

Healthcare Licensing Actions and Criminal Implications

by Robert S. Iwrey

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 (BHP) in its investigation and prosecution of healthcare providers for alleged violations of Michigan's Public Health Code and the interplay between such prosecutions and criminal convictions.

An Overview of the Bureau of Health Professions

Investigations into, and resulting disciplinary actions against, Michigan licensed healthcare providers fall within the purview of the Bureau of Health Professions, which operates under the Michigan 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 accomplished through the administration of the occupational regulation sections of the Michigan Public Health Code, Public Act 368 of 1978, as amended; the health professions rules contained within the Michigan Administrative Code, R 333 101 through 338 6401; and by addressing practice issues related to health care in Michigan.

The BHP licenses and registers providers in 35 different healthcare occupations.¹ 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 BHP, which is composed of both professional and public members appointed by the governor. At present, the BHP oversees 23 separate licensing boards. 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.

Investigation Process

An investigation into a healthcare licensee is often initiated by a patient who has filed an allegation against

the healthcare licensee with the BHP. The allegation must be submitted in writing, contain the name and contact information of the person making the allegation, the name and profession of the licensee, a detailed description of the alleged problem or incident, and the names and contact information of any potential witnesses. The BHP has a specific form to be completed (DCH/BHP Form 200) in order to submit the allegation, which is available to download from its Web site at http://www.michigan.gov/documents/cis_fhs_bhser_cad_allegpkt_64320_7.pdf. Anonymous allegations will not be processed. Typical allegations are for quality-of-care concerns, a scope-of-practice concern issue or the conduct of the licensee, which may include potential criminal conduct (e.g., a patient who is billed for services that he or she never received may submit a written allegation for same to the BHP). After receiving an allegation, the BHP reviews it and determines whether the alleged facts, if true, could be deemed a violation of Michigan's Public Health Code² and thereby warrants an investigation.

In addition to allegations filed by patients, 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 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. Moreover, 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 of whether it is on appeal),³ which will likely lead to an immediate investigation by the BHP. A licensee's

failure to do so may give rise to an independent disciplinary action under the Michigan Public Health Code⁴

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 Michigan 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 Michigan Public Health Code

The Michigan Public Health Code also provides the BHP with grounds for the issuance of an Administrative Complaint for numerous preceding criminal violations. For example, a conviction of any criminal sexual conduct,⁵ reckless or intentional inappropriate destruction or alteration of medical records,⁶ a misdemeanor or felony involving fraud to obtain professional fees,⁷ a misdemeanor related to the ability to practice safely/competently,⁸ and practicing under the influence of alcohol or drugs⁹ all provide a basis for a licensing action against the convicted licensee

If the BHP believes that there could be an immediate risk to the public health, safety or welfare, it may order a summary suspension of the license until an administrative hearing is held. If the licensee is convicted of a felony; a misdemeanor punishable by two years or more in prison; or a misdemeanor involving the illegal delivery, possession or use of a controlled substance, the BHP will summarily suspend the licensee's license, regardless of whether there is such an immediate risk.¹⁰ The suspension will remain in place until the administrative hearing is concluded unless otherwise resolved through a petition to the MDCH for an immediate hearing before an Administrative Law Judge (ALJ) to dissolve the summary suspension order.¹¹

After the issuance of an administrative complaint and filing of an answer thereto, a compliance conference and/or 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. The purpose of the hearing is 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, which 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 finds 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.¹²

Violations that May Lead to Criminal Prosecution

While Michigan's Public Health Code has numerous grounds upon which the BHP may rely for the issuance of an administrative complaint,¹³ some provisions are more apt to lead to criminal prosecution. For example, allegations of an inappropriate sexual relationship with a patient,¹⁴ a pattern of providing controlled substances without medical necessity,¹⁵ a pattern of fraudulent billing,¹⁶ and a pattern of

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performing medically unnecessary procedures for personal financial gain.¹⁷ All of these offenses fall within express provisions of Michigan's Public Health Code giving rise to a licensing action and also fall within the ambit of numerous state and federal criminal statutes, thereby leaving the licensee exposed to potential criminal prosecution.

