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A GUIDE TO HEALTH PROFESSIONAL LICENSING IN MICHIGAN

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HEALTH PROFESSIONAL LICENSING IN MICHIGAN

As the result of significant changes to the Public Health Code beginning in 1994, many health care professionals are now confronted with investigations and licensing proceedings. Increasingly, allegations of negligence are no longer limited to civil malpractice actions, but also form the basis for disciplinary sanctions against a professional's license.

Subpoenas arrive from the Department of Community Health requiring production of medical charts and billing records. Investigators call or show up to interview professionals about patients and cases. At that point, your professional license and career may be at stake. What should you do?

Smith Haughey Rice & Roegge has a long tradition of representing health care professionals. The attorneys in our Health Law Department have extensive experience in handling professional licensing and disciplinary matters. We can assist you in complying with the licensing and professional requirements imposed by the Public Health Code and state agency regulations. We can guide you through the process of responding to licensing subpoenas and investigations. We can represent you when your license is subjected to disciplinary proceedings.

In order to provide you with a basic understanding of the licensing system, we have prepared this summary of the professional licensing laws and regulations in Michigan. The following topics are included:

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WHO IS COVERED?

The licensing of health care professionals is governed by Michigan's Public Health Code. The Code applies to all licensees, registrants and applicants for license or registration in a broad variety of professions.

The Code applies to the following health professions:

Medicine
Osteopathic Medicine and Surgery
Dentistry
Chiropractic
Nursing
Optometry
Pharmacy
Physicians' Assistants
Physical Therapy
Podiatric Medicine and Surgery
Counseling
Psychology
Occupational Therapy
Social Work
Marriage and Family Therapy
Sanitarians
Veterinarians

The Code also has detailed provisions relating to controlled substances.

In addition to the Code, extensive regulations have been adopted by the state agencies and boards involved in this area. These regulations have the force of law, and therefore, are legally binding on the professionals regulated by those agencies and boards.

WHAT STATE AGENCIES ARE INVOLVED?

The principal agency empowered to enforce the Public Health Code is the Michigan Department of Community Health. The licensing and regulation of health care professionals are conducted by the Bureau of Health Professions. Within the Bureau, licensing investigations are handled by the Complaint and Allegation Division.

Each of the health professions listed above has a board, *e.g.*, the Board of Medicine. The majority of the members of a board must be licensed in the specific profession. If the board includes sub-fields, *e.g.*, physician assistants, the board must include a licensee from that subfield. By statute, each board is also required to have at least one public member. As a matter of practice, all boards have at least two public members.

When the Public Health Code was amended in 1994, the responsibility for licensing proceedings was transferred to the “disciplinary subcommittees” of each board. Each board is required to have one or more disciplinary subcommittees, composed of three professional members and two public members. The subcommittees decide whether or not a licensee has violated the Public Health Code, and if so, what sanctions should be imposed. Many health care professionals are surprised to learn that licensing actions are not taken by the entire board.

Within the Michigan Attorney General’s Office, a number of attorneys are assigned to the Health Professionals Division. These attorneys provide legal counsel to the professional boards and handle licensing proceedings on behalf of the Bureau of Health Professions.

WHAT ARE TYPICAL GROUNDS FOR LICENSING ACTION?

The Public Health Code contains a lengthy list of the grounds for disciplinary action against a licensee, including:

- A violation of general duty, consisting of negligence or failure to exercise due care, including negligent delegation to or supervision of employees or other individuals, whether or not injury results
- Incompetence, defined as a failure to comply with minimal standards of care
- Substance abuse or mental or physical inability reasonably related to and adversely affecting the licensee's ability to practice in a safe and competent manner
- Criminal convictions
- Lack of good moral character

- Alteration or destruction of medical records
- Fraud in obtaining or attempting to obtain fees related to the practice of a health profession and other unethical business practices
- Final adverse administrative action by a licensure, registration, disciplinary, or certification board by another state
- Practice outside the scope of a license
- Prescribing or administering drugs for other than lawful diagnostic or therapeutic purposes
- Failure to report a change of name or mailing address within 30 days after the change occurs
- Failure to meet one or more of the requirements for licensure or registration

The Code also includes the failure to comply with regulations issued by the department or the licensing boards. This greatly expands the types of conduct that may lead to licensing actions.

