



More than "Just the Facts" — Best Practices for Disciplinary Investigations

This article is based on a presentation by Stephen Curley, Investigator, and Louis D. Kelly, General Counsel, Kentucky Board of Physical Therapy, at the 2017 FSBPT Annual Meeting.

A regulatory board's investigator and general counsel should work together to ensure the investigation has uncovered all relevant information on the complainant, the licensee, the charges, and any possible subsequent charges uncovered during the investigation, before bringing a recommendation for disciplinary action to the board.

That's the lesson from Kentucky where they have found the key to effectiveness is not to judge the people involved — that's the board's job — or to prejudge the evidence.

Every valid complaint brought to the board is investigated. Sixty to 70% of the complaints each year are dismissed because the case cannot be proven after a thorough investigation. Two or three a year are not investigated because, even if the allegations are true, they do not violate the practice act. It may be true, for instance, that a physical therapist (PT) was rude to a client, but that does not rise to the level of a violation that is prosecutable by the board.

Once a complaint is received a case is opened and the investigator subpoenas every record available. If a patient is involved, those records are subpoenaed. Patient records can uncover issues with documentation, reassessments, or other issues. The real goal of beginning with patient records is not necessarily to find violations; it's really to find a starting point in the investigation.

Then the clinician's personnel records are reviewed. Personnel records often uncover gems of information. Personnel records in Kentucky have uncovered sexual harassment issues, violence towards co-workers, mental health issues, and fraud material deception that wasn't reported to the board. Many times, companies don't want to divulge violations because it makes them look bad or they have to back up the charges. Instead, they discipline the person within the institution, move on, and fail to ever notify the licensing board.

Investigators and the general counsel also need to know the laws governing practice. During one investigation, the investigator asked a basic question on staffing. The clinician replied that he was the only PT staffing his two clinics, but he also employed three physical therapist assistants (PTAs), five techs, and one athletic trainer. It was a passing question and if the investigator didn't know the law, it would have passed by. However, the investigator knew that Kentucky limits PTs to overseeing four supportive personnel and he was overseeing nine. That opened an entirely new side investigation.

Follow the Evidence

Nothing should be taken at face value, not evidence, not statements. It must be supported. In a recent case into a single act of fraud material deception, the licensee called before the investigation began, apologized for the mistake, said it has never happened before and never will again. They said they will accept any punishment the board proposes and move on. The case was investigated anyway and other instances of fraud and mental health issues were uncovered.

Unlike Dagnet's Joe Friday, investigators shouldn't just limit themselves to the facts. The facts are important. They are what builds a case and leads to prosecution. But an investigator should not ignore hearsay, rumors, and department talk. While not admissible on their own, they can lead the investigator into prime territory.

For example, a PTA turned in a PT for using techs to treat patients with Medicare and Medicaid and billing for those services. While interviewing the PTA, the PTA said in passing that they found it hard to find the PT because he was gone a lot. The PT couldn't be found in the hospital, even though it was a small, rural hospital. That seemed odd to the investigator, so he investigated further. He discovered the PT not only worked at the rural hospital but also for three other home health agencies. As the investigator continued to unravel the thread, the people the PT worked with said they believed he was working both at the same time. He was clocked in at the hospital while he was working at home health.

As a consequence, the investigator pulled 365 days of records and found 127 days of overlap between the PT clocked in at the hospital and clocked in at a home health agency. He also found 80 instances of the individual using a tech to treat patients with Medicare and Medicaid and billing for those services, 50 instances of him billing for two patients simultaneously during the same time slot, and about 30 instances of the individual billing from 9:00 to 9:30 and billing for 60 minutes of treatment time, despite being with the patient only 30 minutes.

An investigator and counsel have a responsibility to remain open-minded during an investigation. It is not the job of either to lead the investigation based on personal bias or opinion, but to let the facts lead the investigation. When an investigator begins to start leading the investigation, rather than the investigation leading the investigator, the investigation becomes tainted. If open to following all the leads, investigators may find that the original investigation leads down new roads and spawns new investigations. It starts with ground work: develop the evidence and witness list, identify the questions to ask, clearly determine the grounds for action, and uncover the background information. Investigators typically have an idea of the answers before the questions are asked in order to build a good foundation for interviewing the licensee.

Treat Everyone with Respect

The first thing the Kentucky investigator does when he interviews the licensee is attempt to build rapport. A Board investigation is a stressful event for a licensee. Everyone is nervous when they speak to an investigator: witnesses, complainants, and respondents included. Truthfully, the last thing they want

to do is talk to an investigator. Techniques such as telling a joke or talking about local area in an effort to calm people down work well.

The next thing the investigator normally does is explain the process. Most of the time the licensee does not read the three-page letter sent to them that explains the process, so the investigator explains it. It's another way of putting them at ease, particularly since it gives them a chance to ask questions.

Part of the process also is to assure them that the investigator's role is not to judge the facts, it's to collect them and turn them over to the committee for their recommendation to the board. The goal is to eliminate the perception that the investigator is out to get them, because then they're more willing to talk.

