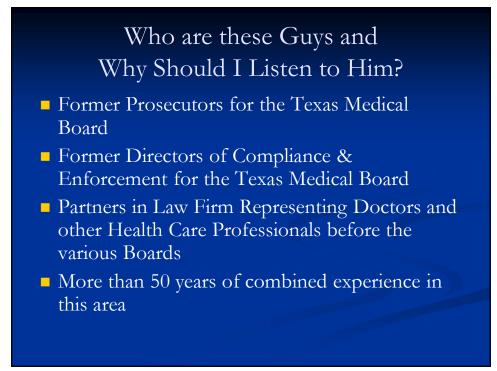
# Texas Medical Board: The Basics of the Investigation and Legal Process

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# Lawyer At Work

### Disclaimer

- The opinions expressed are mine.
- My opinions may not reflect those of McDonald, Mackay, Porter & Weitz, LLP
- My opinions may not reflect those of Texas Osteopathic Medical Association

# **Objectives**

- Explain the Investigative Process & Legal process of the Board
- Discuss issues that get doctors in trouble
- How to defend yourself

# What is the Purpose of Boards?

- To protect the public
  - Licensure
  - Standards
  - Investigation/Discipline



Not to protect or help the licensee



# The Make-Up of the Board

- The District Review Members
- Their role is to assist the Board members
- There are four geographical districts of 28 total people.
- Each district has:
  - 4 Physicians
    - Three MDs
    - One DO
  - 3 "Public" members
  - All are appointed by the Governor and approved by the Senate
  - They serve 6 year staggered terms



## How Does An Investigation Start

### Compliant

- **55%** Patients & Family
- 15% Employees/Other Professionals/Peer Review
- 15% Legal (Criminal & Civil & Administrative)
- 10% Insurance Companies
- 3% Board Created
- 2% Self-Reported



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## Notice of Complaint

- Board sends a letter providing you basic information about a complaint.
- Have 28 days to respond
- Failure to respond will result in an investigation.
- Cases can be dismissed at this level.
- Standard of care allegations often are not dismissed at this stage.
- Better call your med-mal carrier.

# **Pre-Investigation**

- The Board has a statutory deadline to complete an investigation in 180 days.
  - However, there are no consequences if it exceeds that time frame.
- Pre-investigation gives the Board a head start

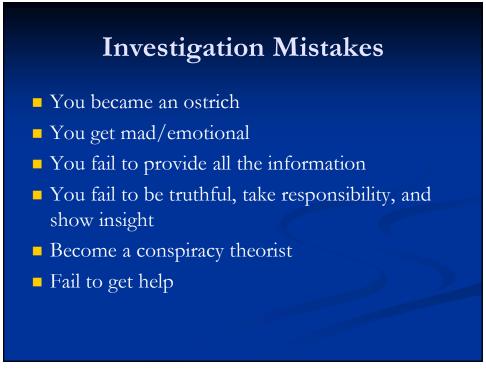
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# Investigation

- Investigations are conducted by Investigators, most are nurses from field offices.
- All standard of care cases are reviewed by "Board consultants"
- Two consultants review each case
- These are doctors who agree to review cases for the Board.

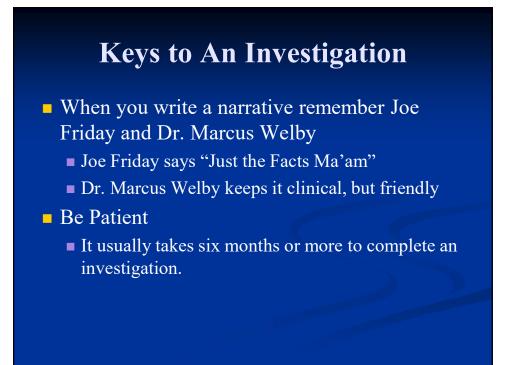




# **Keys to An Investigation**

- Cooperate
- Give them all the records
  - Doesn't matter if the investigator only wants a limited number of records, give them all.
  - Copy everything, notes on back, call logs, sticky notes
  - Don't rely on employees to ensure all the records are there – this is your license at stake
  - Make sure your affidavits are correct





# The Fork In the Road: After the Investigation

- Once the investigation is done, the system takes over
  - It's reviewed by the Investigation's Manager
  - It's then reviewed by the staff's Quality Assurance Committee
  - It's then referred to Legal for review

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# The Fork In the Road: After the Investigation There is then a decision to make: Does it stay in Legal or does it go to Committee? If it is referred to committee, it is sent to the Disciplinary Process Review Committee (DPRC) This is made up of half the Board membership and they determine whether a case is dismissed Complainants have a right to appeal this decision

# The Fork In the Road: After the Investigation

 If it is referred to Legal from either the internal staff review or through the DPRC, then the investigation has made it to the Informal Settlement Conference (ISC).