As mentioned earlier, the question whether a licensee has violated the Public Health Code is decided by a disciplinary subcommittee. The decision is made by a majority vote.

WHAT LICENSING SANCTIONS CAN BE IMPOSED?

If a disciplinary subcommittee finds that a licensee has violated the Public Health Code, it is required to impose one or more sanctions. The range of sanctions varies depending on the specific violation. This table lists the common violations and the corresponding range of permissible sanctions:

Violation	Potential Sanctions
Negligence or failure to exercise due care	Probation, limitation, denial, suspension, revocation, restitution, community service, or fine
Conviction of a criminal alteration or destruction of medical records offense	Revocation or denial
Incompetence; mental or physical inability; criminal conviction; final adverse administrative action by a licensure, registration, disciplinary, or certification board	Limitation, suspension, revocation, denial, probation, restitution, community service, or fine
Practice outside the scope of a license	Probation, denial, suspension, revocation, restitution, community service, or fine
Prescribing or administering drugs for other than lawful diagnostic or therapeutic purposes	Fine, probation, denial, suspension, revocation, community service, or restitution
Fraud or deceit in obtaining or attempting to obtain third party reimbursement	Fine, probation, denial, suspension, revocation, community service, or restitution

The determination as to what sanctions should be imposed is made by a disciplinary subcommittee. The decision is made by majority vote, with an important qualification – at least one public member of the subcommittee must vote in favor of the sanctions. Under the statute, fines may be as high as \$250,000. In most cases, the fines are considerably less, but are still substantial in amount.

Probation may include a requirement that a licensee complete continuing education courses relating to the specific issue involved in the case. Other common conditions of probation include supervision by another professional or periodic review of charts by a board representative.

A licensee may have his or her license completely suspended for a period of time. The disciplinary subcommittee may also place limitations on a licensee’s practice, such as prohibiting the licensee from performing certain procedures or prescribing controlled substances.

If a suspension or limitation is imposed for a period of more than six months, the license is not automatically reinstated at the end of the period. Instead, a licensee must petition for reinstatement of a suspended license or reclassification of a limited license. In that case, the

licensee has the burden of proving at a hearing that he or she has good moral character and is able to practice with reasonable skill and safety. The licensee must also prove that reinstatement or reclassification is in the public interest and that all of the department's guidelines for reinstatement have been met. Reinstatement or reclassification may be subject to appropriate conditions, including retaking of licensing exam if the suspension has been more than five years.

If the disciplinary subcommittee decides to revoke a license, the revocation must be for a minimum of three years. If the license is revoked based on certain grounds, *e.g.*, criminal alteration or destruction of records; obtaining, possessing or dispensing controlled substances without therapeutic purpose; or felony conviction involving controlled substances, the revocation must be for at least five years.

WHAT ARE SOURCES OF COMPLAINTS AND ALLEGATIONS?

The Public Health Code allows any person who believes there has been a violation to file a complaint.

A person who makes a report is immune from civil or criminal liability, as long as it is made in good faith. The identity of the complainant is kept confidential until formal proceedings are commenced.

The statute requires any health care professionals having knowledge of a violation by another licensee to make a report to the bureau. No report is required if knowledge of the violation is gained through participation in professional review functions or in the course of a professional-patient relationship.

If a licensee has reason to believe that another licensee is impaired, a report must be made to the department or the Health Professional Recovery Program.

Information about malpractice actions, settlements, judgments and awards are a primary source of licensing investigations. Any attorney representing either a plaintiff or defendant in a professional malpractice action must file a report with the Insurance Commissioner within 30 days after an answer is filed. A similar report must be filed within 30 days after any settlement or judgment.

In addition, attorneys for plaintiffs and defendants in malpractice actions are required to file a copy of any settlement agreement with the Department of Community Health. Court clerks are required to submit a report to LEG following any judgment against a licensee in a malpractice action or any court-approved settlement.

