A Podiatry Disciplinary Investigation

There's much to learn from this case study.

BY LAWRENCE F. KOBAK, DPM, JD

The specific state is not important, but the lessons are paramount. Among the various professional practice boards, mass confusion reigns concerning what is a standard of care, what is a practice guideline, and what constitutes a lapse in professional practice. This case study reveals a real-life example of how a state board attempted to injure a podiatrist through an abuse of its investigatory powers.

Each state has a Board of Professional Discipline that has jurisdiction over their various licensed professions, such as podiatry. They are part of the executive branch of government that is headed by a governor. They are supposed to protect the public from practitioners who practice in an unprofessional way. Each state has laws which define the general areas of unprofessional practice. Professional practice that goes outside the limits of patient safety, without good reason, can require disciplinary action by its state board.

Some of the causes for discipline are spelled out in detail, and others are more general, such as "unprofessional conduct". The areas with a broad definition allow the state board wide powers in its investigatory powers. They can lead to suspension, probation, and even license revocation. Even a relatively mild disciplinary action, such as a censure and reprimand, can and does lead to loss of inclusion in various insurance panels, Medicaid suspension, loss of Workers Compensation participation, loss of hospital privileges, etc. The stakes are high.

Most states, if they determine it is warranted, will interview the practitioner being investigated. They will usually give a list of potential issues to the person being investigated, or their lawyer. Depending on the state and the individual investigator, the list might be detailed, or it might be quite general. The practitioner's attorney should attempt to get as many details as possible and prepare their client for the interview accordingly. Many states will have their investigator prepare a report of the interview. Both the subject of the interview and the state's expert review it.

The state's expert will also review any relevant medical records and prepare his/her own report. Occasionally, the state will give the provider's attorney a copy of the report, without the expert's name. If the state has an expert participate in the interview, that expert will not usually be the expert that participates in any future hearing. The state is free to find possible disciplinary violations that have nothing to do with the reasons for the initial investigation. The investigation can be started by a complaint from virtually any source. Most, if not all states, must, by law, investigate each complaint. If not credible, the investigation need not proceed to the interview stage.

Okay, time for some definitions. What is a "standard of care"? That is a legal not a medical term. As such, according to Black's Law Dictionary, it is "that degree of care which a reasonably prudent person should exercise in same or similar situation circumstances." In a medical situation, "it is the average degree of skill, care, and diligence exercised by members of the same profession… in light of the present state of medical and surgical science." That does not state that the "gold standard" of care is the standard of care, just the average quality of care.

What is a preferred practice guideline? It is a set of recommendations, in a specific area of care, for best practices. Note, the word best, not average is used. Note also the word recommendations is used, not requirements. They are generally based on medical evidence and de-

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veloped by a panel of "experts". Governmental bodies, such as the CDC, may issue practice guidelines, such as the Treatment of Chronic Pain Guidelines. Medical specialty bodies, such as the APMA or AMA, or subspecialty bodies, may issue such guidelines. So may insurance companies. Their use depends on their acceptance and usage.

Sometimes, a state board might state that they are adopting a guideline as authoritative. Sometimes, an expert from a state professional board of discipline unilaterally declares a particular guideline to be authoritative. Sometimes, an expert from a state professional board of discipline unilaterally declares a standard of care that is applicable, in their own opinion. Sometimes they pick and choose individual items from various studies and standards as authoritative. Confused yet?

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Case Report

Well, in our case at hand, the following happened. After the podiatrist's interview, after phone calls and attempted negotiation at a settlement, a copy of the board's expert was given. It talked about the use of lidocaine as the only acceptable local anesthetic for trigger point injections. Yes, this investigation turned out to be the doctor's use of trigger point injections. The three patients at issue received trigger point injections from four different practitioners in clinic-type practice, between 2011 and 2017. Only one of the doctors was being investigated. There is no statute of limitations in the state disciplinary setting.

The original expert report talked about using a textbook called the *Trigger Point Manual*. On research, it was revealed that there was more than one edition of this textbook. An inquiry into the state revealed that the first edition, from 1983, was being used! Yes, a 40+ year old medical textbook was being used to reveal the standard of care for these patients. The expert also was very disturbed that a 25-gauge needle was used to deliver the trigger point injec-

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tion, not a 22-gauge needle—this, in his experience, was required.