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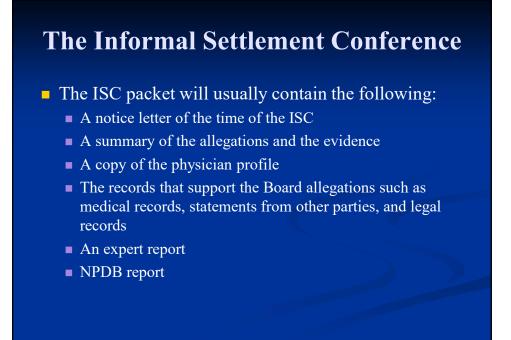
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# **The Informal Settlement Conference**

- You will be notified by letter of the date of the ISC.
- Continuances are rarely granted.
- Later they will send a CD containing the evidence the Board plans to present against

you.





# **The Informal Settlement Conference**

- You need to be careful. The ISC Packet is put together by a prosecutor or that individual's staff.
  - Medical records may not be complete records
  - Exculpatory information may be left out
  - Additional information you submitted may be left out

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# The ISC Process: Nothing Like You've Ever Seen Before

### The Players

- Two representatives of the Board. Always one doctor and one public member. Generally speaking at least one is a member of the Board.
- Encouraged to have similar specialties present, but not always possible.
- A Counsel for the Board. They are the legal advisor to the Board's representatives
- A Board prosecutor

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## The ISC Process: Nothing Like You've Ever Seen Before

The Process

- The Counsel will go over the ground rules
- The prosecutor will have an opening statement
- The licensee has the option of a statement
- The Board representatives ask questions
- The licensee is dismissed
- The Board representatives confer in private with the Counsel
- The licensee is permitted back in
- The Counsel explains the decision of the Board
- The licensee is told to leave

# The ISC Process: Nothing Like You've Ever Seen Before

- This is a specialized practice. This is not District Court and lawyers and licensees who appear and think it is, will get killed.
- This is as much about communication as it is the evidence.
- Each Board representative has their own style and that plays a role in the outcome.



# **Outcome of the ISC**

### Six Possible Outcomes

- Recommendation to dismiss. Goes to DPRC for review
- Defer for additional information
- Remedial Plan
- Offer of an Agreed Order
- Directive to take a Temporary Suspension
- Directive to take directly to the State Office of Administrative Hearings.

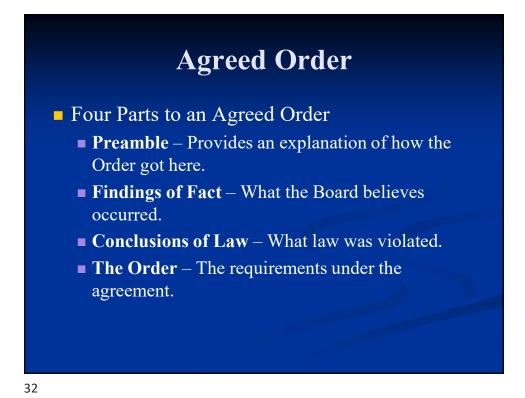
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# **Remedial Plan**

- Public, Non- Disciplinary Action
- Looks like a contract
- The information stated is usually vague
- Self-funding, \$500 annual fee
- Must be approved by both parties

# **Agreed Order**

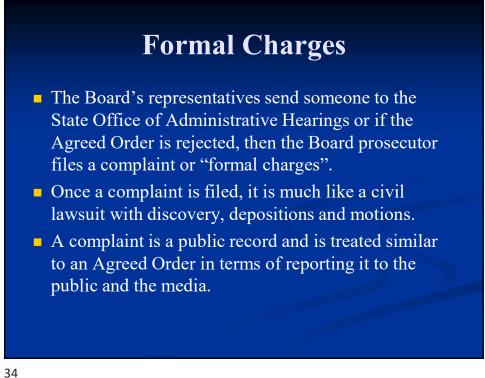
- In short, it is an agreement to accept some action by the Board to keep one's license and avoid court.
- Board can do almost anything the licensee is willing to accept.
- The Order must be accepted by both the licensee and a majority of the full Board to be effective.



