State of Michigan Health Care License Investigations and the Collateral Effects of Licensing Sanctions

by Robert S. Iwrey

This article will provide readers with an overview of the typical process involved in the investigation and prosecution of Michigan licensed health care providers for alleged violations of Michigan's Public Health Code and the collateral legal effect that imposed sanctions can have upon these health care providers.

An Overview of the Bureau of Health Professions

Prior to December 7, 2003, investigations into, and resulting disciplinary actions against, Michigan licensed health care providers fell within the purview of the Bureau of Health Services[1] under the Michigan Department of Consumer & Industry Services (MDCIS). In accordance with Executive Order 2003-18, the Bureau of Health Services became the Bureau of Health Professions (BHP) and, along with the Bureau of Health Systems, transferred its operations from the MDCIS to the Department of Community Health (MDCH), effective December 7, 2003. In 2011, in accordance with Executive Order 2011-04, both BHP and the Bureau of Health Systems transferred their operations from the MDCH to the Department of Licensing and Regulatory Affairs (LARA), effective April 24, 2011. On October 18, 2012, LARA announced the creation of the new Bureau of Health Care Services (BHCS). The new BHCS brought together the Bureau of Health Systems, which governs licensed health care entities such as hospitals and ambulatory surgical centers, and the BHP, which governs individual licensed and registered health care providers such as physicians and nurses, under one umbrella for purposes of consolidating resources and administrative efficiency. At the time of this article, the consolidation has not been completed and there have not been any substantive changes to the policies and procedures affecting licensed health care providers. As such, the remainder of this article shall reference the BHP as opposed to the new BHCS. The BHP regulates more than 410,000 health professionals in Michigan who are licensed, registered or certified under Articles 6, 7 and 15 of the Michigan Public Health Code (MPHC) 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 done through the administration of the occupational regulation sections of the MPHC, Public Act 368 of 1978, as amended, and by addressing practice issues related to health care in Michigan.

The BHP licenses and registers 37 health care occupations in 26 different health care professions.[2] Additionally, the BHP receives and investigates allegations against these professionals. Regulatory discipline is usually a function of a licensing board or task force within the BHP that is composed of both professional and public members appointed by the governor. The BHP is structured into four divisions: the Administration Division, Licensing Division, Regulatory Division, and the Investigation Division, and is charged with the responsibility of licensing and regulatory activities.

A Description of the Investigatory Process

The BHP distinguishes between allegations filed by consumers and others and formal complaints filed by the state. An allegation is a type of consumer complaint filed with the BHP. The consumer alleges that a violation of the MPHC has occurred. 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. Anonymous allegations will typically 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

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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 allegation is within its jurisdiction to act on it (e.g., if it involves a simple fee dispute, it will not be deemed outside the scope of the BHP). If the allegations are within the jurisdiction of the BHP, the BHP will forward the allegations to a representative of the applicable board (e.g., if the allegation pertains to a nurse, a representative of the Board of Nursing will be consulted) for the determination of whether an investigation is warranted. In addition to allegations filed by consumers, 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: (i) a limitation of staff privileges or a change in employment status due to disciplinary action taken by a health facility or agency; (ii) a disciplinary action taken by a professional health society; (iii) an adverse medical malpractice settlement, award or judgment; (iv) a felony conviction; (v) a misdemeanor conviction punishable by up to two years of imprisonment or that involves alcohol or a controlled substance; (vi) a licensee's ineligibility to participate in a federally funded health insurance or health benefits program; (vii) a report by a licensee that another licensee has committed a violation of the MPHC; or (viii) a disciplinary action by a licensing board in another state. A licensee must notify LARA 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 if it's on appeal), which will likely lead to an immediate investigation by the bureau. A licensee's failure to do so gives rise to an independent disciplinary action under the MPHC.[3]

An investigation into an allegation is conducted by the Investigation 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.