This textbook was not recognized as authoritative by any medical society, including any of the pain societies or podiatry societies. The expert also felt that every trigger point injection required a written, signed consent form. That was factually incorrect by that state's statute. A detailed reply was prepared to the expert's report that resulted in a "supplemental" expert report in further reply.

Now, the expert was stating that the medical records should have included, prior to each trigger point injection, a full informed consent obtained, not necessarily a signed consent form. The expert also argued that insurance and Medicare numbers of allowable trigger point injections per visit were irrelevant—the only acceptable standard was what was allowed by the 2nd edition of the same textbook. Yes, the expert changed the edition that was being cited! The expert also argued that a new study, sanctioned by the ASIPP (American Society of Interventional Pain Physicians) was acceptable.

A quick review of the practice guidelines on the American Society of Interventional Pain Physicians webpage did not show that guideline on its list. The study itself was published in 2018, one year after the last patient visit that was being reviewed by the expert! No practitioner can be held to a standard that was not in existence at the time of the treatment of the patient. The study itself stated that prior to this study, there were multiple guidelines and standards, none of which were authoritative.

Additionally, the study that was relied upon by the state's expert never mentioned anything about 22-gauge needles, or informed consent documentation. The expert never differentiated how many trigger point injections were given by the investigation's subject, as opposed to those given by the other practitioners in the same clinic on the same patient, over the time period at issue.

Additionally, in the supplemental report, the myotoxic nature of Marcaine, used as part of the trigger point injection, was brought up for the first time, despite never being mentioned in the "after the fact" study. The very same American Society of Interventional Pain Physicians webpage (that does *not* have the cited study within its guidelines section), even though it was so cited by the expert, does mention the insurance and Medicare guidelines about the number of trigger point injections they will pay for. That was the very point that was demeaned by the state's expert.

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There was a tremendous amount of "pick and choose" going on by the state's expert. The expert, in the reports prepared, other than his own experience, justified the "requirement" to use 22-gauge needles for the injection. The expert also claimed that the trigger point injections could cause osteoporosis. No correlation to the amount of corticosteroid used to make such a claim was ever given by the expert. It must also be noted that none of the three patients had a history of osteoporosis or myotoxicity, before, during, or after the trigger point treatments.

The fact that all three patients were able to avoid the use of opioids, due to the relief that the trigger point injections afforded, was ignored by the expert, despite that point being made during the provider's interview.

The expert also stated that the standard of care was violated by not stating in the medical record if the patient was swabbed, pre-injection, by an alcohol or betadine swab. The expert continuously conflated the meaning of standard of care and the use of preferred practice guidelines that were not even in existence during the time of treatment.

For whatever reason, the state's expert appeared to be nit-picking and was increasingly defensive about any critique about his/her expert opinions. That is not supposed to be in the realm of a "subjective" expert.

The state's investigator, who was not a healthcare professional, had previously stated a wish to come to some type of compromise concerning the outcome of this investigation. This would avoid a hearing where the practitioner's professional license could be in jeopardy. The provider's experts had not seen any violation of any standard of care, let alone non-existent preferred practice guidelines. The problem with coming to a resolution is that any disciplinary action involves a report by the state to the National Practitioner Data Bank. That, in turn, is monitored by the other states, insurance companies, and hospitals. It could result in the practitioner's inability to make a living.

Many states have something called an "administrative warning". That is not reported anywhere and does not result in any punishment. It does not and should not be disclosed concerning any future application. In this case, a warning was given concerning the level of the practitioner's documentation. Yes, the documentation could have been better. After a multi-year investigation, with much anguish for the practitioner, a "solution" was found, and the world moved on. **PM**

Dr. Kobak is Senior Counsel in Frier Levitt's Healthcare Department in New York. Larry has extensive experience representing physicians in connection with licensure issues, as well as successfully defending physicians before Medical Boards, OPMC, OPD investigations, as well as Medicare Fraud, Fraud & Abuse, Hospital Actions, RAC Audits, Medicare Audits, OIG Fraud, Healthcare Fraud, Medical Audits, and Health Plan Billing Audits. As a licensed podiatrist prior to becoming an attorney, he served as the international president of the Academy of Ambulatory Foot and Ankle Surgery.