

Medical Staff Briefing

What you say about the boards can be held against you

by Nadia de la Houssaye

Please join us as we conduct a thought experiment.

Imagine that you are a hardworking physician trying to balance the pressures of a challenging career and your hopes for personal fulfillment in other areas of your life. As part of this effort, you are invited to join a private online group on Facebook created for practicing physicians with specific outside interests (e.g., running marathons, gardening, or any number of other possible subjects). In this group, you and your colleagues—many of whom have also become your friends—share tips and ideas for how to pursue your common goals. Maybe you discuss the best hiking trails, child care, or social outings to art museums.

Now imagine that one of the founders of your group posts an innocuous question about board certifications—nothing specific to the test content or process, just a general question about preparation. You offer some tips or just read the comments of others, most of which are buried in and around the other threads discussing unrelated topics.

A few months later, you receive a letter from the member board of the American Board of Medical Specialties (ABMS) that represents your discipline, indicating that an anonymous member of your private Facebook group reported to the board that you and all the other members participated in a forum in which confidential information regarding the board certification examination was discussed. The letter informs you that your board certification will be revoked unless you prove that you did not reveal such information (i.e., prove a negative).

You and the other group members, except presumably the person who tipped off the member board, seek out legal counsel to defend yourselves against this accusation. Imagine discovering that you have no due process rights. As a private, nongovernmental entity, the board is not required to provide you or your attorneys with any documentation regarding the allegations. Imagine also that the board, which has required you to sign a similar attestation governing the confidentiality of the test each time you've taken the examination, admits that it throws out those attestations after a one-year holding period.

At this point in our thought experiment, you might be thinking that all this is far-fetched and simply couldn't happen, but real-world examples of such actions exist. My colleagues and I have seen some of them firsthand. Over the years, specialty boards, despite the fact that they themselves often discuss the content of their examinations on their own websites and even offer a range of paid proprietary test-prep courses, have increased their efforts to go after practicing physicians who may or may not have revealed information about the content of these tests.

More recently, specialty boards have also notified physicians that their board certification is at risk due to the spreading of false information about COVID-19, particularly with respect to vaccines. Given the emergence of the novel coronavirus and the development and deployment of vaccines that help reduce spread and limit symptoms, it is to be expected that there will be some questions about use of these tools and the circumstances under which they should be used. Even today, such debates continue within the federal and state agencies tasked with approving and distributing the vaccines.

In a [statement](#), the American Board of Emergency Medicine (ABEM) said it “recognizes that there are numerous medical issues on which physicians will have legitimate differences of opinions – and that ABEM-certified physicians have every right to express their opinions on those issues. However, making public statements that are directly contrary to prevailing medical evidence can constitute unprofessional conduct and may be subject to review by ABEM.” It further stated that certification may be withdrawn or denied to physicians found to be disseminating inaccurate following a multilevel review process.

A joint [statement](#) by the American Board of Family Medicine, American Board of Internal Medicine, and American Board of Pediatrics echoed these sentiments about physicians spreading misinformation about COVID-19 and said doing so would open them to disciplinary actions, including suspension or revocation of their medical license or board actions that may put their certification at risk.

For its part, the ABMS has [supported](#) these statements and said that “spread by a diplomate of unscientific misinformation harmful to public health is unethical and unprofessional and may threaten certification by an ABMS Member Board.”

It is my belief that threats to revoke specialty certifications of physicians who have participated in these conversations may impact free speech and set unnecessary limits on physicians' ability to exercise their own medical judgment. Since most

healthcare employers require their physician staff to be board certified, such board actions pose even more serious threats to physicians, including losing their ability to practice medicine, finding themselves unable to earn a livelihood in their chosen profession, and being unable to earn enough money to pay back staggeringly high student loans.

Even when these issues are resolved in physicians' favor, a significant number of providers targeted by these initiatives report giving serious consideration to leaving the practice of medicine altogether. In an era of increased, pandemic-related physician burnout and a shortage of healthcare practitioners, particularly in rural and other underserved communities, do we truly want to drive people away from the profession?

Boards have also flexed their muscles in ways that can cause patient harm by threatening to revoke certification of physicians whom they believe fail to limit their practice in specific ways. For example, in 2013, the American Board of Obstetrics and Gynecology [declared that gynecologists were not allowed to manage the care of men at high risk for anal cancer](#) regardless of the significant similarities in how cervical and anal cancers progress and are treated. This was done despite the lack of evidence that such care was harming their male patients and despite the fact that the lack of expert care could clearly cause harm. After significant pushback, the board [reversed its position](#).

Perhaps more concerning, issues involving speech and medical practice aren't the only potential causes for revocation of certification. Most of the boards also maintain the right to revoke certification if a physician violates vague standards of professionalism. According to the ABMS' own [model policy](#), such lack of professionalism includes conduct "unrelated to a [physician's] medical practice" that poses a "threat to the trustworthiness of the profession." What constitutes such a threat, exactly, is left open to interpretation.

To be sure, none of the above should be read as a call to end the process of specialty certification in medicine. It is in the interest of everyone—patients, providers, and certifying boards—to ensure that our healthcare professionals are as well trained and skilled as possible. We all want better healthcare, and we all want better outcomes; board certification is an important part of achieving these goals.

We need good physicians, and we need more of them. What we don't need is teaching physicians being afraid to discuss certain subjects because someone could report them as "giving away" information about the questions on the board examinations. What we don't need is diverse physicians being reported to their various boards as failing to maintain "professional standards" simply because the tipster doesn't like their political position, sexual orientation, gender, or another factor that has no bearing on their abilities or practices as physicians. What we don't need is an industry in which the inability to defend oneself against murky accusations and the strong threat of certification being revoked stifles the all-important sharing of diagnostic and treatment best practices.

Typically, in an article such as this, it is important to follow the statement of a problem with a set of proposed solutions. However, when accused of unethical behavior, which the American Board of Surgery (ABS) defines as limited to "the disclosure, publication, reproduction or transmission of ABS examinations," or unprofessional conduct, physicians find themselves in a bind from which it is difficult to extricate themselves. Because they lack traditional due process rights, it may seem as if their only defense is to throw themselves on the mercy of their member board with which they are clearly motivated to maintain good relations.

Given all these circumstances, physicians who have received communications from their specialty boards containing a threat to revoke their certification should immediately contact experienced legal counsel. It is important to remember that you do have rights and that an effective attorney can help you exercise them.

Editor's note: De la Houssaye is a partner in Jones Walker LLP's litigation practice and co-leader of the healthcare industry team. She works extensively with hospitals, health systems, providers, and startup companies to structure and integrate telemedicine, telehealth, and digital health platforms.

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