

Defending Health Professional Licensees

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Introduction & Overview

- When representing a licensed health professional in a criminal case, you need to be aware of the attendant consequences for their license
- Aggressive investigative and disciplinary authority – expanded under amendments to the Public Health Code
- Operation of licensing system
 - Grounds for licensing action
 - Allegations and investigations
 - Procedure in licensing cases
- Sanctions and consequences
- Practical approaches

Covered Professions & Occupations

- Any licensee, registrant, or applicant for licensing or registration under the Public Health Code
 - Acupuncture
 - Athletic Trainer
 - Audiologist
 - Chiropractic
 - Counseling
 - Dentistry
 - Dietetics and Nutrition
 - Marriage and Family Therapy
 - Massage Therapy
 - Medicine

Covered Professions & Occupations

- Nurse Aide
- Nursing
- Nursing Home Administrator
- Occupational Therapy
- Optometry
- Osteopathic Medicine and Surgery
- Pharmacist
- Pharmacy
- Pharmacy Technician
- Physical Therapy
- Physician's Assistant

Covered Professions & Occupations

- Podiatric Medicine and Surgery
- Psychology
- Respiratory Care
- Sanitarian
- Social Worker
- Speech Language Pathology
- Veterinarian

Legal Authority and Agencies and Boards

- Public Health Code, MCL 333.16101, et seq
- Department of Licensing and Regulatory Affairs (LARA)
 - Bureau of Professional Licensing
(https://www.michigan.gov/lara/0,4601,7-154-89334_72600-358866--,00.html)
 - Health Professional Boards
 - Each profession has a board or task force with disciplinary authority
 - Michigan Office of Administrative Hearings and Rules (MOAHR)

Convictions That May Result in Collateral Consequences

- Conviction of a misdemeanor punishable by imprisonment for a maximum term of 2 years; a misdemeanor involving the illegal delivery, possession, or use of a controlled substance; or a felon other than one listed below
- Conviction of a criminal offense under MCL 750.520e (criminal sexual conduct (CSC), fourth degree) and .520g (assault with intent to commit CSC)
- Conviction of a violation of MCL 750.492a (placing misleading or inaccurate information in medical records or charts)
- Conviction of a misdemeanor or felony involving fraud in obtaining or attempting to obtain fees related to the practice of a health profession

Convictions That May Result in Collateral Consequences

- Conviction of a misdemeanor that is reasonably related to or that adversely affects the licensee's ability to practice in a safe and competent manner
- Conviction of a violation of MCL 750.430 (practicing of health profession with unlawful bodily alcohol content or under influence of controlled substance)
- Conviction of a criminal offense under MCL 750.520b (CSC, first degree), .520c (CSC, second degree), .520d (CSC, third degree), and .520f (second or subsequent offense of CSC, first, second, or third degree)

Convictions That May Result in Collateral Consequences

- Conviction of a violation of MCL 750.83 (assault with intent to commit murder), .84 (assault with intent to do great bodily harm less than murder or assault by strangulation or suffocation), .316 (first degree- murder), .317 (second-degree), and .321 (manslaughter)
- Conviction of a violation of MCL 750.136 (female genital mutilation), .136a (transportation for female genital mutilation)
- MCL 333.16201-.16249.
- Under MCL 333.16221(b), a certified copy of the court record is conclusive evidence of a conviction

Good Moral Character Catch All

- In addition to specific enumerated offenses, under MCL 333.16221, health professional licensees can face administrative licensing disciplinary actions for a criminal conviction that may be premised on the fact that the underlying criminal allegations and subsequent conviction demonstrate that the individual lacks “good moral character”
- MCL 333.16104(6) refers to MCL 338.41(1), which defines “good moral character” as “the propensity on the part of the person to serve the public in the licensed area in a fair, honest, and open manner”

Conviction

- Public Health Code defines “conviction” as a “judgment entered by a court upon a plea of guilty, guilty but mentally ill, or nolo contendere or upon a jury verdict or court finding that a defendant is guilty or guilty but mentally ill”
- MCL 333.16103(5)

Other Grounds For Licensing Action

- Improper prescribing or administering
- Practice outside scope of license
- Alteration or destruction of medical records
- Fraud and other unethical business practices
- Substance abuse
- Final adverse administrative action by another state
- Failure to report adverse action, convictions, etc.