The Bureau of Health Professions is entitled to request information about disciplinary action from licensed health care facilities; from professional liability insurers; from courts; from the Insurance Commissioner; and from other sources such as the National Practitioner Data Bank, public and private review bodies, and public health insurance programs.

An investigation is required if there have been three or more settlements, judgments and awards against a licensee within a five-year period *or* if there has been one or more settlements, judgments and awards with a cumulative total exceeding \$200,000 over a five-year period.

The department may, and frequently does, conduct investigations relating to malpractice cases regardless of the number or amount of any settlements or judgments. Indeed, the department may investigate incidents that are the subject of pending malpractice actions.

Licensing actions taken by agencies and boards in other states are also reported to the bureau. Licensees have a duty to self-report criminal convictions and licensing actions by other states.

Health care facilities and agencies that take adverse actions relating to a licensee's clinical privileges must make a report to the bureau. This includes any agreement not to pursue an investigation or to take disciplinary action in exchange for any restrictions on or surrender of a licensee's clinical privileges.

WHAT HAPPENS DURING AN INVESTIGATION?

After a complaint or report has been received, the department conducts an initial review to determine if there is a reasonable basis to believe the existence of violation. A request is made to the chair of the relevant licensing board for authorization to investigate. If authorization is not granted, the department may still investigate.

Typically, the bureau will obtain authorizations from the patient and issue a subpoena for production of medical records and other relevant documents. When the investigation arises from a malpractice case, the department will commonly obtain copies of documents from the court and the plaintiff's and defense attorneys involved in the case.

The physician-patient and similar professional privileges do not apply. However, the department may not obtain records or information covered by the peer review privilege.

It is important to note that the recipient of a subpoena or record request may not be a subject of the investigation. In any case, it is crucial to maintain a complete copy of all documents provided to the department.

The department may also interview patients, health professionals and other witnesses as part of the investigation. In many cases, an investigator will also request to interview the licensee who is the subject of the investigation. It is very common for licensees to assume that cooperating with the investigator and discussing the facts of the case will end the investigation. In some cases, that may be true. In others, the statements given to investigators can be devastating as the case proceeds to a formal complaint. The decision whether to meet with an investigator should only be made after consulting with experienced licensing counsel.

After the records and information are gathered, the department conducts a review. The department employs some health professionals and also obtains reviews from outside experts.

If a decision is made not to issue a formal complaint, the file is closed. While the licensee may be informed of the decision not to proceed, that is not always the case. Allegations that are dismissed as unsubstantiated are retained in a licensee's historical record for five years. If no other allegations are received during the five-year period, the allegation is removed from the file.

If the department determines that a licensee has violated the Public Health Code, an "administrative complaint" is issued and mailed to the licensee. The complaint contains the alleged facts establishing the violation and identifies the specific provisions of the Public Health Code.

WHAT HAPPENS AFTER A FORMAL COMPLAINT IS FILED?

A licensee must submit a written response to the complaint within 30 days. This is a critical step – the failure to timely file a written response is treated as an admission that facts alleged in the complaint are true. If no response is filed, the case is referred to the disciplinary subcommittee for imposition of sanctions.

An administrative complaint is a matter of public record. The existence of a pending licensing case is published on the department's web site.

In certain cases, the department may issue a "summary suspension" which terminates a licensee's right to practice before there has been any hearing. Summary suspensions are required for certain criminal convictions and may be imposed if public health, safety or welfare requires emergency action. A licensee has a right to an expedited hearing to dissolve the summary suspension, so that he or she can practice until the disciplinary subcommittee ultimately decides the case.

After an administrative complaint is filed, a licensee is entitled to obtain a copy of the investigative file. Typically, this will include medical records, documents from any related court case, reports of witness statements, any expert reviews, and a summary of the investigation.

The administrative complaint will always include a notice that a licensee has the right to a compliance conference. Under the statute, the purpose of the conference is to allow a licensee to demonstrate to a departmental analyst that he or she is currently in compliance. This type of conference is helpful only in the case of very technical violations, such as a failure to maintain CME credits. Whenever the complaint alleges any substantive matters, it is preferable to have a settlement conference with a member of the professional board and the assistant attorney general handling the case. This is an opportunity for the licensee to discuss the case in detail with a board member. At the end of the conference, the board member and assistant attorney general meet privately to discuss and then propose a resolution of the case to the licensee. Proposed resolutions may include a dismissal of the case or a recommended sanction.

