

State of Michigan Healthcare License Investigations and the Practical Effect of Licensing Sanctions

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The purpose of this article is to provide the reader with an overview of the typical process followed by Michigan's Bureau of Health Professions in its investigation and prosecution of healthcare providers for alleged violations of Michigan's Public Health Code and the collateral legal effect that imposed sanctions can have upon the healthcare provider.

An Overview of the Bureau of Health Professions

Prior to December 7, 2003, investigations into, and resulting disciplinary actions against, Michigan licensed healthcare providers fell within the purview of the Bureau of Health Services¹ under the Michigan Department of Consumer & Industry Services ("MDCIS"). In accordance with Executive Order 2003-18, as of December 7, 2003, the Bureau of Health Services became the Bureau of Health Professions ("BHP") and, along with the Bureau of Health Systems, transferred its operations from the MDCIS to the Department of Community Health ("MDCH"). The BHP regulates more than 340,000 health professionals in Michigan who are licensed, registered, or certified under Articles 7, 15 and 17 of the Michigan Public Health Code and 42 Code of Federal Regulation (CFR) Part 483. The mission of the BHP is to protect the health, safety, and welfare of the citizens of Michigan by ensuring that providers of health services meet required standards of practice. This is done through the administration of the occupational regulation sections of the Michigan Public Health Code, Public Act 368 of 1978, as amended, and by addressing practice issues related to health care in Michigan.

The BHP licenses and registers 32 healthcare occupations in 20 different healthcare professions.² Additionally, the Bureau receives and investigates allegations against these professionals. Regulatory discipline is usually a function of a licensing board or task force within the Bureau that is composed of both professional and public members appointed by the Governor. The BHP is structured into three divisions – the Licensing Division, Regulatory Division, and the Complaint and Allegation Division – and is charged with the responsibility of licensing and regulatory activities.

Investigatory Process

The BHP distinguishes between *allegations* filed by consumers and formal *complaints* filed by the State. An allegation is a type of consumer complaint filed with the BHP. The consumer alleges that a violation of the Public Health Code has occurred. Typical allegations are for quality-of-care concerns, the conduct of the licensee, or a scope-of-practice concern issue. After receiving an allegation, the BHP reviews it and determines whether an investigation is warranted. In addition to allegations filed by consumers, the BHP may also receive written notice of any of the following circumstances,

often in accordance with one or more state and/or federal statutes requiring certain individuals and entities to report such circumstances to the BHP: 1) a limitation of staff privileges or a change in employment status due to disciplinary action taken by a health facility or agency; 2) a disciplinary action taken by a professional health society; 3) an adverse medical malpractice settlement, award or judgment; 4) a felony conviction; 5) a misdemeanor conviction punishable by up to two years of imprisonment or one that involves alcohol or a controlled substance; 6) a licensee's ineligibility to participate in a federally-funded health insurance or health benefits program; 7) a report by a licensee that another licensee has committed a violation of the Public Health Code; or 8) a disciplinary action by a licensing board in another state. A licensee must notify the MDCH of a criminal conviction or a disciplinary licensing action taken by another state against the licensee within 30 days after the date of conviction or disciplinary action (regardless if it's on appeal), which will likely lead to an immediate investigation by the Bureau. A licensee's failure to do so gives rise to an independent disciplinary action under the Public Health Code.

An investigation into an allegation is conducted by the Regulatory Division and usually involves interviewing the person filing the allegation, interviewing the licensee, identifying and interviewing other persons such as coworkers or employers who may provide relevant information, and collecting other evidence.

Administrative Complaint & Hearing

If the BHP believes there is sufficient evidence to demonstrate a violation of the Public Health Code, a formal Administrative Complaint is filed by an Assistant Attorney General on behalf of the BHP against the licensee charging the licensee with specific violations of the Public Health Code. If the BHP believes that there could be an immediate risk to the public, it may order a summary suspension of the license until an administrative hearing is held. The licensee may petition the MDCH for an immediate hearing before an Administrative Law Judge ("ALJ") to dissolve the summary suspension order. A settlement conference may be held to attempt to reach a resolution of the Complaint short of attending a formal administrative hearing. Any proposed settlement between the BHP and the licensee must be approved by the disciplinary subcommittee of the applicable licensing board.