Bases for the Issuance of an Administrative Complaint

If the BHP believes that there is sufficient evidence to demonstrate a violation of the MPHC, a formal administrative complaint will be issued on behalf of the BHP against the licensee charging the licensee with specific violations of the MPHC.[4] MCLA §333.16221 sets forth the numerous bases for the issuance of an administrative complaint. The most commonly used bases are MCLA §§333.16221(a), (b)(i) and (b)(vi). MCLA §333.16221(a) is cited as a basis due to "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, or any conduct, practice, or condition that impairs, or may impair, the ability to safely and skillfully practice the health profession." MCLA §333.16221(b)(i) is cited as a basis due to "incompetence." MCLA §333.16221(b)(i) is cited as a basis due to "lack of good moral character."

Amongst the numerous grounds for issuance of an administrative complaint, the MPHC provides that the BHP may issue an administrative complaint due to certain preceding criminal violations. For example, a conviction of: a misdemeanor punishable by imprisonment for a maximum term of two years;[5] a misdemeanor involving the illegal delivery, possession, or use of a controlled substance;[6] a felony;[7] any criminal sexual conduct;[8] reckless or intentional inappropriate destruction or alteration of medical records;[9] a misdemeanor or felony involving fraud to obtain professional fees;[10] a misdemeanor related to the ability to practice safely / competently;[11] and practicing under the influence of alcohol or drugs[12] all provide a basis for a licensing action against the convicted licensee.

Issuance of the Administrative Complaint & Summary Suspension

When the administrative complaint is issued, a summary suspension may also be issued. 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

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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.[13] The suspension will remain in place until the administrative hearing, if requested, is concluded unless otherwise resolved through a petition to LARA for an immediate hearing before an administrative law judge (ALJ) to dissolve the summary suspension order.[14]

Compliance Conference and Settlement Conferences

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. A compliance conference is an informal meeting typically between the health care licensee, his or her attorney, and an analyst from the BHP. On occasion, when available and/or upon request, a designated representative of the licensee's respective board (referred to as the "conferee") may also attend the compliance conference. At the compliance conference, the health care licensee is given an opportunity to demonstrate his or her compliance with the applicable provisions of the MPHC alleged to have been violated in the administrative complaint. The meeting is informal and there are no sound or video recordings or statements taken under oath. At, or shortly after, the compliance conference, the BHP confers with the conferee and then communicates any available settlement offers to the licensee or the licensee's legal counsel for consideration. While not expressly provided for by statute or administrative rule, if the matter is not resolved via a compliance conference, there may be opportunities to resolve the matter short of a formal administrative hearing via a settlement conference held between the assistant attorney general (AAG) assigned to the matter and the licensee's legal counsel.

Consent Orders

If a proposed settlement is reached between the BHP and/or the AAG, the licensee and the conferee, such settlement is reduced to a written, proposed consent order and stipulation (COS)[15] that is drafted by the BHP and/or the AAG. While most of the language of the proposed COS is standard, attorneys for the licensee can negotiate certain language to the benefit of the licensee. Importantly, the COS is not final until it is approved by the disciplinary subcommittee of the applicable licensing board. Typically, such approval is sought at the next regularly scheduled meeting of that subcommit-

tee. Each licensing board publishes its schedule of annual meetings online. Most licensing boards meet every other month. Moreover, if the proposed COS is not timely submitted for consideration by the subcommittee well in advance of its next regularly scheduled meeting (e.g., approximately two weeks prior to the scheduled meeting), the matter may not be placed onto the agenda and the parties will need to wait until the next meeting thereafter for consideration.

Although the meeting of the disciplinary subcommittee is a public meeting and can be attended by the licensee and/or the licensee's legal counsel, neither the licensee nor the licensee's legal counsel will be provided with an opportunity to argue the matter or introduce any information in an attempt to influence the disciplinary subcommittee's decision. The disciplinary subcommittee can accept, modify or reject the terms and conditions of the proposed COS. If the disciplinary subcommittee accepts the COS as written, it is signed and becomes effective in accordance with the terms of the COS (e.g., the COS may indicate that it is effective upon signature by the chair of the applicable licensing board or within 30 days of such signature). If the disciplinary subcommittee modifies any of the terms and conditions of the proposed COS, the BHP and/or AAG notifies the licensee of the proposed modifications (which are often referred to collectively as a "counteroffer"). If the licensee accepts the counteroffer, the modified COS will be entered and the matter will be concluded. If the licensee rejects the counteroffer and no other offers are acceptable to the applicable licensing board or if the board simply rejects the proposed COS without making any counteroffer, the matter will proceed to an ALJ hearing.

