

LEGAL ALERT

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COURT OF APPEALS DECISION REAFFIRMS THE EXPANSIVE SCOPE OF MDCH'S AUTHORITY DURING INVESTIGATIONS OF LICENSED HEALTH PROFESSIONALS

By Christopher R. Genther & Richard C. Kraus, Attorneys

In a recent decision, the Michigan Court of Appeals held that neither HIPAA nor state privilege law restricts the authority of the Michigan Department of Community Health to subpoena patient records for use in a licensing investigation. While the outcome is not surprising, the decision confirms the extensive authority of the Department of Community Health (MDCH) to obtain confidential patient records during investigations of licensed health professionals.

MDCH, acting through the Bureau of Health Professions, is empowered to investigate allegations that a licensed health professional has violated the Public Health Code. As a routine part of licensing investigations, the Bureau obtains and reviews patient records. Frequently, patients sign authorizations for disclosure of their records. In other cases, the Bureau seeks a circuit court subpoena for the records.

During the investigation into allegations that a dentist had engaged in insurance fraud, the Attorney General, on behalf of MDCH, obtained a subpoena requiring the dentist to turn over all original dental charts and radiographs for seven of his patients. The dentist moved to quash the subpoena, claiming that producing such records would violate HIPAA regulations as well as Michigan's dentist-patient privilege statute. He also argued that his privacy and due process rights were violated by the procedure used by the Attorney General in seeking and obtaining the investigative subpoena.

HIPAA's Role

As most are now well aware, HIPAA provides that a health care provider may not use or disclose protected health information, such as a patient record, except as permitted or required by specific

regulations. Section 512(d) of the HIPAA Standards permits disclosures "to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal investigations or actions ..."

Applying that language, the Court of Appeals ruled that the MDCH is a "health oversight agency" responsible for over-seeing public health policy and management, including the licensing and discipline of health professionals in Michigan. Accordingly, the court held that the information requested by the Attorney General's subpoena pertained to oversight activities authorized by law. More significantly, the court held that the procedural requirements governing disclosure of protected health information pursuant to subpoenas for judicial and administrative subpoenas did not apply. Therefore, the requirement of reasonable efforts to notify the affected patients does not apply.

Dentist-Patient Privilege Denied

The dentist also argued that turning over patient records would violate the dentist-patient privilege statute. While information related to the care and treatment of a dental patient obtained as a result of providing professional services to that patient is typically confidential and privileged, the statute includes an exception for disclosures which are "otherwise permitted or required under" HIPAA. Thus, the court concluded that where protected health information may be disclosed under HIPAA, it also may be disclosed under Michigan's dentist-patient privilege statute.

There are other provisions in the Public Health Code which similarly authorize or require other health professionals to disclose otherwise privileged information in licensing investigations and proceedings.

MDCH’s Investigation of a Licensed Healthcare Provider Does Not Violate Provider’s Privacy or Due Process Rights

Finally, the Court of Appeals rejected several other arguments. First, the dentist asserted that MDCH should be required to make a showing of “good cause” in order to obtain a subpoena for patient records. The court held that neither HIPAA nor the Public Health Code imposed such a requirement.

Second, the dentist argued that the circuit court procedure for obtaining subpoenas was nothing more than a “rubber stamp” for MDCH’s requests which violated his privacy and due process rights. The court held that the dentist could not invoke his due process rights “in the context of administrative investigations and investigatory subpoenas where no legal rights are adjudicated.” The Court of Appeals found that the extensive procedures available after the MDCH decides to pursue disciplinary proceedings were adequate to protect a health professional’s due process rights. The court reached this conclusion even though the investigation of the dentist involved allegations of insurance fraud, which could lead to criminal prosecution as well as a licensing action.

The outcome of this case is not surprising, given that physicians, dentists, nurses, psychologists and other licensed health professionals have long been required to provide patient records to MDCH during licensing investigations. However, the decision decisively reaffirms the expansive scope of MDCH’s investigatory authority following HIPAA.

The decision provides an important reminder that the receipt of a request for patient records or a subpoena from MDCH is a very serious matter. A subpoena cannot be ignored and a request for records should not be simply passed along to a staff member.

Based on our experience in representing licensed health professionals who are the subjects of licensing investigations, it is critical to understand that a request for records or subpoena from MDCH is often just the first step in a lengthy and difficult process which may

involve very significant consequences to a professional’s license, career, and practice.

The Health Professional Licensing Team at Smith Haughey has a long tradition of representing health care professionals in licensing and disciplinary matters. Attorneys Chris Genther and Richard Kraus regularly assist professionals in complying with the licensing and professional requirements imposed by the Public Health Code and state agency regulations. They can guide professionals through the process of responding to licensing subpoenas and investigations, or represent them when their license is subjected to disciplinary proceedings.

For a complimentary copy of the team’s *Guide to Health Professional Licensing in Michigan* please contact Lisa Young at lyoung@shrr.com or 616.458.3636.

Health Professional Licensing Team:



Richard C. Kraus
517.318.5653
rkraus@shr.com



Christopher R. Genther
616.458.0222
cgenther@shrr.com