If a settlement cannot be reached, the matter proceeds to an administrative hearing, to be conducted in accordance with the Michigan Administrative Procedures Act and Michigan Administrative Code Rules 338.1601 through 338.1637. It is held to determine the facts of the case and the laws and rules that should be applied to the case. Witnesses may be called and questions can be asked. An ALJ presides at the hearing and issues a report after the hearing that is then sent to the disciplinary subcommittee for review and final decision. The report includes a summary of the testimony and evidence, the

findings of fact, conclusions of law and a proposal for decision. The ALJ is not permitted to recommend or impose penalties. The disciplinary subcommittee can dismiss the matter, remand the matter for further testimony or evidence, or revise the findings of fact and conclusions of law. If the disciplinary subcommittee determines that a preponderance of the evidence supports the proposed findings of the ALJ, the disciplinary subcommittee can adopt the findings and impose a sanction under MCLA § 333.16226. The penalties that can be imposed range from a monetary fine, probation, reprimand, restricted license, additional education, community service and/or revocation or suspension of license. The BHP implements the decisions of the disciplinary subcommittee and monitors compliance with the decisions. A licensee affected by an adverse action may appeal to the Michigan Court of Appeals.³

Disclosure of Sanctions

In accordance with the Public Health Code, the MDCH is required to publish the names and addresses of disciplined licensees. To comply with this requirement, the BHP frequently publishes a Disciplinary Action Report (DAR). The DAR lists the disciplinary actions taken against health professionals who are licensed and regulated by the various health boards within the BHP. The report also includes updated information regarding licensees who have appealed the Board's action to a higher court. The report includes the names of the health professionals, their address on file with the department, their professional license number, the type of disciplinary action taken, the effective date of the action and the general nature of the complaint. This information is available online at <http://www.michigan.gov/healthlicense> and is also available in writing from the MDCH.

In addition to publishing the DAR, the MDCH also notifies the Commissioner of the Office of Financial and Insurance Services (OFIS) (which provides the information to insurance carriers providing professional liability insurance), the Department of Public Health (which reports disciplinary actions to licensed healthcare facilities and agencies), state and federal agencies responsible for fiscal administration of federal healthcare programs, applicable professional associations, the Associated Press (AP) and the United Press International (UPI). MDCH also provides the State of Michigan Library with an annual report of all disciplined licensees for the preceding three years and provides the National Practitioner Data Bank with a list of disciplined licensees.

In accordance with the federal Health Care Quality Improvement Act of 1986, any time a physician or dentist is sanctioned by the State, the appropriate board within the BHP is required to report such action to the National Practitioner Databank ("NPDB"), which acts as a flagging system, disseminating certain information to eligible entities to assist them in conducting investigations of the qualifications of the healthcare practitioners they seek to license or hire or to whom they

wish to grant membership or clinical privileges. Such adverse action reports must be made to the NPDB within 30 days from the date of the formal approval of the licensure action by the Board or its authorized official. Significant delays may occur between the formal approval of the action and the drafting of the order for publication but the trigger date for the report is based upon the Board's formal approval of the action. The Board must also report revisions to adverse licensure actions such as reinstatement of a license. A licensee whose license has been revoked or suspended will be reported, as will a licensee who has been reprimanded, placed on probation or censured. However, a licensee who has been fined only (i.e., no other accompanying sanction such as revocation, suspension, censure, reprimand, probation or surrender) will not be reported, nor will a licensee who enters into a settlement agreement that imposes a period of monitoring without a restriction on his or her license. A physician or dentist who voluntarily surrenders his or her license for personal reasons unrelated to his or her professional competence or conduct (e.g., retirement) will not be reported either.

Hospitals must query the NPDB when a practitioner applies for privileges and every two years for practitioners on the medical staff or holding privileges. Other healthcare entities, including professional societies, may query the NPDB when entering an employment or affiliation relationship with a practitioner or in conjunction with professional review activities. State licensing boards may query the NPDB at any time and healthcare practitioners can self-query at any time. Medical malpractice payers and lawyers may **not** query the NPDB at any time.

In addition to disclosures by the MDCH and the applicable professional board, a licensee has a duty to self-report in certain circumstances. If a licensee is fined, reprimanded, placed on probation or ordered to pay restitution, the licensee must notify his or her employer and any hospital where he or she is admitted to practice within 10 days of the final order imposing the sanction. Additionally, if a licensee's license is revoked or suspended for greater than 60 days, within 30 days of the final order imposing the revocation or suspension the licensee must provide written notice to all patients seen within 120 days immediately preceding the effective date of the revocation or suspension. The licensee must also provide oral notice to all patients who contact the licensee for professional services during the first 120 days after the date of the final order imposing the revocation or suspension.

