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REPRESENTING HEALTHCARE PROFESSIONALS IN DISCIPLINARY ACTIONS: CONTAINING THE COLLATERAL DAMAGE

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Professional discipline of any type can jeopardize a healthcare professional's career. For instance, even though a disciplinary action by a state licensing board may be resolved on terms that allow the healthcare professional to retain his or her license, a disciplinary record with a licensing board is usually a basis for discipline by other agencies and organizations with which the healthcare provider is affiliated. Similarly, a disciplinary action by a medical staff or other organization may lead to discipline by the state licensing board.

Organizational and agency affiliations represent points of vulnerability for healthcare professionals in any disciplinary action. Discipline by one entity, such as a state medical board or hospital medical staff, can quickly cascade into a career-threatening series of events. This article addresses the major issues that should be considered when representing a healthcare professional in a disciplinary action. Fifteen areas of concern are discussed below.

1. Patient Safety and Client Rehabilitation

The starting point and touchstone in representing healthcare professionals in disciplinary proceedings is patient safety. It is ethically appropriate and in many instances legally mandated to assign priority to patient safety. In fact, some state licensing boards require that protection of the public be given the highest priority in fashioning a disciplinary order.¹ A common corollary to this mandate is the requirement in some states that discipline be calculated to aid in the rehabilitation of the licensee whenever possible, consistent with patient safety.² One of the most effective ways to mitigate or possibly prevent discipline is to clearly demonstrate that the client has not jeopardized patient safety, or that the client is sufficiently rehabilitated to eliminate the risk to patient safety. When there are credible allegations that the client's conduct has put patients at risk (e.g., substance abuse or substandard clinical practices) it is imperative for the client to take immediate remedial action.

In cases where patient safety is at risk because of possible behavioral or mental health problems, the client will need

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assistance to develop a rehabilitation plan that successfully addresses the underlying issues sufficiently to demonstrate protection of the public safety. This effort often requires that the attorney consult with and make referrals to mental health professionals. Other cases involving substandard clinical skills may require remedial education, for which a referral to an appropriate training program will be helpful. This assistance goes beyond the provision of legal advice, strictly construed, but is essential in handling disciplinary cases.

Even in cases of egregious misconduct, the licensing authorities may be persuaded to let the professional remain in practice if he or she demonstrates a genuine motivation to take all measures necessary to achieve rehabilitation. The attorney on the case should therefore be prepared to make an early assessment of what remedial measures will be beneficial, and recommend them to the client.

2. Client's Mental Health

The threat of professional discipline is extremely stressful for most healthcare professionals, and can cause an acute onset of situational stress disorders or exacerbate existing mental health problems. In addition, the behavior at issue in the disciplinary action may be related to an underlying mental health problem. Therefore, it is advisable for the attorney to be very attentive to any indication of mental health issues. When it appears that the client may not be dealing well with the stress, or that the misconduct may be related to an underlying disorder, the client should be referred to a psychologist or psychiatrist for appropriate treatment and possible medication.

The treating clinician should be independent of any mental health professional who may be called as an expert witness in the case. This separation of responsibilities protects the patient/therapist privilege against discovery requirements that apply when

a mental health professional is designated as an expert.

Aside from the intrinsic benefit of effective mental health treatment, such treatment provides at least two advantages in any disciplinary case. First, an emotionally stable client is in a much better position to help prepare a defense. Second, effective mental health treatment is often a mitigating factor in the determination of discipline.

3. Alcohol and Drug Abuse

Many cases of professional discipline involve alcohol or drug abuse. In these cases, it is crucial to get the client enrolled in an appropriate treatment program as soon as possible. Many state licensing boards either sponsor or approve of specific alcohol and drug abuse treatment programs.³ In many of these states, a licensee will be shielded from professional discipline based upon substance abuse if the licensee enrolls in and completes an approved substance abuse treatment program.⁴ If the licensee fails to timely enroll in an approved treatment program or satisfactorily complete the program, he or she may be subject to licensing discipline and criminal prosecution.⁵

In situations where the licensing board does not sponsor a treatment program, it is imperative to determine whether the state either approves of or recommends specific programs. Some programs are more rigorous than others, and it is important for the client to know whether the licensing board's preferred treatment program is likely under the circumstances to require inpatient treatment. In any event, where the client has a problem with alcohol or substance abuse, the attorney should use all of his or her persuasive efforts to get the client involved in an appropriate treatment program. The unfortunate reality is that alcohol or drug abuse, left untreated, can among other things destroy a healthcare professional's career.

