

# Introduction

Historically, the overwhelming majority of physician licensing sanctions have been based on grounds such as impairment from alcohol or drug abuse, violation of a controlled substance law, violation of sexual boundaries, non-compliance with the mandatory coverage requirements, or corrective action by another jurisdiction. However, in recent years, the physician licensing boards have significantly increased their scrutiny of the quality of care provided by physicians. This increased focus was prompted by public alarm over media reports concerning high incidences of medical errors, widespread criticism that the physician licensing boards were not fulfilling their responsibility to impose appropriate corrective action on incompetent physicians, and a clear legislative message to implement appropriate changes.

The legislative message was sent via the Medical Care Availability and Reduction of Error Act (Mcare Act, a/k/a Act 13 of 2002). [See Appendix A, p. 53 for link to this law.] It incorporates physician licensing reforms, including the following key provisions:

- Physicians must self-report certain events to their licensing board, including when they are served with a complaint in a professional liability action. [See p. 18-19.]
- The physician licensing boards must adopt criteria and standards for review of self-reported events and administrative complaints, based upon their frequency and severity. [See p. 20.]
- The physician licensing boards are authorized to impose disciplinary or other corrective action on a physician if they determine, through their review of a reportable event or administrative complaint, that the physician “practiced negligently.” [See p. 19-20.]

The physician licensing boards have taken a number of steps to address their increased workload and responsibilities under the Mcare Act and to otherwise revise their corrective action process. They substantially

increased the physician biennial license fee and are using the increased revenue to fund additional investigative and prosecution staff and to retain physician experts to review medical care and testify in licensing proceedings. In addition, the boards have developed “triage guidelines” for review of professional liability complaints. Although Mcare reviews have resulted in only a small number of prosecutions for substandard care to date, the number and frequency of those prosecutions likely will increase in the near future as more cases work their way through the system.

The Pennsylvania Medical Society developed this guide to educate our members regarding physician licensing investigations and prosecutions and the Mcare licensing reforms. It provides an overview of the applicable law and standard practices. While the guide references Medical Society policy in some areas, it does not include a comprehensive compendium of our policy regarding physician licensing investigations and prosecutions. The Medical Society has serious concerns with the efficacy of the Mcare licensing reforms, especially the self-reporting requirement, and also has some questions and concerns regarding the current investigation and prosecution process. The Medical Society has developed a separate action plan to address those issues.

## Nothing in this guide is intended as legal advice.

This guide provides general legal information. Laws and procedures change frequently and are subject to differing interpretations. Physicians should consult an attorney with expertise and experience in physician licensing matters if they are in need of legal guidance. [See p. 49-52.]

# Overview

## Physician licensing boards

Physicians who commit licensing infractions can be subject to disciplinary or other corrective action by their physician licensing board — i.e., the State Board of Medicine for medical doctors and the State Board of Osteopathic Medicine for osteopathic physicians.

The physician licensing boards are under the jurisdiction of the Department of State and are administered by the Department's Bureau of Professional and Occupational Affairs (BPOA).

Each board is composed of seven physicians (one of whom is the Physician General or Secretary of Health), the Commissioner of the BPOA, a limited license practitioner regulated by the board, and two consumer representatives (a/k/a public members).

## Decision-makers

Although the physician licensing board makes the ultimate decision as to whether a physician has committed an infraction and what corrective action to impose, Department of State staff, who are not controlled by the board, play key roles.

A prosecuting attorney decides whether to file formal charges. The physician licensing board cannot be involved in individual decisions as to whether to prosecute a physician due to constitutional restrictions on the commingling of the prosecutorial and adjudicatory (fact-finding) functions.

A hearing examiner ordinarily conducts the hearing and renders an initial decision. The hearing examiner's decision is final unless either side appeals it to the physician licensing board or the board elects on its own motion to review the decision.

If a case proceeds to physician licensing board review, the board's review is *de novo* — meaning that it can substitute its judgment for that of the hearing examiner on the facts, legal issues, and the appropriate corrective action.