The Collateral Effect of Licensing Sanctions Upon the Licensee

The severity of the sanction imposed by the disciplinary subcommittee will determine the extent of the collateral damage to the licensee. The following is a list of some, but not all, of the repercussions that a sanctioned licensee may encounter:

1. Loss of Hospital Privileges: Typically, in accordance with medical staff bylaws at a hospital, a licensee whose license has been revoked or suspended will have his or her clinical privileges revoked or suspended for at least the term of the suspension. Similarly, a licensee whose license has been restricted will often have his or her clinical privileges restricted if they fall within the scope of the limitation or restriction imposed by the State. If a licensee is placed on probation, hospitals vary in their response (i.e., some will suspend the licensee's clinical privileges for the period of probation, while others may only suspend voting and office-holding prerogatives). However, if the underlying actions or omissions of the licensee that gave rise to the state-imposed sanction concern quality-of-care issues, hospitals will invariably take some form of corrective action. Depending upon the severity of the sanction and/or whether quality-of-care issues are raised, a hospital may summarily or automatically suspend the licensee's clinical privileges prior to any hearing on the matter. When a licensee's clinical privileges at a hospital are affected, due process is often afforded the licensee in accordance with the hospital's fair hearing plan. Provisions in the hospital's credentialing procedures manual, hospital bylaws and medical staff bylaws are often implicated and should be reviewed as well. Judicial review of the termination of clinical privileges at a private hospital is essentially unavailable under current Michigan law in the absence of allegations of discrimination or violations of state or federal statutory law.

2. Loss of Participation and Enrollment with State Professional Associations: Professional associations will vary in their response to a sanctioned member, although it is unlikely that a licensee will be deparicipated due to the imposition of a fine or reprimand. On the other hand, a licensee whose license has been revoked or suspended for a lengthy period of time will usually lose his or her membership in the association (e.g., Michigan State Medical Society). Typically, a licensee must maintain his or her membership in the professional association in order to continue to qualify for group healthcare insurance originally obtained through the professional association. Thus, deparicipation from a professional association may have significant ramifications for the sanctioned licensee. In addition, there are some professional associations that obtain reduced premiums for professional liability insurance for its group members. Such malpractice insurance may be affected by a state-imposed sanction.

3. Loss of Participation in Preferred Provider Organizations ("PPOs"): While PPOs vary in their reaction to licensing sanctions, many PPOs have very strict policies regarding sanctions, often deparicipating sanctioned licensees who have been reprimanded or placed on probation and not just those whose licenses have been revoked or suspended.

While quality-of-care concerns will certainly lead to investigation and possible departicipation, sanctions having nothing to do with quality-of-care concerns are often cited as the basis for departicipation. PPOs have justified such departicipations as administrative cost savings, elimination of redundant services and other business reasons. Judicial review of such departicipation is available, although one must often exhaust internal administrative remedies within the PPO first. Legal challenges to such departicipation may be based upon numerous legal theories including, but not limited to: a) violation of public policy, b) breach of provider contract, c) breach of implied covenant of good faith and fair dealing, d) due process violations, e) tortious interference with business expectations and/or contract, f) violation of unfair competition laws, g) violation of antitrust laws, h) breach of third-party beneficiary contracts, and i) breach of fiduciary duty.

4. Loss of Enrollment with Third-Party Payors: Like PPOs, third-party payors vary in their reaction to licensing sanctions, although the reaction tends not to be as severe as with the PPOs. Commercial carriers vary in their responses but often will follow departicipation policies similar to BCBSM's Traditional Program. BCBSM's Traditional Program has set policies by which it determines whether departicipation is appropriate and, if so, the length of the departicipation period. At present, there are 13 non-exclusive departicipation criteria that include termination or suspension of licensure, certification, registration, certificate of need or accreditation in Michigan. However, it is important to note that BCBSM may departicipate licensees who have lesser sanctions imposed upon them as well. For example, criterion number 13 provides for departicipation of providers who violate any local, state or federal regulation, law or code (which includes the Public Health Code), regardless of whether any sanction is imposed by the State for such violation. BCBSM's Blue Preferred Plan (Trust) Program Professional Provider Agreement does not reveal any provision mandating termination from its network for licensing sanctions but does provide that the Agreement may be terminated by BCBSM immediately at BCBSM's option if a Trust provider's license is revoked, restricted or suspended.

5. Loss of DEA Registration: The MDCH will report to the U.S. Department of Justice when it revokes or suspends a provider's license. 21 USCA § 824 provides that the U.S. Attorney General may suspend or revoke a provider's DEA registration when the provider's state license or registration is suspended, revoked or denied or where competent state authority has merely recommended that the provider's state license or registration be suspended, revoked or denied. The provider may request a hearing in order to contest such action. In cases where there is a perception of imminent danger to the public health or safety, the U.S. Attorney General may immediately suspend a provider's DEA registration prior to any hearing.

6. Loss of Board Certification: A licensee whose license has been revoked or suspended for a lengthy period of time may lose his or her board certification in his or her field of specialty depending upon the rules and requirements of

the governing board. Such loss of board certification could result in loss of clinical privileges in accordance with an entity's medical staff bylaws that require such certification in order to practice at the entity.