Failure To Report

- A licensee must notify LARA of any criminal conviction within 30 days of the date of the conviction
- A licensee must notify LARA of any criminal conviction within 30 days after the date of the conviction in another state
- The date of conviction is not the sentencing date but the date when a court enters a judgment on a plea of guilty, guilty but mentally ill, or nolo contendere or the date of a jury verdict or court finding that a defendant is guilty or guilty but mentally ill
- A licensee's failure to report a conviction will result in an investigation and could lead to disciplinary action

Sources Of Complaints

- Any person who believes there has been a violation of the Public Health Code may file a complaint
- In a criminal situation, that can be
 - Complainant/alleged victim
 - Prosecutor
 - Plaintiff attorneys, if there is civil litigation
 - If conviction, the licensee him/herself

Failure To Report

- Health care professionals with knowledge of a violation by another licensee have a duty to report
 - *One exception: If knowledge is gained through professional review functions or in professional-patient relationship*

Investigations

- Mandatory when there has been a conviction
- Investigation may also be commenced after licensee has been charged but not yet convicted
 - During the course of the investigation the licensee may be approached to give a statement to an investigator
 - There is nothing in the Public Health Code or the Michigan Administrative Rules that require a licensee to speak with an investigator
 - As a licensee's lawyer, you and your client must carefully consider whether speaking with the investigator is in the licensee's best interests
 - If a licensee chooses to speak with an investigator, he/she may have his/her lawyer present

Investigations

- Other option to speaking with the investigator is to ask for written questions and then for the lawyer to respond in writing
 - This can be very effective, especially if the criminal matter is in the pre-charge, investigative stage

Administrative Complaint

- If LARA determines that its investigation provides evidence of a violation of the Public Health Code, LARA or the Attorney General files an administrative complaint against the licensee
- Licensee must submit written response within 30 days
- Under MCL 333.16231(8), a failure to respond will result in the allegations being admitted as true and the matter will be sent directly to the disciplinary subcommittee (DSC) of the relevant board (duty for licensee to have current address)
- DSC can then impose sanctions on the licensee

Disciplinary Subcommittee

- Violations and sanctions are determined by “disciplinary subcommittee” of each board, and not the full board
 - At least three professionals and two public members
 - Violations determined by majority vote
 - Majority on sanctions must include at least one public member

Summary Suspension

- Normally, license is not affected until final decision after an administrative hearing
- Under MCL 333.16233(5), summary suspension of the license may be imposed by LARA prior to hearing
 - Certain criminal convictions
 - Felony
 - Misdemeanor punishable by imprisonment for a maximum term of two years
 - Misdemeanor involving illegal delivery, possession, or use of controlled substance
 - LARA may also summarily suspend for misdemeanor conviction involving illegal delivery, possession, or use of alcohol that adversely affects licensee's ability to practice in a safe and competent manner
 - Even certain criminal charges, if public health, safety or welfare requires emergency action
 - Licensee has right to expedited hearing to dissolve suspension

Summary Suspension

- After summary suspension, licensee may petition MOAHR to dissolve the summary suspension
- Licensee will have an administrative hearing where LARA, represented by Attorney General, will have burden of proof to show that the licensee poses a threat to the public health, safety, and welfare
- Administrative Law Judge (ALJ) will either uphold or dissolve
- If summary suspension upheld, license will remain suspended throughout the administrative proceedings
- If dissolved, licensee will have full and unlimited license during pendency of administrative proceedings

Summary Suspensions

- Licensee still has right to formal hearing on substantive administrative complaint
- Record created during the summary suspension hearing will automatically become part of record of the subsequent hearing on full merits

Compliance Conference

- Under MCL 333.16231(5) must offer “compliance conference” to licensee
- A kind of settlement conference where licensee given ability to show compliance with Public Health Code
 - Demonstrate grounds for dismissal (unlikely in criminal case)
- Attempt to find resolution
 - Meeting with departmental analyst (NO)
 - Meeting with board member and Attorney General (YES) – When answering complaint, request hearing
 - DSC can accept, reject, or modify
- No transcript
- If not resolved, scheduled for administrative hearing

Administrative Hearing

- Similar to trial – no jury
 - Critical difference – Under section 75 of the Administrative Procedures Act (MCL 24.275), Rules of Evidence are loosely applied
- Held before an ALJ
- ALJ issues a written “proposal for decision” (PFD)
- Disciplinary subcommittee may accept, reject, or modify
- Disciplinary subcommittee is final decision-maker

