

**State Bar of Michigan, Health Law Section**

**THE MICHIGAN CON PROGRAM:  
NEW ISSUES AND DEVELOPMENTS  
FOR HEALTH CARE ATTORNEYS**

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# I. Orientation to CON Website

## CON Website - Overview

- ❖ MDCH has significantly revamped the CON website.
- ❖ Content includes helpful information as to:
  - On-line filing system and FAQs
  - CON Advisories
  - CON reports and data
  - Updated bed need inventories
  - Current CON review standards, Code and Rules
  - CON Commission meetings and minutes

## **CON Website – Single Sign On System**

- ❖ **On-line filing system through State of Michigan Single Sign On applies to:**
  - **Letters of Intent**
  - **Nonsubstantive CON applications**
  - **Substantive CON applications**
  - **Emergency CON applications**
  - **CON amendments**
  
- ❖ **Does not apply to comparative review applications at this time.**

## **CON Website – Single Sign On System**

- ❖ **To be a user of Single Sign On, you must subscribe and have a password.**
- ❖ **Applications include not only CON but also Health Facilities Engineering Section.**
- ❖ **Single Sign On includes data base information for filed letters of intent and CON applications.**

## **CON Website – Single Sign On System**

- ❖ **MDCH conducts new training sessions on Single Sign On periodically. See link on CON website for “2009 Training Schedule.”**
- ❖ **The website also includes FAQs specific to the Online Application process.**
- ❖ **CON Program staff are knowledgeable about the system and helpful in addressing questions.**

## **CON Website – Single Sign On System**

- ❖ **Single Sign On has reduced paperwork, reduced response times, and improved efficiency of the CON filing process.**
- ❖ **CON application fees also may be paid electronically under a new system recently implemented by MDCH.**

## CON Website – CON Advisories

- ❖ **The CON website includes extensive information as to current CON application and program requirements.**
- ❖ **Issues of potential note to attorneys advising clients on CON issues include:**
  - **Checks for CON application fees must be dated within 60 days of the CON application filing date. Note that the date of receipt by MDCH may not be the filing date.**

## CON Website – CON Advisories

- **Clarifications to CON requirements for change of ownership (“CHOW”) of only the real property of a health facility. No new CON required IF:**
  - **No change in the licensee of the facility; and**
  - **No change in the terms of the lease most recently approved by the CON Section; and**
  - **No change in licensed bed capacity or physical structure.**

## CON Website – CON Advisories

- Although technically, a CON approval involving a lease of a health facility is valid for the approved lease term, a lease renewal may not require a new CON IF:
  - No increase in rent in excess of the applicable CON capital expenditure threshold; and
  - No change in licensed bed capacity or physical structure.
  - ASK if in doubt.

## CON Website – CON Advisories

- **Verification of Medicaid participation (consistent with Part 222 requirements) is required at the time of submission of the CON application.**
  - **If a new entity, an affidavit is required as to the applicant's intent to enroll and participate.**
- **If you have a health facility seeking Medicare participation, BEWARE of CMS S & C Letters 08-03 and 08-13.**

## **CON Website – CON Advisories**

- **If a CON application involves radial distance measurements, MDCH will accept maps generated by commercially available software.**
- **MDCH will verify distances within one (1) mile of any distance requirement under the Standards through the MSU Department of Geology.**
- **MSU computed distances will be determinative.**

## **CON Website – CON Advisories**

- **If physician commitment forms are required to support a CON application for covered clinical services, the commitment forms must be submitted with the CON application at the time of filing.**
- **Remember to file CON applications for projects within certain counties with the respective CON regional review agency.**

## CON Website – CON Reports

- ❖ MDCH maintains CON “Activity Reports” on its website, in addition to information through the Single Sign On system.
- ❖ Other data reports list annual volumes of various CON-approved services, e.g., surgical services, CT, MRI, BMT, air ambulance, open heart surgery.
- ❖ Data reports also list occupancy data for acute and psychiatric hospitals, and nursing homes.

## **CON Website – Updated bed Need Inventories**

- ❖ **MDCH now has a system for regularly updating and posting bed need inventories.**
- ❖ **Inventories by planning area are available for acute care hospital beds, psychiatric hospital beds (adult and child/adolescent) and nursing homes**
- ❖ **Regular inventories have taken some of the “gamesmanship” out of the CON application process. (Not all!)**

## **CON Website – Current CON Review Standards**

- ❖ **All current (approved and effective) CON review standards are posted on the CON website.**
- ❖ **CON Standards change quite frequently for some types of providers/covered services.**
- ❖ **Advisable to always pull the current Standards from the website.**

## **CON Website – CON Commission Meetings**

- ❖ **The CON website lists all CON meetings, by year, along with agendas, open meeting act notices, minutes or transcripts, proposed and final CON standards and other relevant information.**
- ❖ **This link also includes information as to the current CON Commission work plan so that attorneys can advise clients as to when CON standards may be up for review or under revision.**