ALJ Hearing Process

As stated above, if a settlement cannot be reached, the BHP will refer the matter over to the AG and 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. It is held 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.

Sanctions and Disclosure of Sanctions

If the disciplinary subcommittee determines that a preponderance of the evidence supports the proposed findings of the ALJ, the 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, and/or community service to a 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.[16]

In accordance with the MPHC, LARA is required to publish the names and addresses of disciplined licensees. To comply with this requirement, the BHP regularly publishes a Disciplinary Action Report (DAR). The DAR lists the disciplinary actions taken against health professionals who are licensed and regulated by the various health boards within the BHP. The report also includes updated information regarding licensees who have appealed the board's action to a higher court. The report includes the names of the health professionals, the city of the address on file with LARA, their professional license number, the type of disciplinary action taken, the effective date of the action and the general nature of the complaint. This information is available online at http://www.michigan.gov/healthlicense and is also available in writing from LARA.

In addition to publishing the DAR, LARA also notifies the commissioner of the Office of Financial and Insurance Regulation (OFIR) (which provides the information to insurance carriers providing professional liability insurance),

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the Department of Community Health (which reports disciplinary actions to licensed health care facilities and agencies), state and federal agencies responsible for fiscal administration of federal health care programs, applicable professional associations, the Associated Press (AP) and the United Press International (UPI). LARA also provides the State of Michigan Library with an annual report of all disciplined licensees for the preceding three years and provides the National Practitioner Data Bank with a list of disciplined licensees.

In accordance with the federal Health Care Quality Improvement Act of 1986, anytime a physician or dentist is sanctioned by the state, the appropriate board within the BHP is required to report such action to the National Practitioner Databank (NPDB), which acts as a flagging system, disseminating certain information to eligible entities to assist them in conducting investigations of the qualifications of the health care practitioners they seek to license or hire, or to whom they wish to grant membership or clinical privileges. An adverse action report must be given to the NPDB within 30 days after formal approval of the licensure action by the board or its authorized official. Significant delays may occur between the formal approval of the action and the drafting of the order for publication but the trigger date for the report is based upon the board's formal approval of the action. The board must also report revisions to adverse licensure actions such as reinstatement of a license. A licensee whose license has been revoked or suspended will be reported, as will a licensee who has been reprimanded, placed on probation, censured or otherwise sanctioned. However, if a licensee has been fined only (there has been no other accompanying sanction such as revocation, suspension, censure, reprimand, probation or surrender) and such fine is imposed for reasons unrelated to quality of care, such fine will not be reported. A physician or dentist who voluntarily surrenders his or her license for personal reasons unrelated to his or her professional competence or conduct (e.g., retirement) will not be reported either.

Hospitals must query the NPDB when a practitioner applies for privileges and every two years for practitioners on the medical staff or holding privileges. Other health care entities, including professional societies, may query the NPDB when entering an employment or affiliation relationship with a practitioner or in conjunction with professional review activities. State licensing boards may query the NPDB at any time and health care practitioners can self-query at any time. Medical malpractice payers and lawyers may not query the NPDB at any time.

In addition to disclosures by LARA and the applicable professional board, a licensee has a duty to self-report in certain circumstances. If a licensee is fined, reprimanded, placed on probation or ordered to pay restitution, the licensee must notify his or her employer and any hospital where he or she is admitted to practice within 10 days of the final order imposing the sanction. Additionally, if a licensee's license is revoked or suspended for greater than 60 days, within 30 days of the final order imposing the revocation or suspension, the licensee must provide written notice to all patients seen within 120 days immediately preceding the effective date of the revocation or suspension. The licensee must also provide oral notice to all patients who contact the licensee for professional services during the first 120 days after the date of the final order imposing the revocation or suspension.