4. Criminal Prosecution

A criminal defense attorney should be retained in any case where there is a pending criminal investigation or the possibility of an investigation into allegations of a serious criminal offense.

Criminal cases often involve alcohol or drug abuse, such as driving under the influence or the use of controlled substances without a valid prescription. As stated above, in cases involving alcohol or substance abuse, it is imperative to get the client involved in an appropriate treatment program as soon as possible. Aside from the obvious benefits of effective treatment, participation in an appropriate treatment program provides mitigating evidence that can be used in settlement or at hearing.

In cases involving drug abuse, attorneys should be very careful about advising the client to plead no-contest with a deferred entry of judgment, even if the plea agreement allows the client to withdraw the no-contest plea and obtain a dismissal of charges following completion of substance abuse treatment. Though a deferred entry of judgment with the chance of dismissal is an attractive resolution in a criminal case, a no-contest plea generally constitutes a basis for discipline under state licensing statutes and is defined as a conviction for purposes of exclusion from the Medicare and Medicaid programs.⁶ Many criminal defense attorneys, prosecutors and judges are not alert to this problem. For this reason, a knowledgeable healthcare attorney can provide valuable advice to the client or outside counsel.

5. Foreign States

In any licensing discipline case, it is important to ask the client whether he or she is licensed in any other states. If the client holds a license in a foreign state, it must be determined whether that state requires licensees to self-report

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discipline in other states. Self-reporting requirements vary significantly. For example, some states require licensees to self-report within 30 days of the imposition of discipline in a foreign state.⁷ Other states do not require licensees to self-report, but instead require disclosure of professional discipline on the application for license renewal.

The licensee should be advised that discipline in one state will likely result in discipline in any other state where he or she is licensed. Most state licensing boards are statutorily authorized to impose discipline based on the record of discipline in a foreign state without any independent proof regarding the underlying facts.⁸

The licensing board in a foreign state will generally impose a level of discipline roughly similar to the discipline that was imposed in the home state. There are, however, significant exceptions. First, some states are simply stricter than others. Where one state may typically impose a public reprimand, another state may more often impose probation. Second, two states may have entirely different statutory schemes of discipline and rehabilitation. For example, one state may permit a licensee to participate in a substance abuse treatment program without any probation, whereas another may more often require probation as a condition of participation in a treatment program. Third, it is possible that one state will misinterpret the disciplinary order of another. This possibility is particularly acute when the accusatory pleading lists all of the factual allegations within a single paragraph or cause of action. In such cases it is imperative that any settlement document clearly specify the legal and factual admissions and denials. This will help prevent a foreign state from imposing a more severe level of discipline based on a mistakenly broad reading of the factual and/or legal admissions.

Even in cases where the foreign state imposes an identical level of discipline, there may be additional problems. First, some licensing boards toll any period of probation during the time that the licensee resides outside the state.⁹ Thus, the licensee may face the prospect of remaining on probation for an indefinite term unless he or she returns to the foreign state to serve out the term. Second, some state licensing boards will cancel a healthcare professional's license if the licensee remains outside the state for more than two continuous years during the term of probation, unless the licensee is also on probation in the state where he or she resides.¹⁰ A potential problem with this, beyond the threat of cancellation, is that cancellation of a license may be cause for permissive exclusion from the Medicare and Medicaid programs on the basis that the provider's license has been "revoked or suspended" or "otherwise lost".¹¹

6. Medicare and Medicaid Exclusions

In discipline cases involving a client who is a provider in state or federal healthcare programs, such as Medicare and Medicaid, the attorney should carefully review the bases for mandatory and permissive exclusion from participation. The grounds for mandatory and permissive exclusion from federal healthcare programs are set forth below.