It is not unusual for the board to disagree with the hearing examiner's judgment and to enter a different decision.

## Corrective action forms and grounds

The physician licensing board's corrective action arsenal includes: revocation, suspension, or restriction of the physician's license; a civil fine of up to \$10,000 per violation; a reprimand of the physician; and an order directing the physician to undergo treatment or to obtain further education or training as a condition of the physician's continued practice.

Examples of licensing infractions that constitute grounds for corrective action include: unprofessional conduct such as medical negligence or sexual misconduct, corrective action by another jurisdiction, certain adverse criminal dispositions, chemical dependency or alcohol abuse, fraud in the practice of medicine, and aiding the illegal practice of medicine.

The physician licensing board generally has broad discretion whether to impose corrective action and as to the form and extent of any corrective action.

The physician licensing board must impose specified action for certain infractions. For example, the Board of Medicine must suspend the license of a medical doctor convicted of a felony controlled substance offense for a minimum of 10 years from the date of the conviction.

## Potential collateral consequences

The imposition of corrective action can adversely affect the physician's license in other jurisdictions, participation in managed care networks, and privileges to practice at hospitals and other facilities.

A physician's defense of a related professional liability civil action or criminal action also may be compromised by disclosures, admissions, or findings in the licensing proceeding.

There is a concern that a physician licensing board determination that the physician was negligent will be conclusive on that issue in a related professional liability civil claim under a legal doctrine referred to as collateral estoppel.

Physicians are not eligible for an Mcare abatement if their license has been revoked within the last 10 years.

## Medical negligence

Even before enactment of the Mcare Act, a single instance of medical negligence was ground for corrective action. However, in practice, the physician licensing boards rarely imposed corrective action for substandard care and such actions typically involved gross negligence — i.e., multiple instances of negligence or egregious conduct.

The physician licensing boards have adopted triage guidelines for prosecutors to use in evaluating whether to investigate and prosecute conduct that is the subject of a professional liability complaint. [See Appendix E for Board of Medicine guidelines.]

The triage guidelines do not preclude investigation and prosecution of misconduct outside the listed criteria. The guidelines are internal operating procedures to provide guidance to prosecutors to assist them in focusing the department's resources.

Simple negligence satisfies the triage guidelines in some circumstances — e.g., if the case involves an unanticipated death. However, the triage guidelines largely focus on gross negligence and other egregious conduct.

When a physician is charged with having provided substandard care, the prosecutor normally must present testimony from a qualified physician expert that the physician deviated from the standard of care and ordinarily consults with a physician expert before even filing the charge.

A finding that the physician deviated from the standard of care does not necessarily mean that the

physician licensing board will impose a “disciplinary” measure, such as suspension of the physician's license. The board may impose a primarily “remedial” measure, such as a refresher educational course or probation, or could conclude that the isolated incident warrants no corrective action.

## Investigations

Information leading to physician licensing investigations comes from a variety of sources including: administrative complaints by patients and their representatives, physician notices of professional liability complaints and other Mcare reportable events, insurer reports of professional liability payments, and referrals from other agencies and jurisdictions.

The Bureau of Enforcement and Investigations (BEI) conducts investigations under the direction and oversight of a prosecutor in the prosecution division of the Department of State legal office.

Potential outcomes of an investigation include: no further action, a letter of caution, filing of formal charges, or a pre-charge settlement.

The physician licensing board and the Governor's general counsel may issue investigative subpoenas upon application of a prosecuting attorney. However, they cannot subpoena medical records without the patient's consent or a court order upon a showing that the records are reasonably necessary for the conduct of the investigation.

The physician licensing board may order a physician to undergo a mental or physical examination if there is probable cause that the physician is unable to practice the profession with reasonable skill and safety to patients by reason of illness, addiction to drugs or alcohol, or mental incompetence.

## Formal prosecution

Formal physician licensing prosecutions are largely governed by the Administrative Agency Law and the General Rules of Administrative Practice and Procedure (GRAPP).