The Collateral Effect of Licensing Sanctions upon the Licensee

The severity of the sanction imposed by the disciplinary subcommittee will determine the extent of the collateral damage to the licensee. This is a list of some, but not all, of the repercussions that a sanctioned licensee may encounter:

1. Loss of Hospital Privileges: Typically, in accordance with medical staff bylaws at a hospital, a licensee whose license has been revoked or suspended will have his or her clinical privileges revoked or suspended for at least the term of the suspension. Similarly, a licensee whose license has been restricted will often have his or her clinical privileges restricted if they fall within the scope of the limitation or restriction imposed by the state. If a licensee is placed on probation, hospitals vary in their response (some will suspend the licensee's clinical privileges for the period of probation, while others may only suspend voting and office holding prerogatives). However, if the underlying actions or omissions of the licensee that gave rise to the state-imposed sanction concerns quality-of-care issues, hospitals will invariably take some form of corrective action. Depending upon the severity of the sanction and/or whether quality-of-care issues are raised, a hospital may summarily or automatically suspend the licensee's clinical privileges prior to any hearing on the matter. When a licensee's clinical privileges at a hospital are affected, due process is often afforded the licensee in accordance with the hospital's fair-hearing plan. Provisions in the hospital's credentialing procedures manual, hospital bylaws and medical staff bylaws are often implicated and should be reviewed as well. Judicial review of the termination of clinical privileges at a private hospital was essentially unavailable under Michigan law in the absence of allegations of discrimination or violations of state or federal statutory law from approximately 1982 until 2005 when the Michigan Court of Appeals in *Feyz v. Mercy Memorial Hospital, et al*,[17] significantly changed more than 20 years of prior case law by empowering licensees with the ability to challenge private hospital staffing decisions in ways that were previously barred. On June 24, 2006, the Michigan Supreme Court issued its opinion in *Feyz v. Mercy Memorial Hospital*,

et al,[18] upholding the abrogation of the judicial non-intervention doctrine and a licensee's right to challenge a private hospital staffing decision in court.

2. Loss of Participation and Enrollment with State Professional Associations: Professional associations will vary in their response to a sanctioned member, although it is unlikely that a licensee will be departicipated due to the imposition of a fine or reprimand. On the other hand, a licensee whose license has been revoked or suspended for a lengthy period of time will usually lose his or her membership in the association (e.g., Michigan State Medical Society). Typically, a licensee must maintain his or her membership in the professional association in order to continue to qualify for group health care insurance originally obtained through the professional association. Thus, departicipation from a professional association may have significant ramifications for the sanctioned licensee. In addition, there are some professional associations that obtain reduced premiums for professional liability insurance for its group members. Such malpractice insurance may be affected by a state-imposed sanction.

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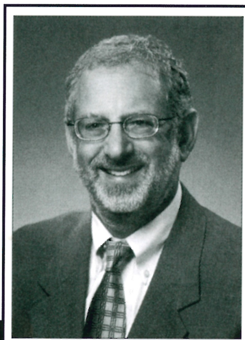

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3. Loss of Participation in Preferred Provider Organizations (PPOs): While PPOs vary in their reaction to licensing sanctions, many PPOs have very strict policies regarding sanctions, often departicipating sanctioned licensees who have been reprimanded or placed on probation and not just those whose licenses have been revoked or suspended. While quality-of-care concerns will certainly lead to investigation and possible departicipation, sanctions having nothing to do with quality-of-care concerns are often cited as the basis for departicipation. PPOs have justified such departicipations as administrative cost savings, elimination of redundant services and other business reasons. Judicial review of such departicipation is available, although one must often exhaust internal, administrative remedies within the PPO first. Legal challenges to such departicipation may be based upon numerous legal theories including but not limited to: (a) violation of public policy, (b) breach of provider contract, (c) breach of implied covenant of good faith and fair dealing, (d) due process violations, (e) tortious interference with business expectations and/or contract, (f) violation of unfair competition laws, (g) violation of antitrust laws, (h) breach of third-party beneficiary contracts, and (i) breach of fiduciary duty.

