur. For instance, the complainant writes a letter to the Board, you have gone through a series of polygraph tests, or you have decided to no longer see male or female patients depending on the violation found against you.

In addition, an individual or chiropractic facility whose license or registration has been revoked for more than one year may, after the expiration of at least one year from the date that such revocation became final, apply to the Board (on forms provided by the Board) for reinstatement. In considering the reinstatement of a revoked license or registration, the Board in its discretion may: (1) Deny reinstatement; or (2) Grant reinstatement. If the Board grants reinstatement, it can: (A) without condition; or (B) with probation for a specified period of time under specified conditions; or (C) with or without reexamination or additional training.

In conclusion, our advice to chiropractors is to really watch and be careful of your words and actions. If a complaint is filed against you, obtain an attorney right away. And if an investigation is being conducted, really be aggressive and take major steps to change your lifestyle and practice.