7. Exclusion from Participation with Medicare, Medicaid and Other Federal and State Governmental Programs: There are basically two types of exclusion under the federal statutory and regulatory provisions regarding participation in federal programs (e.g., Medicare and Medicaid): *mandatory* exclusion and *permissive* exclusion. A criminal conviction related to the delivery of an item or service under the Medicare program or any state healthcare program (e.g., Medicaid) will result in a mandatory exclusion of at least five years. However, a provider whose license has been revoked or suspended or has otherwise lost his or her license for reasons bearing on the individual's professional competence, professional performance or financial integrity may be excluded from participating in Medicare and Medicaid at the discretion of the Secretary of HHS. Likewise, the Secretary of HHS has discretion to exclude a provider who has surrendered his or her license during the pendency of a formal disciplinary proceeding concerning the provider's professional competence, professional performance or financial integrity. The duration of a permissive exclusion resulting from a licensing sanction will be for a period of time not less than the period during which the provider's license is revoked, suspended or otherwise not in effect as a result of, or in connection with, a state licensing agency action.⁴

The effect of exclusion from the Medicare/Medicaid program is that no federal healthcare program payment may be made for any items or services furnished, directed or prescribed by an excluded provider, regardless of the method of reimbursement or to whom the payment is made. Likewise, no payment can be made for administrative and management services not directly related to patient care that are provided or directed by an excluded provider. In addition, no federal program payment may be made to cover an excluded provider's salary, expenses or fringe benefits, even if the excluded provider does not provide direct patient care. An excluded provider cannot avoid the effect of such exclusion by changing from one healthcare profession to another.

An excluded provider that submits, or causes to be submitted, a claim for reimbursement to Medicare/Medicaid may be subjected to a civil monetary penalty of \$10,000 for each claim plus treble damages. In addition, the excluded provider could jeopardize his or her ability for reinstatement into the Medicare/Medicaid programs in the future. Importantly, healthcare providers that employ or enter into contracts with excluded providers to provide items or services to Medicare/Medicaid beneficiaries may also be subject to civil monetary penalties and potential exclusion from the Medicare/Medicaid programs if they submit claims for items or services furnished by an excluded provider that they knew or should have known was excluded. According to the Office of Inspector General, providers and contracting entities have an affirmative duty to check the program exclusion status of individuals and entities prior to entering into employment or

contractual relationships, or run the risk of the imposition of civil monetary penalties. Excluded providers are listed on the OIG Web site at www.hhs.gov/oig. Healthcare providers may only employ an excluded provider in limited situations where the healthcare provider is both able to pay the individual exclusively with private funds or funds from other non-federal sources and where the services furnished by the excluded provider relate solely to non-federal program patients.

Conclusion

A healthcare provider facing a healthcare investigation or administrative action by the State of Michigan cannot afford to take a myopic view of his or her predicament. Due to the domino effect that often accompanies the imposition of state-imposed sanctions, such providers are well advised to obtain experienced healthcare counsel who will take an expansive view of the matter in order to assess the collateral damage that could result from a proposed settlement of a state action. Although most attorneys are knowledgeable enough to inform their clients of their 5th Amendment rights against self-incrimination in order to avoid having their clients make any admissions during the administrative proceedings that could lead to criminal charges, many attorneys are unaware of the effect that collateral sanctions may have on their clients. Any settlement strategy should take into consideration all of the collateral sanctions and enforcement actions that could arise as a result of a settlement. For some providers, the damage from a collateral sanction could be more devastating than the state-imposed sanction.

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Footnotes

1 The authority of the Bureau of Health Services, now referred to as the Bureau of Health Professions, is limited to granting licenses or registrations for the healthcare professionals in Michigan and does not extend to fee disputes or personal conflicts between patients and their healthcare providers.

2 These professions include: chiropractic, counseling, dentistry, emergency medical services personnel, marriage and family therapy, medicine, certified nurse aides, nursing, nursing home administrator, occupational therapy, optometry,

osteopathic medicine, pharmacy, physical therapy, physician's assistants, podiatry, psychology, social workers, sanitarian and veterinary medicine.

3 It should be noted that in an unpublished opinion, the Michigan Court of Appeals denied the argument that the administrative revocation of a physician's license based upon the physician's previous misdemeanor conviction constituted multiple punishment in contravention of federal double jeopardy protection. *Dep't of Consumer & Industry Services v. Orzame, M.D.*, 2001 WL 1545809 (2001).

4 The Secretary of HHS may take into consideration certain enumerated aggravating circumstances that can lengthen the exclusionary period, as well as certain enumerated mitigating factors that may reduce the effect of such aggravating circumstances.

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Original Printing: LACHES, July 2004