Appeals

- Under MCL 333.16237(6), final order by disciplinary subcommittee is subject to review by appeal to Court of Appeals, *not* Circuit Court
- Very limited grounds for appeal
- COA still gives deference to judgement of professional boards

Licensing Sanctions

- Possible sanctions vary depending on nature of violation
 - Fine – Up to \$250,000
 - Reprimand
 - Probation – conditions
 - Education, monitoring, corrective action
 - Limitation
 - Suspension
 - Definite period
 - Not automatically reinstated if longer than six months
 - Revocation
 - Minimum of three years
 - Permanent for certain violent criminal convictions

Consequences

- Adverse licensing action can have dramatic impact
 - Collateral consequences
 - LARA publishes disciplinary action reports, making name and location of disciplined licensee a matter of public record
 - LARA also required to report final action or summary suspension to Department of Health and Human Services (DHHS)
 - Department of Insurance and Financial Services (DIFS), which in turn, reports it to insurance carriers providing professional liability, as well as health insurance carriers
 - State and federal agencies responsible for fiscal administration of federal health care programs (Medicare and Medicaid)

Consequences

- Licensee has duty to disclose a final action to
 - Employer
 - Hospital where licensee has privileges
 - Past and present patients, depending on severity of sanction – MCL 333.16241
- LARA's online licensing profile with state of Michigan will reflect the action
- Published in journals of state professional societies

Consequences

- National Practitioners Data Bank (NPDB)
 - Federally mandated electronic depository that collects information about adverse actions against physicians and other health care providers, including state licensure actions – 42 USC 1320a-7e, 1396r-2
- Practical Consequences – May also result in
 - Loss of hospital staff privileges
 - Loss of employment
 - Loss of Drug Enforcement Administration (DEA) registration
 - Debarment by the Food and Drug Administration (FDA)

Consequences

- Loss of participation with professional boards, societies, credentialing bodies and associations
- Exclusion from participation with private insurance companies
- Exclusion from Medicare, Medicaid, and other state and federal payor programs

Practical Steps

- Attorney representing an individual charged in criminal matter and who is licensed under the Public Health Code needs to be aware of the consequences and the climate the client is practicing in
 - Consider the long-term effect that a conviction or plea agreement may have on the client and his/her professional career

Practical Steps

- Plea deals and convictions
 - When negotiating, attorneys should try to obtain a reduced plea that decreases the likelihood of a board taking action against client's license
 - For example, for an alleged crime in which there is an element of fraud, try for a plea deal for a lesser offense that eliminates fraud element
 - Avoid "high" misdemeanors
 - Avoid misdemeanors involving illegal delivery, possession, or use of a controlled substance

Practical Steps

- Contact with Bureau of Professional Licensing
 - Consider very carefully
 - May inquire about possible implications of a conviction for certain offense without identifying the client
 - May also want to consider resolving any potential licensing action globally with the criminal plea
 - Pros and cons – Any decision whether to reach out to BPL should be very carefully considered

Practical Steps

- LARA request for interview
 - Critical step, particularly if there is criminal case pending
 - Don't assume the licensing case will go away if you just explain it to investigator
 - Must be extremely careful about decision whether client meets with investigator – very unlikely
 - Consider asking for written questions
 - Consider whether written response makes sense, including supportive materials

Practical Steps

- Receipt of administrative complaint
 - Absolutely must file response within 30 days
 - First step in administrative/legal proceeding that can result in serious consequences
- Compliance conference
 - Consider use as a settlement conference
 - Use of as a mitigation – Best opportunity to control choice of sanction

Health Professional Recovery Program (HPRP)

- If licensee has an underlying substance abuse problem, attorney may discuss possibility of entering into a monitoring agreement with Health Professional Recovery Program (HPRP) – MCL 333.16170
- Confidential program operated by private contractor under agreement with the state, and designed to assist licensed health professionals recovery from substance abuse disorders and mental illness
- Very careful consideration must be given, though

Reinstatement

- Petition for reinstatement or reclassification – MCL 333.16245 - 16248
- Licensee has burden of proving:
 - Good moral character
 - Able to practice with reasonable skill and safety
 - In the public interest
- Attorney must familiarize self with LARA's guidelines for reinstatement

Questions

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