There are five grounds for mandatory exclusion from participation as a provider in federal healthcare programs: (a) conviction of program-related crimes; (b) conviction related to patient abuse; (c) felony conviction related to healthcare fraud; (d) felony conviction related to controlled substances; and (e) failure to enter an agreement to repay a Health Education Assistance Loan.¹²

There are sixteen grounds for permissive exclusion from participation as a provider in federal healthcare programs: (a) conviction related to fraud;

(b) conviction relating to obstruction of an investigation; (c) misdemeanor relating to controlled substance; (d) license revocation or suspension; (e) exclusion or suspension under a federal or state health care program; (f) claims for excessive charges or unnecessary services; (g) fraud, kickbacks, and other prohibited conduct; (h) entities controlled by sanctioned individual; (i) failure to disclose required information; (j) failure to supply requested information on subcontractors and suppliers; (k) failure to supply payment information; (l) failure to grant immediate access; (m) failure to take corrective action; (n) default on health education loan or scholarship obligations; (o) individuals controlling a sanctioned entity; and (p) failure to meet statutory obligations of practitioners and providers to provide medically necessary services meeting professionally recognized standards of healthcare.¹³

These grounds for mandatory and permissive exclusion should be carefully reviewed with the client in developing a case strategy and giving appropriate warnings regarding possible adverse consequences.

7. Medicare and Medicaid Investigations

Government investigations are typically initiated based on either irregular billing patterns, or evidence of excessive treatment or poor quality of care. Investigations may be civil, criminal, and/or administrative.

Civil investigations are commonly initiated by a qui tam claimant whose claim may be joined by the United States Attorney under the Civil False Claims Act. The best way to prevent a qui tam action is to maintain a rigorous compliance program. This is important even for small offices given the complexities of billing government healthcare programs and the substantial penalties that may be imposed for false or fraudulent billing.

Criminal investigations too frequently come to the attention of healthcare professionals with the execution of a search warrant, in which case the only immediate option is to practice damage control. The first step in such cases is to call in an experienced criminal defense attorney. If at all possible, it is best to have the defense attorney present during execution of the search warrant to advise the client.

Administrative investigations can also be very stressful for healthcare professionals. First, there is the potential for criminal prosecution in any case where there are credible allegations of false or inappropriate billing. Second, aside from the criminal implications, possible administrative sanctions include monetary penalties and exclusion from state and federal healthcare programs. The combination of monetary penalties and exclusion from state and federal healthcare programs can be financially devastating.

8. DEA Certificate

The Drug Enforcement Administration ("DEA") is authorized to supervise and investigate physicians, pharmacists, and others who are registered to prescribe or dispense controlled substances. The DEA has the authority to suspend or revoke a DEA registration upon a finding that the DEA registrant has (a) submitted a materially false application; (b) been convicted of a felony related to controlled substances; (c) had his or her state license or registration to distribute or dispense controlled substances revoked or suspended; (d) committed acts that render registration against the public interest; or (e) been excluded from participation in federal healthcare programs.¹⁴

When one of these precipitating events has occurred, the DEA will typically contact the healthcare professional with a choice to either surrender the DEA registration or go through revocation proceedings. In cases where the healthcare professional has suffered a criminal conviction or lost his or her license to practice, it often makes the most sense to surrender the DEA regis-

tration and reapply if and when the professional license has been reinstated and any criminal conviction has been expunged or term of probation has been completed.

9. Private Insurance

Private insurers may take action to terminate providers from their respective panels for reasons including billing irregularities and allegations of substandard care. These actions are generally initiated in response to discipline by a government entity, such as the state licensing board. Occasionally, though, insurers will initiate actions based on their own utilization review. Typical cases involve unusually high utilization rates without clear documentation in the clinical records. The use of narcotics and steroids are obvious red flags, the need for which should be carefully documented in the clinical notes.

Any action by a private insurer to terminate a provider from its panel should be taken very seriously, not only because of the financial losses that accompany removal from a provider panel, but also because insurance companies often share their allegations with the licensing board. Some insurers will take the additional step of notifying the administrators of Medicare and Medicaid of an adverse action.

Given the potential adverse consequences in these cases, an early assessment should be done to determine whether it is possible to explain the issues to the insurer's satisfaction or to implement a corrective action plan that resolves the problem.

