
THE PROSECUTION AND DEFENSE OF A PENNSYLVANIA HEALTH CARE LICENSE ACTION



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MARCH 13, 2019

EVENTS THAT TRIGGER AN INVESTIGATION

- Patient complaints
- Self-Reporting Required by Mcare
 - Professional Liability Actions
 - Controlled Substance Conviction
 - Arrest for Certain Crimes
 - Discipline from other States

TRIGGER EVENTS CONTINUED

- Self-disclosure on License Applications
- Sentinel events reported by hospitals
- Reports from the National Practitioner Data Bank
- Reports by the Mcare fund
- Referrals from other state and federal agencies
- Impaired physician reports

BUREAU OF ENFORCEMENT & INVESTIGATIONS

- BEI Investigator will conduct interviews and gather relevant documents and information
- Investigatory subpoena for: billing records, patient records, telephone/computer/email records
- Professional should retain counsel to assist
- Report sent to the Bureau for charging decision

PRE-CHARGE SETTLEMENT

- Counsel may wish to contact investigator/prosecutor
- Research previous sanctions through website
- Educate Client regarding collateral consequences
- Develop proof of mitigating circumstances
- Consider proactive remedial actions

RANGE OF SANCTIONS

- Letter of Warning
- Fine- \$10,000 under 63 P.S. § 2205(b)(4)
- Reprimand (Private or Public)
- Probation (with Conditions)
- Suspension (Active or Stayed with Conditions)
- Restrictions

RANGE OF SANCTIONS CONTINUED

- Additional Continuing Medical Education
 - Professional Ethics and Boundaries
 - Prescribing
 - Recordkeeping
- Practice Monitors
- Re-Entry Programs
- Drug and Alcohol Monitoring
- Revocation-mandatory 5 years

COMPOSITION OF LICENSING BOARD

- Appointed by Governor, approved by Senate
- Secretary of Health
- Commissioner of Professional and Occupational Affairs
- 2 Members of the Public at Large
- 6-7 Licensed Professionals of the Relevant Board
- 1 Allied Professional under the Relevant Board
- 4-6 Term for Professional and Public Members

PUBLIC NATURE OF PROCEEDING

- Board hearings are open to the public
- Consent Decree or Final Adjudication are public records
- Sanctions are published on the Board website
- Sanctions are published in Board Newsletters

COLLATERAL CONSEQUENCES

- National Practitioner Data Bank Report
- Corrective action is usually required by other states
- Adverse impact on civil or criminal proceeding
- Medicare/Payor/managed care exclusion

COLLATERAL CONSEQUENCES CONTINUED

- Hospital Medical Staff Discipline
- Specialty Board Discipline
- Impact on premiums for professional liability insurance
- Loss of Employment
- Adverse Publicity

CONSENT AGREEMENTS

- Statement of Jurisdiction, Facts, Violation, Terms
- Placed on Board agenda for approval-consider attending
- Board will approve or disapprove without guidance
- *Lyness v. Pa. Board*-prohibits commingling of prosecution and adjudicatory functions

PROFESSIONAL HEALTH MONITORING PROGRAM

- Board Ordered Mental/Physical Examination
- Voluntary Recovery Program (VRP)
- Disciplinary Monitoring Unit (DMU)
- Both the VRP and DMU require simultaneous participation with the Physicians' Health Programs (PHP), a program of the Pennsylvania Medical Society
- Length and expense of monitoring program

AUTOMATIC AND TEMPORARY SUSPENSIONS

- Felony controlled substance conviction
- Misdemeanor controlled substance conviction
- Mental health commitment
- Non-compliance with insurance requirements
- Temporary Suspension - *Shah v. State Board* - due process satisfied with post-suspension hearing

FORMAL CHARGES-AGENCY LAW

- Administrative agencies observe due process requirements 2 Pa.C.S.A. 501 et seq.
- Boards can delegate to Hearing Examiners
- Formal Hearing will be provided
- Precise Acts of misconduct should be outlined
- Rules of evidence are relaxed | Pa. Code 31.1 et seq.
- Probable Cause Screening Committees handle emergency matters to avoid prejudicing entire Board

ORDERS TO SHOW CAUSE

- Unprofessional conduct
- Fraudulent billing
- Mental or physical impairment
- Corrective action in another jurisdiction

SHOW CAUSE CONTINUED

- Sexual Misconduct
- Prescription Errors or Abuse
- Practicing below the Standard of Care
- Failure to supervise non-physician providers
- Criminal Convictions

PLEADINGS AVAILABLE

- Administrative Practice Rules | Pa. Code § 31.1 *et seq.*
- Motion to enter default/final order
- Motion to dismiss (must include Answer)
- Motion for more specific pleading
- Answer and Request for hearing
- New matter-provide mitigating circumstances

MITIGATION/DEFENSES

- Statute or regulation unconstitutionally vague - *Watkins v. State Board of Dentistry*
- Delay in prosecution-*Weinberg v. State Bd. Of Accountancy*
- Character/Reputation evidence Pa. R.E. 405
- Proactive Public Service or Continuing Medical Education

PRE-HEARING PROCEDURES

- Request Early Conference - | Pa. Code 35.112
- Limited pre-hearing discovery available
- Learn preferences of Hearing Officer
- File formal request for Subpoenas - | Pa. Code 35.142
- Arrange for deposition if required - | Pa. Code 35.145-52
- Consider filing Motions in Limine - | Pa.Code 35.177

PRE-HEARING CONFERENCE

- Submit Pre-Hearing Conference Statement
- Disclose witnesses
- Exchange exhibits
- Request Admissions- 1 Pa. Code 35.116
- Identify unique legal issues for Hearing Officer to consider

HEARING

- Boards often delegate fact finding to Hearing Officer - *Pellizzeri v. Bureau*
- Opening and closing statements
- Expert and lay witnesses
- Character witnesses
- Burden of proof - *Starr v. Bd. of Medicine*

DUE PROCESS ISSUES

- Denial of Procedural Due Process-Subpoena not issued, deprived of witness *Weinberg v. Commonwealth*
- Denial of Substantive Due Process-Board lacked power to order exam *Pisnanont v. State Bd. Of Medicine*
- Order to Show Cause- May not be amended after close of Evidence *White v. State Bd. Of Optometry*
- Due Process Not Violated-Hearing Examiner who issues decision does not need to be the same examiner who heard the evidence *Pellizzeri v. Bureau of Prof'l & Occupational Affairs*

POST-HEARING PROCEDURES

- Post-Hearing Findings of Fact and Conclusions of Law
- Proposed or Final Adjudication and Order
- Exceptions/Application for Review
- Notice of Intent to Review-Board may review *Sua Sponte*
- Final Adjudication and Order

APPEAL OPTIONS

- Petition for review to the PA Commonwealth Court
- Stay pending appeal-*Process Gas Consumer Group*
- Standard of Review is Limited
 - Have constitutional rights been violated?
 - Have errors of law been committed?
 - Are findings supported by substantial evidence? *Stoner v. Bureau*

SUMMARY

- Carefully review collateral consequences with the client
- Full disclosure to the investigator should be carefully considered
- Immediate remedial efforts are important
- Consent Agreements are a useful tool to control risk
- If a hearing is required, the practitioner should make a full evidentiary record and prepare detailed Findings of Fact and Conclusions of Law