If the licensee and the Attorney General agree to the proposed settlement, the matter is submitted to the disciplinary subcommittee for review. The board member who participated in the settlement conference is not permitted to vote, but will usually appear at the subcommittee meeting and explain why the proposed resolution should be accepted. The disciplinary subcommittee is not required to accept the proposal. The subcommittee can reject the settlement or propose modifications as part of a counter-offer.

If the licensee and the Attorney General do not agree on the settlement after the conference, or if the disciplinary subcommittee rejects it, the case is scheduled for an administrative hearing.

WHAT HAPPENS AT THE HEARING?

The hearing is conducted before an administrative law judge. The department is represented by an assistant attorney general. It is similar in many ways to a trial without a jury.

The assistant attorney general presents witnesses and exhibits. In almost all cases, an expert witness will testify regarding the standard of care and the alleged breaches of the standard by the licensee. The licensee can cross-examine the department's witnesses and may present his or her own witnesses and exhibits. The hearing is recorded by a court reporter or on audio tape.

After the hearing, the administrative law judge issues a written "proposal for decision" which contains recommended factual findings and legal conclusions for consideration by the disciplinary subcommittee. Both parties have the opportunity to file exceptions to the proposal for decision.

The disciplinary subcommittee may accept, reject or modify the proposal for decision. The decision by the disciplinary subcommittee is set forth in a written final order.

The final order issued by the disciplinary subcommittee is subject to review by appeal to the Court of Appeals. However, there are very limited grounds for appeal. The Court of Appeals is required to give great deference to matters within the professional expertise of the specific board.

WHAT ARE THE CONSEQUENCES OF A LICENSING VIOLATION?

Once the disciplinary subcommittee has found that a licensee has violated the Public Health Code and imposed a disciplinary sanction, there are a number of other serious consequences.

There are increased sanctions for any further violations committed within two years.

The list of disciplined individuals is public information. The final orders of the disciplinary subcommittee are available on the department's web site and published in professional journals.

Licensees who are subject to disciplinary action are required to make certain reports. All sanctions must be reported to a licensee's employer and any hospital where he or she is privileged. During any time that a license is suspended or revoked, the licensee must inform any patients who contact the office to request professional services. If a suspension is longer than 60 days, a licensee is required to notify all patients who were seen for 120 days before the suspension and for 120 days after reinstatement of the license.

As a practical matter, licensees will be required to disclose disciplinary actions when applying for or renewing staff privileges, participation in managed care organizations, malpractice insurance applications, and professional organizations and associations.

The Department of Community Health is required to report disciplinary actions to a variety of public and private entities, including the Insurance Bureau (which is then required to provide that information to malpractice insurers), to licensed health care facilities and agencies, and other state and federal programs.

A licensee may be excluded from participation in Medicare and Medicaid.

Another significant consequence involves reporting to the National Practitioner Data Bank. The NPDB only covers physicians and dentists.

The following licensing actions are “reportable events”:

- Revocation, suspension, probation, limitation or reprimand
- Fines, restitution and other monetary sanctions if accompanied by other licensure action
- Denial of renewal application when related to professional conduct or competence
- Disciplinary action taken in connection with license renewal if related to professional conduct or competence
- Surrender of license if related to professional conduct or competence

There are a few licensing actions that are not reported to the NPDB.

- Fines unaccompanied by other licensure actions
- Settlement agreement imposing monitoring requirements which do not restrict license
- Voluntary relinquishment of license not related to professional conduct or competence

There is another federal reporting system called the Health Integrity Protection Data Bank. It is similar in many ways to the NPDB, but it includes final adverse licensure actions taken against all health care practitioners, providers, or suppliers, not just physicians and dentists. Moreover, adverse actions need not be specifically related to professional competence or conduct.