10. Medical Staff Privileges

In most disciplinary actions initiated by a hospital medical staff the physician is at an immediate disadvantage. The medical staff executive committee typically has the power to initiate an investigation, impose a summary suspension if warranted, file a notice of charges, and nominate members of the medical staff to serve on the hearing committee.

An additional challenge to the physician is that credentialing hearings can be very protracted due to the fact that they are typically held in the evening to accommodate members of the hearing committee.

Given the burdens and risks of litigating in this forum, there should be an early assessment to determine whether the disciplinary charges have merit or are driven more by political animosity within the medical staff. In cases where the physician provides good quality care and has no other behavior problems, it may be worth the expense and risks of litigation to go forward with a hearing. In other cases, a careful review of the legal merits and political climate at the hospital may suggest that the physician should settle the case without a hearing. In cases where there are serious behavioral or quality of care problems, settlement can prevent a highly damaging set of findings following a full hearing.

If no formal investigation has been initiated, it may be possible to settle the case without a report to the National Practitioner Data Bank ("NPDB").¹⁵ The NPDB was established to comply with the requirements of Health Care Quality Improvement Act, and serves as a repository of information regarding licensing discipline, medical staff discipline, and malpractice judgments.¹⁶ The information is available to state licensing boards, hospitals and other healthcare entities, professional societies, and licensees concerning their own status.¹⁷ Obviously, licensed healthcare professionals want to avoid being listed in the NPDB. If this is not possible, any settlement should include a stipulation regarding the language to be submitted to the NPDB.

11. Specialty Boards

Board-certified physicians who have suffered licensing or other discipline are vulnerable to discipline by their respective specialty boards. The various specialty boards have codes of conduct, violations of which may be grounds to revoke certification.

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The implications of discipline by a specialty board are substantial. First, specialty boards are required to report adverse action to the NPDB.¹⁸ Second, many provider organizations require that physicians be board-certified or board-eligible. Third, in an environment where patients and referral sources are increasingly discriminating in their choice of physicians, revocation of certification can substantially reduce a physician's patient base.

In the event that a physician receives notice of possible discipline from a specialty board, he or she should be advised to request a hearing if provided under the bylaws, or to submit a written statement along with documentary evidence if a hearing is not available.

12. Employment

In most employment actions employers have substantial advantages, including superior financial resources and employment agreements that typically allow termination at-will or for good cause. Notwithstanding the imbalance of power, employees have legal protections against discrimination and retaliation. In addition, employment contracts in many states include an implied covenant of good faith and fair dealing prohibiting either party from taking action that prevents the other party from receiving the benefits of the agreement.

In cases where the employer has acted unfairly, the employee should be prepared to take full advantage of any legal or contractual protections. In other cases where there is strong evidence that the employee had engaged in serious misconduct, the best strategy may be to negotiate a separation agreement on the best terms available.

In any case involving unprofessional conduct, the employee should negotiate a confidentiality clause to be included in the separation agreement. This will prevent the employer from notifying

licensing boards or other government agencies on its own initiative, unless the confidentiality clause is specifically limited by state law. For example, California law makes it illegal to include in the settlement of any civil dispute a clause that would prohibit the adverse party from notifying the Medical Board of California.¹⁹ Obviously, any separation agreement should be prepared by a knowledgeable employment attorney.

13. Immigration Status

An immigration attorney should be consulted in any case in which a non-citizen's status in the United States is at risk. Common examples include situations where a non-citizen is facing criminal prosecution or loss of employment. Criminal convictions for certain offenses are a basis for deportation.²⁰ Similarly, if a person is in the United States on an employment visa, loss of employment may require departure.²¹ The potential consequences are obviously too severe to proceed without specialized legal advice.

14. Tort Liability

Disciplinary actions involving substandard care or other possibly tortious conduct include the risk of a separate civil action alleging tort liability. Plaintiff's counsel will often seek to use administrative disciplinary proceedings to advance the plaintiff's case, and may encourage the plaintiff to file a complaint with the licensing board. Two potential advantages for the plaintiff are that the administrative proceedings may serve as an additional source of discovery, and a record of discipline may be admissible in a civil proceeding.