# **Collateral Damage**

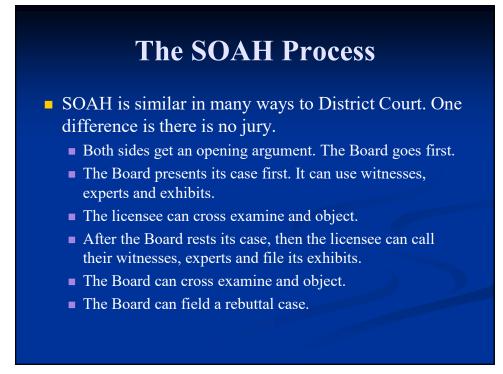
### • The Agreed Order has many possible effects:

- It's public, therefore:
  - Newsletter
  - Website
  - Various Data Banks
  - Press Release
- May affect insurance contracts
- May affect hospital privileges
- May affect Board certification
- May affect Malpractice insurance
- May affect who and what you can supervise in your practice
- Of course, whatever the Order requires, you must do.
- It enters the licensee into the Compliance Program.



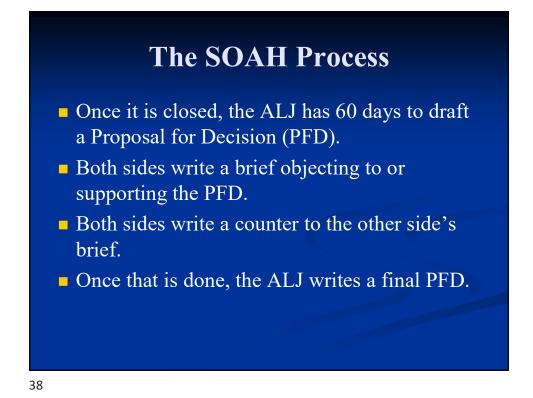
# The State Office of Administrative Hearings

- The State Office of Administrative Hearings (SOAH) is an administrative (executive branch) court.
- A licensee appears before an Administrative Law Judge to hear the case.
- The Board has the burden of proof, which is a preponderance of the evidence this means 51%



# **The SOAH Process**

- It is at the end when the SOAH process gets a little odd.
  - There can be closing arguments, but most ALJs would rather have written closing arguments.
  - The ALJ may want other issues briefed after the hearing.
  - The hearing remains open until the ALJ says it is closed.



# **The SOAH Process**

- The ALJ has complete control over the Finding of Fact and Conclusions of Law
- Has no authority over the actions taken by the Board.
- Therefore, if an adverse finding is made, the Board could do anything it wants to.

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# Why a PROPOSAL for Decision, because the Board, who sent you there in the first place, has the legal power to amend or even reverse the decision of the ALJ. The prosecutor speaks and then the licensee. The Board asks questions and then votes to accept, reject or modify the PFD. There is a complex appeals process thereafter, but it to fiftee the action of the process.

# **Time Line**

- In a pre-investigation the licensee has 28 days to respond. The Board will typically take thirty days to make a determination.
- An investigation usually takes six months after the licensee receives notice.
- A case set for an ISC usually takes another three to six months to resolve.
- SOAH can take an additional eighteen months to two years in order to resolve. Sometimes longer.
- An appeal of a Board decision can take years.





# Boundaries

- Boundary Violations
  - Not just sex
  - Economic
  - Dual Relations
  - Improper relationship
  - Gifts





# What to Do To Insure Against A Complaint

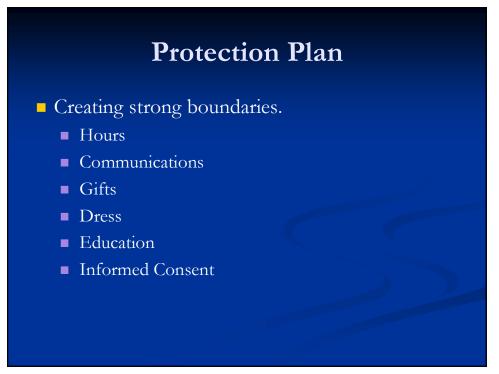
- Outstanding record keeping
- Employees
- Patients
- Know the rules
- Statistics
- Internal audits
- Criminal violations
- Suspicious activity by patients
- Business arrangements



# **Protection Plan**

- Saying "No"
- Know You Are a Licensee 24/7
- Don't Self-Medicate, Family, Employees
- Knowing Your Limitations
- Knowing Your Vulnerabilities
- Not Making Someone Special





# **Questions?**

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Can email us from our website: Healthlicensedefense.com