Actions that are reported to the HIPDB include:

- Revocation, suspension, reprimand, censure, or probation
- Any other loss of license or right to apply for or renew a license whether by operation of law, voluntary surrender, non-renewal (excluding non-renewal due to nonpayment of fees, retirement, or change to inactive status) or otherwise

- Any other negative action or finding by a state agency that is publicly available information and is rendered by a licensing authority
- Denial of an application for licensure (initial or renewal)
- Disciplinary action taken by a licensing agency based upon the practitioner's, provider's, or supplier's deliberate failure to report a licensure disciplinary action taken by another licensing agency, when a report of such action is requested on a licensure application
- Voluntary surrender of a license

The following licensing actions are not reported:

- Settlement agreement imposing monitoring of a practitioner, provider, or supplier for a specific period of time, unless such monitoring constitutes a restriction on the licensee, or is considered to be a reprimand
- Voluntary relinquishment of a practitioner's license for personal reasons such as retirement or change to inactive status

At present, there is some question about reporting of fines. The HIPDB Guidebook states that fines which are not imposed in conjunction with other licensure actions such as revocation, suspension, censure, reprimand, probation, or surrender should not be reported. However, the department had been reporting all disciplinary sanctions. The regulations governing the HIPDB are being amended to clarify this issue.

WHAT IS THE HEALTH PROFESSIONAL RECOVERY PROGRAM?

The Health Professional Recovery Program is a confidential, non-disciplinary approach for assisting licensees in dealing with and recovering from substance abuse or mental illness. It is administered by a private organization, the Michigan Health Professional Recovery Corporation.

As discussed earlier, licensing action can be taken if a licensee is unable to practice safely and competently due to substance abuse or mental or physical disability. Under the Public Health Code, any licensee with reasonable cause to believe that another professional is impaired is required to make a report to the department or to the Health Professional Recovery Program. In many cases, licensees take the initiative to recognize and respond to problems affecting their lives and practices. The HPRP is designed to approach these issues from a treatment-based perspective rather than a disciplinary model.

An impaired health professional can choose to participate in the program by acknowledging impairment and complying with required conditions. The program has an intake process that determine what steps are needed to assist the professional in addressing his or her impairment and what conditions are required to avoid any harm to patients in the meantime. During participation, the case is generally removed from the disciplinary track.

WHAT STEPS SHOULD BE TAKEN?

If a subpoena or request for records from the Department of Community Health is received, there are a few important steps to take.

- 1.** It is important to get a sense of whether you may be the subject of the investigation. In many cases, the department is obtaining the records as part of its investigation of another licensee. If the request relates to a case that was the subject of a malpractice action or adverse clinical privileging action, you should presume that you are the subject of the investigation and should consult an experienced health law attorney. Check to see if the records have been requested by anyone else, including the patient. Determine if you or your staff recalls any dissatisfaction or complaints by the patient or family.
- 2.** You should assemble all of the requested information. Frequently, requests include x-rays, imaging studies, and other information that may not be filed with the patient chart. It is important to include all requested information in your response. If you have a question about the scope of the request, you can call the person listed on the cover sheet for assistance. Usually, it is sufficient to send the documents to the department along with a certification that the material is complete. Always make a complete set of copies of any materials sent to the department.
- 3.** In some cases, it may be appropriate to let the patient know that records have been requested and provided to the department. Remember that the Public Health Code provides that the physician-patient privilege does not apply in licensing investigations. The department has the right to obtain records even without a patient authorization, even after HIPAA.
- 4.** The subpoena or record request will have a deadline for providing the requested records. If additional time is necessary, call the department employee identified in the request. The department is typically cooperative with reasonable requests for extensions.
- 5.** *Never* add anything to the existing records – even if the information is completely accurate – unless any entries are clearly dated and marked as late entries. *Never* delete anything. Alteration of a medical chart is an almost certain way to guarantee licensing action, if not criminal prosecution.
- 6.** You should also consult an attorney if an interview is requested by a department investigator. Don't assume that the case will go away if you simply explain it to the investigator. Many times, there are very good reasons not to meet with the investigator or to have an attorney handle the communications.
- 7.** If you receive an administrative complaint, it's critical to understand that the complaint is the first step in a legal proceeding by an agency that can result in serious consequences. You should immediately consult with counsel experienced in licensing proceedings. Remember that a written response to the complaint must be filed within thirty days.