In cases involving allegations of alcohol or drug abuse, the attorney representing the healthcare professional in the administrative matter should seek a protective order to prevent disclosure of any treatment records. The client has

a right to privacy with respect to substance abuse treatment records, and under no circumstances should plaintiff's counsel be allowed uncontested access to them.

15. Contractual Losses and Liabilities

Professional discipline can lead to substantial contractual liabilities and lost opportunities. For example, physician recruitment agreements often require that a portion of any recruitment bonus be refunded if the contractual relationship is terminated early. Hospital/physician recruitment agreements usually require that the physician remain on staff for a certain period of time to justify the bonus. If the physician loses his or her license to practice or is terminated from the medical staff based upon professional discipline, the hospital will likely seek a full or partial return of the recruitment bonus.

Even in cases where there is no direct financial liability, professional discipline can cause substantial losses. For example, consulting agreements between physicians and pharmaceutical companies or medical device manufacturers generally include a clause that allows the corporation to terminate the agreement in the event that the physician is professionally disciplined. Based on the sums often involved in these consulting agreements, early termination of the agreement may represent a substantial financial loss.

Conclusion

Given the potential consequences of professional discipline, it is imperative to develop a clear strategy early in any disciplinary case to contain the damage as much as possible. With careful case management, the consequences of professional discipline can often be limited to allow the client to continue his or her chosen career as a healthcare professional.



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Endnotes

- ¹ E.g., Cal. Bus. & Prof. Code § 2229(a); see also, Fla. Stat. ch. 458.301.
- ² E.g., Cal. Bus. & Prof. Code § 2229(b).
- ³ E.g., Cal. Bus. & Prof. Code § 2350(g) (inoperative effective July 1, 2008); Fla. Stat. ch. 456.076. Pursuant to California Bus & Prof. code section 2358, California's Diversion

Program statute (Bus & Prof section 2350) will become inoperative on July 1, 2008, and will be repealed effective January 1, 2009, unless a statute is enacted before January 1, 2009, that deletes or extends the dates on which section 2350 becomes inoperative or repealed. At this time, the California Diversion Program is evaluating participating physicians. Those participants who have three years sobriety will complete the Program. Participants who do not have three years sobriety will need to locate a program similar to the Diversion Program that will monitor them until they have achieved three years sobriety. It is not clear at this time whether and what program(s) will replace the existing Diversion Program.

- ⁴ *Id.*
- ⁵ *Id.*
- ⁶ E.g., 42 U.S.C. §§ 1320a-7(i); Cal. Bus. & Prof. Code § 2236(e); Fla. Stat. ch. 458.331(1)(c).
- ⁷ E.g., Fla. Stat. ch. 458.331(1)(kk); Hawaii Revised Statutes §453-8(a)(14).
- ⁸ Cal. Bus. & Prof. Code § 2305; Fla. Stat. ch. 456.072(1)(f).

- ⁹ E.g., Medical Board of California, *Manual of Model Disciplinary Orders and Disciplinary Guidelines*, 9th Ed. (2003) at p. 25.
- ¹⁰ *Id.*
- ¹¹ 42 U.S.C. § 1320a-7(b)(4).
- ¹² 42 U.S.C. §§ 1320a-7(a), 1395ccc.
- ¹³ 42 U.S.C. §§ 1320a-7(b), 1320c-5.
- ¹⁴ 21 U.S.C. § 824(a).
- ¹⁵ 42 U.S.C. § 11133(a)(1)(B)(i).
- ¹⁶ 42 U.S.C. §§ 11101 *et seq.*; Health Resources and Services Administration, U.S. Dep't of Health and Human Services, Publication No. HRSA-95-255, *National Practitioner Data Bank Guidebook* (2001) at pp. A-1, C-2 (available at <http://www.npdb-hipdb.hrsa.gov>).
- ¹⁷ 42 U.S.C. §§ 11136, 11137(a).
- ¹⁸ 42 U.S.C. § 11133(a)(1).
- ¹⁹ Cal. Bus. & Prof. Code § 2220.7.
- ²⁰ 8 U.S.C. § 1227(a)(2).
- ²¹ 8 U.S.C. § 1227(a)(1)(C)(ii).

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