4. Loss of Enrollment with Third-Party Payors: Like PPOs, third-party payors vary in their reaction to licensing sanctions, although the reaction tends not to be as severe as with the PPOs. Commercial carriers vary in their responses but often will follow departicipation policies similar to BCBSM's Traditional Program. BCBSM's Traditional Program has set policies by which it determines whether departicipation is appropriate and, if so, the length of the departicipation period. At present, there are 13 non-exclusive departicipation criteria, which include termination or suspension of licensure, certification, registration, certificate of need or accreditation in Michigan. However, it is important to note that BCBSM may departicipate licensees who have lesser sanctions imposed upon them as well. For example, criterion number 13 provides for departicipation of providers who violate any local, state or federal regulation, law or code (which includes the MPHC), regardless of whether any sanction is imposed by the state for such violation. BCBSM's Blue Preferred Plan (Trust) Program Professional Provider Agreement does not reveal any provision mandating termination from its network for licensing sanctions but does provide that the agreement may be terminated by BCBSM immediately at BCBSM's option if a trust provider's license is revoked, restricted or suspended.

5. Loss of DEA Registration: LARA will report to the U.S. Department of Justice when it revokes or suspends a provider's license. 21 USCA § 824 provides that the U.S. Attorney General may suspend or revoke a provider's DEA registration when the provider's state license or registration is suspended, revoked or denied, or where competent state authority has merely recommended that the provider's state license or registration be suspended, revoked or denied. The provider may request a hearing in order to contest such action. In cases where there is a perception of imminent danger to the public health or safety, the U.S. attorney general may immediately suspend a provider's DEA registration prior to any hearing.
6. Loss of Board Certification: A licensee whose license has been revoked or suspended for a lengthy period of time may lose his or her board certification in his or her field of specialty depending upon the rules and requirements of the governing board. Such loss of board certification could result in loss of clinical privileges in accordance with an entity's medical staff bylaws that require such certification in order to practice at the entity.
7. Exclusion from Participation with Medicare, Medicaid and Other Federal and State Governmental Programs: There are basically two types of exclusion under the federal statutory and regulatory provisions regarding federal program (e.g., Medicare and Medicaid) participation: mandatory exclusion and permissive exclusion. A criminal conviction related to the delivery of an item or service under the Medicare program or any state health care program (e.g., Medicaid) will result in a mandatory exclusion of at least five years. However, a provider whose license has been revoked or suspended or has otherwise lost his or her license for reasons bearing on the individual's professional competence, professional performance or financial integrity may be excluded from participating in Medicare and Medicaid at the discretion of the secretary of HHS. Likewise, the secretary of HHS has discretion to exclude a provider who has surrendered his or her license during the pendency of a formal disciplinary proceeding concerning the provider's professional competence, professional performance or financial integrity. The duration of a permissive exclusion resulting from a licensing sanction will be for a period of time not less than the period during which the provider's license is revoked, suspended or otherwise not in effect as a result of, or in connection with, a state licensing agency action.[19]

The effect of exclusion from the Medicare/Medicaid program is that no federal health care program payment may be made for any items or services furnished by an excluded provider or directed or prescribed by an excluded provider, regardless of the method of reimbursement or to whom the payment is made. Likewise, no payment can be made for administrative and management services not directly related to patient care that are provided or directed by an excluded provider. In addition, no federal program payment may be made to cover an excluded provider's salary, expenses or fringe benefits, even if the excluded provider does not provide direct patient care. An excluded provider cannot avoid the effect of such exclusion by changing from one health care profession to another.

An excluded provider that submits, or causes to be submitted, a claim for reimbursement to Medicare/Medicaid may be subjected to a civil monetary penalty of $10,000 for each claim plus treble damages. In addition, the excluded provider could jeopardize his or her ability for reinstatement into the Medicare/Medicaid programs in the future. Importantly, health care providers who employ or enter into contracts with excluded providers to provide items or services to Medicare/Medicaid beneficiaries may also be subject to civil monetary penalties and potential exclusion from the Medicare/Medicaid programs if they submit claims for items or services furnished by an excluded provider who they knew or should have known was excluded. According to the Office of Inspector General, providers and contracting entities have an affirmative duty to check the program exclusion status of individuals and entities prior to entering into employment or contractual relationships, or run the risk of the imposition of civil monetary penalties. Excluded providers are listed on the OIG website at oig.hhs.gov/. Health care providers may only employ an excluded provider in limited situations where the health care provider is both able to pay the individual exclusively with private funds or funds from other non-federal sources and where the services furnished by the excluded provider relate solely to non-federal program patients.