Furthermore, it is important to understand that some actions by the healthcare licensee subsequent to being served with an administrative complaint may also lead to criminal prosecution. One common allegation contained within an administrative complaint is that the healthcare licensee violated his or her general duty¹⁸ due to inadequate, insufficient and/or missing documentation. Such an allegation can lead a concerned licensee to attempt to "correct" the situation by creating records where none existed or supplementing the records to address the alleged inadequacy or insufficiency without including sufficient information to make it clear when these new records were added. Such action by a licensee is a felony under MCLA 750.492a¹⁹

When defending a healthcare licensing matter, it is important to always consider the possibility of criminal exposure for the subject licensee. Such consideration is integral to the decision of whether to have the licensee testify at an administrative hearing.²⁰ Licensees have to weigh the risk of asserting their 5th Amendment rights against self-incrimination in order to avoid having admissions made

during administrative proceedings that could be used against them in a criminal matter

Collateral Effects of a Licensing Action Other Than Criminal Prosecution

In addition to the aforementioned potential for criminal prosecution, there are numerous consequences and collateral effects that a licensing action may have on a healthcare licensee. Any sanctions imposed upon the licensee are published online and in the Disciplinary Action Report (DAR), and notice of the sanctions are sent to numerous state and federal authorities (which, for physicians and dentists, may include the National Practitioner Data Bank) along with applicable professional associations, the Associated Press (AP) and the United Press International (UPI). 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: loss of hospital privileges; loss of participation and enrollment with state professional associations; loss of participation in preferred provider organizations (PPOs); loss of enrollment with third-party payors; loss of DEA registration; loss of board certification; and exclusion from participation with Medicare, Medicaid and other federal and state government programs

Conclusion

A healthcare provider facing a healthcare investigation or an administrative action by the State of Michigan cannot afford to take a myopic view of his or her predicament. Due to the criminal implications and 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 effects 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



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Footnotes

- 1 These professions include, but are not limited to: 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.
- 2 A list of the statutory bases for disciplinary action against a healthcare licensee is contained within MCLA §333.16221
- 3 MCLA §333.16222(3)
- 4 In *Department of Consumer Industry Services v Shah*, 236 Mich App 381 (1999), the court held that MCLA §333.16222(3) did not require the healthcare licensee to report an in-state criminal conviction that would form the basis for disciplinary action against the licensee to the MDCH because the MDCH is already apprised of such in-state criminal convictions pursuant to MCLA §769.16a(7). MCLA §769.16a(7) provides, in pertinent part, that within 21 days after the healthcare licensee is convicted of a misdemeanor involving the illegal delivery, possession, or use of alcohol or a controlled substance or a felony, the clerk of the court entering the conviction shall report the conviction to the MDCH. The *Shah* court held that since the court clerk must apprise the MDCH of the in-state conviction, there is no need for the licensee to do so as well. Thus, the *Shah* court held that MCLA §333.16222(3) only required the healthcare licensee to report an out-of-state criminal conviction or out-of-state disciplinary action. Nonetheless, Michigan's Attorney General's Office has taken the unofficial position that the *Shah* case was wrongly decided and will typically add a count in an administrative complaint against a healthcare licensee for not self-reporting an in-state criminal conviction.
- 5 See MCLA §333.16221 (b)(vii).
- 6 See MCLA §333.16221 (b)(viii).
- 7 See MCLA §333.16221 (b)(ix).
- 8 See MCLA §333.16221 (b)(xi).
- 9 See MCLA §333.16221 (b)(xii).
- 10 See Michigan Administrative Code R 338.1609
- 11 See Michigan Administrative Code R 338.1610
- 12 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 (*Dept of Consumer & Industry Services v Orzame*, M.D. 2001 WL 1545809 (2001))
- 13 See Footnote 3 above.
- 14 See MCLA §333.16221(a) and MCLA §333.16221 (b)(vi)
- 15 See MCLA §333.16221(c)(iv)
- 16 See MCLA §333.16221(d)(iii)
- 17 See MCLA §333.16221(c)(iii)
- 18 See MCLA §333.16221(a)
- 19 MCLA §750.492a(1) provides, in pertinent part, that "a health care provider or other person, knowing that the information is misleading or inaccurate, shall not intentionally, willfully or recklessly place or direct another to place in a patient's medical record or chart misleading or inaccurate information regarding the diagnosis, treatment, or cause of a patient's condition." A healthcare provider who intentionally or willfully does so is guilty of a felony MCLA §750.492a(1)(a). A healthcare provider who recklessly does so is guilty of a misdemeanor and/or a fine of up to \$1,000 MCLA §750.492a(1)(b). MCLA §750.492a(3)(b) essentially exempts from such criminal liability "supplementation of information or correction of an error in a patient's medical record or chart in a manner that reasonably discloses that the supplementation or correction was performed and that does not conceal or alter prior entries."
- 20 This consideration is even more pronounced when the hearing is for a petition to dissolve a summary suspension of the licensee's license since such hearings often occur prior to having an opportunity to fully investigate and prepare for the defense of the underlying allegations (as the licensee cannot practice his or her profession until the suspension is dissolved and thus timing is of the essence). In the midst of trying to gain back the licensee's ability to earn a living pending a formal hearing on the underlying administrative complaint, one can inadvertently expose the licensee to criminal prosecution if he or she makes certain admissions aimed at lifting the summary suspension that give rise to criminal liability.

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