## **II. CON Compliance and Enforcement Issues**

## **CON Compliance – Joint Ventures**

- ❖ **As with other aspects of health care law, joint ventures pose special problems.**
- ❖ **Some Standards, e.g., cardiac cath, require CON holder to be hospital so that freestanding service is prohibited.**
- ❖ **CON holder must be entity that bills for technical/facility component of the CON service.**

## **CON Compliance – Project Implementation and Timing**

- ❖ **Key CON dates to consider when advising clients about joint ventures or projects that involve CON covered facilities or services:**
  - **CON expires 1 year after effective date unless proposed project is “implemented” i.e., binding agreement for construction or acquisition of equipment.**
  - **If substantial progress, MDCH may grant one 6-month extension, upon request.**

## **CON Compliance – Project Implementation and Timing**

- **If project involves construction or renovation, it must begin within 24 months after CON effective date; MDCH has discretion to approve longer period if justified.**
- **Enforceable contract to implement CON “covered clinical services” must specify installation date within 24 months of CON effective date (UESWL, MRT, PET, CT, Cardiac Cath, MRI, Air Ambulance).**

## **CON Compliance – Project Implementation and Timing**

- ❖ **Common Compliance Problems Upon Implementation of CON**
  - **Failure to monitor time deadlines**
  - **Changes to project costs that require amendment**
  - **Change in location that is inconsistent with CON approval**
  - **Change in method of financing – watch out for cash projects and equipment leases**

## CON Compliance – Amendments

- ❖ **Keep an eye on the need for amendment of the CON decision.**
- ❖ **Amendments may not be granted for:**
  - **A completed project**
  - **A change of applicant/legal entity or location**
  - **A change in method and terms of financing, approved capital expenditures, or operating costs unless (i) circumstances beyond CON holder's control; or (ii) amendment offers better alternative as determined by MDCH**
- ❖ **Review period  $\leq$  original review period.**

## **CON Compliance – Physician Commitments**

- ❖ **Many CON standards incorporate 333.16221 by reference**
  - **Requires compliance as to operation and referral of patients to certain CON covered services, including physician volume commitments.**
  - **CON Standards subject to this restriction include: MRI, CT, PET, Surgical Services, UESWL (lithotripsy), MRT.**

## **CON Compliance – Covered Clinical Services**

- ❖ **“Project Delivery Requirements” include substantive, licensure-type standards for certain health facilities and covered clinical services.**
- ❖ **Operations team for CON covered clinical service should be familiar with CON annual minimum volume requirements and periodically assess compliance.**

**CON Compliance -- Other  
Issues?**

# CON ENFORCEMENT

## CON Enforcement – Potential Penalties

- ❖ MDCH may impose penalties for noncompliance:
  - Revoke or suspend a CON
  - Civil fine  $\leq$  billings for the services furnished in violation of CON requirements
  - Action for violation of Article 17 of the Code, including issuance of a compliance order
  - Injunction
  - Other enforcement action per Code
  - Publicize or report the violation or enforcement action, or both, to any person.

## **CON Enforcement – Potential Penalties**

- ❖ **May not charge to, collect from, or otherwise recover costs for services provided in violation of Part 222.**
- ❖ **Upon request, person must refund charges for services furnished in violation of CON requirements by refund or credit.**
- ❖ **By statute, refund is by request although CON regulations suggest it is mandatory.**

## **CON Enforcement – Potential Penalties**

- ❖ **Section 20165 grants MDCH the authority to suspend or revoke hospital licensure for failure to comply with Part 222 or a term, condition, or stipulation of a CON issued under Part 222.**
- ❖ **“Nuclear Option” – but potentially available if egregious circumstances.**

## CON Enforcement – Potential Penalties

- ❖ **Currently, MDCH enforcement efforts consist primarily of:**
  - **“Soft” enforcement**
  - **Special targeted enforcement initiatives, e.g., open heart surgery, with potential compliance agreement**
  
- ❖ **CON statute and current MDCH policies do not require voluntary disclosure if noncompliance. However, consider whether sanctions may be more lenient if self-reported.**

## **CON Enforcement – Potential Penalties**

- ❖ **Self-reporting of noncompliance by providers may be required by providers under corporate integrity agreements or provider compliance programs.**
- ❖ **Query whether under the proposed Michigan False Claims Act failure to comply with CON requirements would constitute a false claim.**

## CON Enforcement – Potential Penalties

- ❖ **Potential new enforcement initiatives?**
  - **“Per day” penalties for noncompliance**
  - **Mandatory notice to third party payers and recoupment**
  - **Fines related to billings while not in compliance**
  - **Random provider audits to verify compliance with project delivery requirements and minimum volumes**
  - **Other?**