Important Changes in the Investigation and Discipline of Licensed Health Care Professionals are Coming Soon

Richard C. Kraus
Foster Swift Health Care Law E-News
April 25, 2014

PRACTICE AREAS
Health Care

On April 3, 2014, Gov. Snyder signed four bills that significantly change the procedure for investigating and disciplining licensed health professionals under the Public Health Code. The four statutes take effect on July 1, 2014.

These important changes make it even more crucial for a health professional to consult with legal counsel experienced with the disciplinary process whenever he or she is contacted by the Bureau of Health Care Services (BHCS).

BHCS, which is part of the Department of Licensing and Regulatory Affairs (LARA), is now *required* to investigate *any* allegation that one or more grounds for disciplinary subcommittee action exist (except if the allegation is made more than four years after the incident or activity). In the past, BHCS had the discretion to determine which allegations about a licensee's "activities related to the practice of a health profession" were worthy of further investigation. From our experience representing health professionals in licensing matters for more than 30 years, we know that any investigation is stressful, threatening and expensive, even when an allegation is dismissed early in the process.

The procedure for deciding whether a matter should proceed to a full investigation or a formal complaint is significantly changed. In the past, the department presented the results of an initial investigation to the board chair, or his or her designee, to decide whether full investigation or formal licensing action was appropriate.

Under the amended statute, most allegations that have been screened by the department must be presented to a panel of three board members, including the board chair. However, review by the board panel is not required if (1) the panel fails to act within seven days; (2) the department believes that immediate jeopardy exists; or (3) the licensee has been the subject of one substantiated allegation or two investigated allegations within the past four years.

The statute prohibits a board's chair or members from participating in investigative or disciplinary decisions if the chair or members have a conflict of interest, defined to include:

- a personal or financial interest in the outcome;
- a past or present business or professional relationship with the affected licensee;
- prior expert testimony in a medical malpractice action against or on behalf of the affected licensee; or
- any other interest or relationship designated as a conflict of interest in a rule declared or order issued under the act.

A separate statute, enacted along with the Public Health Code amendments, requires disclosure of any direct or indirect monetary, contractual, business, employment or personal interest relating to a disciplinary matter.

There are several inconsistencies and considerable uncertainty in the interplay of the two conflict of interest statutes. It appears that *any* person can raise a challenge to *any* enforcement or disciplinary matter within one year after *any* board action. A challenge can be based on (1) the failure to disclose an interest specified in the statute; or (2) an interest that is not required to be disclosed but would have a tendency to affect the member's ability to render an impartial decision.

If LARA decides that the board member's interest is "sufficient to raise a reasonable doubt," which is a very low threshold, any action in which the affected member was the deciding vote must be reconsidered. The statute does not appear to allow anyone to review the department's belief as to the existence of a conflict. The result is that the subject of any licensing investigation or action cannot be certain that the matter is final for at least a year after the board has taken action.

The most troubling amendment is a provision allowing the final decision of a disciplinary subcommittee to be set aside. (The decisions as to whether a person has violated the code and what sanction should be imposed are made by a "disciplinary subcommittee," rather than the entire board.) Under the existing statute, a decision by the disciplinary subcommittee is final and only subject to review by the Michigan Court of Appeals on very limited grounds.

Under the amended statute, the disciplinary subcommittee's final decision can be set aside and a different final action can be issued if the department and board chair believe that the decision does not protect the public health, safety and welfare. This procedure, which allows the department and board chair who were involved in the decision to investigate and initiate the licensing complaint, to overrule the disciplinary subcommittee raises serious due process concerns. These concerns are aggravated by the apparent lack of any standards or restraints on the power of the department and board chair to set aside the decision by a disciplinary subcommittee whose members reviewed the evidence after a full hearing. The statute also leaves many unanswered questions about judicial review in these circumstances.

The amendments make several other substantive changes. The grounds for licensing action are expanded to include:

- Any conduct by a health professional with a patient "that is sexual or may reasonably be interpreted as sexual," including conduct initiated by or consented to by the patient. The prohibited conduct includes "sexual intercourse, kissing in a sexual manner, or touching of a body part for any purpose other than appropriate examination, treatment, or comfort."
- Offering to provide practice-related services, such as drugs, in exchange for sexual favors.

The amendment is certainly uncontroversial—health professionals are, of course, required to refrain from sexual conduct with patients. The statute, however, includes conduct that "may reasonably be interpreted as sexual" but does not specify whose interpretation is decisive—whether a professional's conduct is judged from the perspective of the patient or that of other licensees in the same profession.

Another section requires a licensee to promptly notify LARA of any criminal conviction or disciplinary action by another state. While the duty to report makes sense, the amendment requires the imposition of a sanction against a licensee who does not comply, even if the licensee does not know of the requirement. From our experience, many criminal defense attorneys who handle criminal matters for health professionals do not know about or advise their clients about the reporting obligations.

The statute also amends the sanctions that can or must be imposed. A fine of $25,000 or more must be imposed if a patient death results from certain violations, including failure to exercise due care, noncompliance with the standard of care, substance abuse disorder, mental or physical conditions affecting the ability to practice, lack of good moral character, criminal conviction, or a disciplinary action by another state. Community service is no longer allowed as a sanction.

Because of the seriousness of licensing investigations and disciplinary actions, it is essential for licensed health care professionals to consult with counsel experienced in these matters. To address how these changes may affect your license, please contact Richard Kraus at 517.371.8104.