The proceedings include five stages: filing of formal charges and physician's response, discovery and pre-hearing matters, hearing and post-hearing filings, initial decision by hearing examiner, and review by the physician licensing board.

Discovery is more limited than in civil professional liability actions. Exchange of information, beyond what is voluntarily provided by the parties, is within the discretion of the hearing examiner. At or prior to the pre-hearing conference, the hearing examiner often orders the parties to exchange reports from their experts as well as the documents that they intend to introduce at the hearing.

The hearing resembles a modified, more informal, version of a civil trial. Both sides may make opening statements, present their evidence, and make closing arguments. The prosecutor begins with the state's evidence and ends with the state's closing argument.

The prosecution has the burden of proof as to the factual basis for the charges and the physician has the burden of proof as to any affirmative defenses. The standard is the same as in a civil professional liability action — i.e., by a preponderance of the evidence. This standard requires evidence that the contention is slightly more true than not.

While the Pennsylvania Rules of Evidence do not apply, the presiding officer generally enforces those rules, although typically in a less stringent manner than in a court proceeding.

Medical records generally are admissible at the hearing as proof of the recorded facts.

A physician can appeal an adverse physician licensing board determination to the Commonwealth Court and, in rare circumstances, upon request, the Pennsylvania Supreme Court will agree to review the Commonwealth Court's decision.

Under the Administrative Agency Law, the courts may only overturn a physician licensing board determination for one of the following grounds: a constitutional violation, an error of law, a violation

of the rules of administrative procedure, or lack of substantial evidence for a necessary factual finding.

## Mandatory and temporary suspensions

The physician licensing board must suspend a physician's license in certain situations, such as a felony or misdemeanor controlled substance conviction, non-compliance with the mandatory professional liability insurance/Mcare assessment requirements, and as directed by the Department of Public Welfare for delinquent child support.

The physician licensing board is empowered to temporarily suspend a physician's license pending the filing and resolution of formal charges against the physician, if it determines that the physician's continued practice presents an immediate and clear danger to the public health and safety.

## Alternative tracks

Many corrective actions are imposed as a result of a consent agreement in which the physician and the physician licensing board agree to specified corrective action for alleged misconduct. A consent agreement can be negotiated at any time during the process, either before or after a formal charge is filed.

The physician licensing boards use the professional health monitoring programs (PHMP) operated by the BPOA. Through the PHMP, eligible physicians suffering from a physical or mental impairment, such as chemical dependency or alcohol abuse, can have a license suspension deferred in favor of probation and ultimately dismissed by successfully participating in a treatment and monitoring program.

## Defense issues

Generally speaking, the best defense to formal licensing charges is to challenge any factually inaccurate allegations.

Physicians have a constitutionally protected property interest in their license to practice medicine. As a result, they must be afforded due process when subject to corrective action that adversely affects their license to practice. This ordinarily requires prior notice of the charges and a hearing before an impartial fact-finder on disputed issues of fact.

If a physician is charged with violating a statute or regulation, it generally is not a valid defense to assert that the physician was not aware of the pertinent rule of law, although that may affect the sanction imposed in certain circumstances.

A favorable outcome in a related criminal, civil, or administrative proceeding ordinarily does not entitle the physician to have a licensing charge dismissed.

Corrective action can be imposed for misconduct even though the physician previously was sentenced for a criminal offense, ordered to pay civil damages in a professional liability civil action, or subjected to corrective action in another jurisdiction for the same misconduct.

Generally speaking, licensing charges are barred under a defense known as laches if: (i) there was unjustified delay by the prosecution in initiating the action, and (ii) the defense was unduly prejudiced by the delay. However, the Mcare Act limits use of this defense in most cases.

## Public access and disclosure

The contents of the BPOA investigative file generally are confidential and not subject to discovery for use in a related proceeding, such as a professional liability action, without the written consent of the physician licensing board. However, once formal charges are filed, the proceedings and filings are public.

Final adjudications and orders imposing corrective action generally are published and disclosed through a number of means including the Department of State Web site and physician licensing board newsletters, which are distributed to all physicians in Pennsylvania.