It's important to treat everyone in the process with fairness and respect. The investigator and general counsel are the face of the board to the public. Being state agents, they also are the face of the state. The licensees may never meet a board member, so what happens during the investigative process often determines their attitude toward the board.

A case in point: The board received a complaint for fraud material deception and assigned the investigator to the case. The complaint said the PT did not treat a patient she billed for. When interviewed, the PT swore 100% that she treated the patient. The investigator presented her with video evidence that she did not, in fact, treat the patient. The investigator calmly and professionally asked if she wished to change her story based on the video evidence. She said, no, I treated the patient. At that point there was nothing left to talk about, and the investigator left. The next day the PT's attorney called the board's general counsel to work on settling the case. The point had been made, she thought about it and called her attorney.

Being overly aggressive or just indifferent can create hard feelings and rash behavior. A complaint often feels to the licensee as a threat to their livelihood; it is high stakes and means a lot to them.

Watch for Bias

One of the most important things an investigator must do is to maintain impartiality. Investigators, counsels, and board members, must stay in the middle and judge the evidence based off the facts. Not doing so taints the evidence and the board's credibility. Many kinds of bias can potentially rear their ugly heads: outward bias, confirmation bias, expectation bias, and recurring bias among them.

Outward bias is the easiest to recognize. It occurs when the person isn't likeable. The person being investigated may have been a schoolmate of the investigator or during the interview said something that sticks in your gut. While easy to recognize, it's also a very dangerous bias because it's often hard to shake.

A confirmation bias is where the investigator tries to find evidence that confirms the complaint. That leads to only looking at evidence that supports the complaint and ignoring all exculpatory evidence, possibly subconsciously.

Expectation bias is when an investigator makes early decision in an investigation. This is possible when the investigator comes across a piece of evidence they feel is so strong and influential that the licensee must be guilty and then ceases to look for exculpatory evidence.

Recurring bias occurs with the habitual line steppers. They have been investigated and disciplined many times. Boards know them on sight. They possibly by now even know the names of their children. Human nature is to judge them guilty on the spot because they have done it before. Boards and investigators, however, must treat them like it's their first time and investigate the complaint on its merits. Presuming they are guilty taints the evidence even before it's collected.

Finally, there's the reverse bias. This is bias against complainants. It occurs when the complaint is cryptic and rambling and doesn't make much sense. The first inclination is to ignore them or dismiss them because perhaps they're mentally unstable. But being unstable doesn't mean they aren't telling truth. Each complainant must be respected and each complaint investigated.

One way to fight bias is through a technique called the falsification of a hypothesis. The complaint and the response to a complaint both are treated as a hypothesis. The goal of the investigator, then, is to tear both of them apart. The investigator attempts to find evidence to disprove the complaint and evidence to disprove the response. And whatever is left standing is what you have. If the evidence proves the complaint is incorrect, then the case would be dismissed because there isn't enough evidence to move forward. Alternately, if the response is torn apart, the evidence is there to prosecute the person. If both are torn apart, the logical conclusion is it's not a matter of whether or not the person violated the practice act, there just isn't enough evidence to move forward.

Investigator and Counsel Confer and Concur

Once the investigator believes he has collected all the evidence, the investigator and counsel go through it together. Sometimes the counsel will find a hole in the evidence and ask for more such as hospital records needing to be certified. When both investigator and counsel are satisfied they have all the evidence, in most cases counsel draws up appropriate charges and presents them to the complaint committee, if the state has one, or directly to the board.

Some cases are brought to the board without a recommendation, particularly in substandard care cases. The investigator and counsel are not medical experts. They cannot determine if a licensee performed substandard care on a patient. The cases may come from a complaint or a lawsuit that was settled before a ruling on the charges. In one case, a patient became paralyzed shortly after a physical therapy treatment. The case was settled without a ruling, but the counsel summarized the depositions and gathered the court proceedings and other evidence. Ultimately it was taken to the board to determine there was a violation of the standard of care.

Give the Accused Everything You Have

In Kentucky, the charging documents sent to the licensee or their counsel are as specific as possible. It not only shows the licensee that the case against them is strong, but it also doesn't keep them in the dark wondering what evidence the Board has against them. It also helps with resolving the case quickly. If the 30 to 60 disciplinary cases a year Kentucky deals with all go to a hearing, the board is not going to be able to conduct any other business.

For example, there was a case with the initial complaint about a tech issue that ballooned into a huge ongoing fraud case. The clinician was presented with all the information about the case when informed of the charges. The evidence was compiled and highlighted so the charges and evidence were easy to review. The counsel then called the licensee and said he was recommending a settlement and had all the documents for him to look at. The recommended discipline was fairly harsh: \$10,000 in fines, months of suspension, and a complete home health prohibition with monitoring after the suspension.

The licensee reviewed the evidence and signed the deal. This approach has resulted in few formal hearings in Kentucky.

But no one is pressured to accept the settlement. They have a right to have a hearing. Usually what the board offers is what they believe to be a reasonable resolution. But if the licensee wants a hearing, they are entitled to one. They have all the evidence compiled against them. If the investigator and counsel were thorough, it's unlikely they will win.



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