Practical Tips to Avoid a Licensing Action

Having a license to practice health care in the state of Michigan is not a right but a privilege that can be taken away or restricted for failing to abide by various statutory bases set forth within the Michigan Public Health Code ("MPHC"). As such, compliance with the MPHC is the key to avoiding a licensing action. In order to facilitate such compliance, each health care licensee is encouraged to actively participate in an effective compliance plan at his or her worksite. If the health care licensee is a solo provider or member of a group that does not have a compliance plan, he or she should develop, implement and maintain an active compliance plan that includes: (1) designating a compliance officer or contact, (2) implementing written standards and procedures, (3) conducting appropriate training and education, (4) developing open lines of communication, (5) conducting internal monitoring and auditing, (6) responding appropriately to detected offenses and developing corrective action, and (7) enforcing disciplinary standards through well-publicized guidelines.[20] Although each of these elements plays a role

in facilitating compliance, emphasis should be placed on conducting internal monitoring and auditing, as this can help identify a previously unknown issue and provide one with an opportunity to take proactive, prophylactic measures to address the issue prior to the issue resulting in a licensing investigation.

In addition, emphasis must be placed on appropriate documentation of the medical record. The majority of licensing actions are based, at least in part, upon a lack of appropriate documentation in the medical record. For example, if a patient is non-compliant with the health care licensee's instructions, such non-compliance should be documented. If not, a subsequent review of the licensee's medical records may lead the reviewer to conclude that the licensee, not the patient, failed to follow up. Moreover, while there is no standard form utilized by all health care licensees for documenting patient encounters, incorporating the S.O.A.P. format (Subjective, Objective, Assessment and Plan) is strongly advised, as record reviewers will look to see if each of these elements is present in the documentation. Importantly, as of December 2006, a health care licensee is required to maintain a record for each patient for whom he or she had provided medical services, including a full and complete record of tests and examinations performed, observations made and treatments provided.[21]

Furthermore, with the recent push toward adopting and meaningful use of electronic health records (EHR), health care licensees should be mindful of issues such as self-populating record fields that can result in significant inconsistencies in the medical record. For example, due to a self-populating field, the medical record may state in one area: "patient has no complaints of pain," but in another area state: "patient presents with severe pain." In some cases, EHR systems may automatically generate a prescription, including strength and form, based on the notes in the record. In such instances, the health care licensee must take care on two levels. Firstly, the licensee must ensure that the prescription generated by the EHR system is appropriate for the patient. Though the system is convenient in generating the prescription, nothing can substitute for the professional judgment of the licensee. Secondly, if the licensee does, in fact, change the EHR-system-generated prescription, the licensee must ensure that such alterations are also reflected in the exam note itself. Other licensees will rely on that exam note to make future decisions on refilling the prescription or prescribing another medication. Liability can also arise by missing simple spelling errors, despite spell check (e.g., writing care instead of case). The ease with which certain tasks can be completed with an EHR system can result in increased carelessness where such mistakes could have much greater implications, including risks of patient safety, medical malpractice claims or audit activity – all which could lead to a licensing action.

Lastly, due to the growing epidemic in Michigan regarding prescription drug abuse, there has been an increase in actions against health care licensees for illegitimate prescribing of controlled substances. As set forth above, administrative complaints may be issued against a health care licensee for (i) a "violation of general duty, consisting of negligence or failure to exercise due care … whether or not injury results…"[22] or (ii) "incompetence."[23] Both of these bases essentially allow a licensing action for not following the applicable standards of care. The applicable standards of care, while not delineated by statute, have been developed by the various health care licensing boards (including the Boards of Medicine, Osteopathic Medicine & Surgery and Pharmacy) to include a consideration of: (1) "Michigan Guidelines for the Use of Controlled Substances for the Treatment of Pain," developed by the Michigan Board of Medicine and the Michigan Board of Osteopathic Medicine and Surgery;[24](2) "Michigan Board of Pharmacy Guidelines for the Use of Controlled Substances for the Treatment of Pain";[25] (3) "Responsible Opioid Prescribing: A Guide for Michigan Physicians" – a book endorsed by LARA as representing the standard of care in Michigan;[26] and (4) the use of the Michigan Automated Prescription System (MAPS). Health care licensees who prescribe controlled substances are well advised to familiarize themselves with these publications and the standards of prescribing controlled substances in Michigan. Moreover, with regard to MAPS, while not required by statute or administrative rule, prescribing licensees are "encouraged to register to MAPS

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Online to request prescription data on patients ... [since] using MAPS Online before and during treatment ... can alert [the licensee] to any past 'doctor shopping' or questionable behavior."[27] Health care licensees should not take this "encouragement" lightly. BHP and law enforcement have taken the position that the applicable standards of care require physicians to perform MAPS queries regularly on patients for whom they prescribe controlled substances and that failure to do so is a breach of the applicable standard of care.

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Footnotes

1 The authority of the Bureau of Health Services, now referred to as the Bureau of Health Professions, is limited to granting licenses or registrations for the health care professionals in Michigan and does not extend to fee disputes or personal conflicts between patients and their health care providers.
2 These professions include: acupuncture, athletic trainer, audiologist, chiropractic, counseling, dentistry, dietetics and nutrition, marriage and family therapy, massage therapy, medicine, nurse aide, nursing, nursing home administrator, occupational therapy, optometry, osteopathic medicine, pharmacy, physical therapy, physician's assistant, podiatry, psychology, respiratory care, sanitarian, social worker, speech-language pathology and veterinary medicine.
3 In the case of *Dep't of Consumer Industry Services v. Shah*, 236 Mich App 381, 600 NW2d 406 (1999), the court interpreted the statutory reporting requirement to only apply to criminal convictions and disciplinary actions that occurred in a state other than Michigan since the department already receives information from the clerk of a court for criminal convictions under MCLA §769.16a. Nonetheless, the BHP has taken a position that it disagrees with the court's finding and will charge a health care licensee under MCLA 333.16221(h) for failing to make a report of a criminal conviction that occurred in Michigan under MCLA §333.16222(3).
4 It should be noted that while the majority of administrative complaints are issued directly from the BHP, some administrative complaints are issued from the Michigan Attorney General's Office (AG) on behalf of the BHP. For example, if an allegation is complex and involves violations of the applicable standards of care for that profession, it will often be referred by the BHP to the AG or if there are other complaints already in process against a health care licensee, the matter may be forwarded by the BHP to the AG for handling.
5 See MCLA §333.16221 (b)(v).
6 *Id.*
7 *Id.*
8 See MCLA §333.16221 (b)(vii).
9 See MCLA §333.16221 (b)(viii).
10 See MCLA §333.16221 (b)(ix).
11 See MCLA §333.16221 (b)(xi).
12 See MCLA §333.16221 (b)(xii).
13 See Michigan Administrative Code R 338.1609.
14 See Michigan Administrative Code R 338.1610.
15 If the conferee recommends a dismissal of the administrative complaint, a COS is unnecessary; however, the matter must still be approved by the disciplinary subcommittee of the applicable licensing board.
16 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 (*Dep't of Consumer & Industry Services v. Orzame, MD*, 2001 WL 1545809 (2001)).
17 264 Mich App 699 (2005).
18 475 Mich 663 (2006).
19 The secretary of HHS may take into consideration certain enumerated aggravating circumstances, which can lengthen the exclusionary period, as well as certain enumerated mitigating factors, which may reduce the effect of such aggravating circumstances.
20 These seven elements have been identified by the Office of Inspector General (OIG) for the U.S. Department of Health and Human Services as key components of an effective compliance program. For additional information on implementing these components, see e.g., the OIG's "Compliance Program Guidance for Individual and Small Group Physician Practices."
21 MCLA §333.16213(1).
22 MCLA §333.16221(a).
23 MCLA §333.16221(b)(i).
24 http://www.michigan.gov/documents/mdch_MI_guidelines_91795_7.pdf.
25 http://www.michigan.gov/documents/mdch_pharmacyguidelinesusecspain_139447_7.pdf.
26 "Responsible Opioid Prescribing: A Guide for Michigan Physicians," Scott M. Fishman, M.D., Michigan Department of Community Health, 2007. A copy may be obtained by calling the Michigan Bureau of Health Professions Professional Practice Section Office at (517) 335-6557.
27 http://www.michigan.gov/lara/0,4601,7-154-27417_55478_55485---,00.html.

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