

Cracking the Case

How to Decipher the Unique Procedural Twists in a Health Professional Licensing Action

By Kelly K. Elizondo

My father kept the complete works of Sir Arthur Conan Doyle on his desk when I was growing up. Sherlock Holmes, with the assistance of Watson, solved cases by never overlooking important details. To successfully litigate a health professional licensing action, it is important to follow up on important information and pay close attention to detail.

Statutory framework

Article 15 of Michigan's Public Health Code¹ provides the framework for litigation involving a holder of a health professional license. Part 161 contains the general provisions applicable to all health professions regulated by the statute. Section 16221² authorizes the Department of Licensing and Regulatory Affairs to investigate allegations when grounds for disciplinary subcommittee action exist under the code. These grounds are set forth in Section 16221 and include specific conduct such as conviction of a felony and more general conduct such as negligence.

If grounds for discipline are found to exist, an administrative complaint is issued and filed with the relevant healthcare board's disciplinary subcommittee. The complaint will state the grounds for discipline along with the factual basis. In cases involving complex factual and legal issues, the Department of Attorney General will issue the complaint on behalf of the Department of Licensing and Regulatory Affairs. This

article addresses cases involving the Attorney General's Office.

Litigating the case

The procedure in a health professional licensing action is governed by the Administrative Procedures Act.³ By rule, discovery in the form of interrogatories and depositions does not take place in a health professional licensing action, so counsel must do their own investigation into the events that led to a complaint being filed against their client.⁴ Read through the complaint with your client and tease out details regarding the facts at issue. If the complaint relates to care rendered to a patient, ask your client for relevant medical records and an explanation of actions taken and why the particular treatment at issue was rendered. If a mistake occurred, ask your client to explain the circumstances that led to the mistake and any remedial actions taken to prevent future mistakes.

Under the Administrative Procedures Act, counsel may request identifiable agency records related to a material disputed fact in a contested case.⁵ Counsel should consider requesting relevant records referred to in the complaint to gain insight into the basis for the administrative complaint. Once you have completed your investigation into the facts, it is time to assess whether there was a violation of the Public Health Code and the possible consequences for your client.

Counsel should be aware of the sanctions that correspond to the violations of the Public Health Code set forth in the administrative complaint. Sanctions are described in Section 16226⁶ and may include a fine, suspension, or even revocation of the health professional's license.

Under Section 16231(5)⁷ of the code, a meeting called a "compliance conference"

may be scheduled with the assistant attorney general and opposing counsel. A member of the relevant healthcare board may also attend. The compliance conference is confidential and its purpose is to give the licensee an opportunity to show compliance with the code or to reach an agreement between the parties to resolve the administrative action. Any agreement reached during a compliance conference is tentative, as the agreement must be approved by the relevant health board's disciplinary subcommittee. If the matter is not resolved during the compliance conference, a hearing is scheduled before an administrative law judge.

The majority of administrative actions are resolved by way of a document called a consent order and stipulation. The consent order is a proposed order that identifies the sanction on which the parties have agreed. By entering into a stipulation, the health professional waives his or her right to proceed to hearing before an administrative law judge. Since the disciplinary subcommittee is comprised of public members and health professionals practicing in the specialty of the board,⁸ the stipulation should make it clear to both the public and professional members why a particular sanction is being recommended.

There are some important points to keep in mind when trying to negotiate a consent order and stipulation during a compliance conference:

- Counsel should present any legally admissible evidence believed to mitigate the conduct at issue.
- The protection of the public is the primary concern of the healthcare boards. The boards do not consider the economic impact a particular sanction will have on a health professional.

"Trial Practice" is designed to provide advice and guidance on how to effectively prepare for and conduct trials.

- In assessing a fine, the health boards are required to look at the extent to which the licensee derived a financial benefit from his or her conduct, the willfulness of the conduct, the public harm caused by the conduct, and the cost incurred in investigating and proceeding against the licensee.⁹

The consent order and stipulation must be presented to the relevant health board's disciplinary subcommittee at an open meeting. If the subcommittee approves the stipulated order, it becomes binding on the parties.

Administrative hearings

The Administrative Procedures Act applies to hearings held in a contested case involving a health professional license. Under Section 75 of the Administrative Procedures Act, the rules of evidence applicable in a nonjury trial apply "as far as practicable." The act further provides that "an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."¹⁰ Under this relaxed standard, it is imperative that attorneys be familiar with documents customarily generated and used in the health profession at issue. These types of documents are generally admitted into the administrative record and are relied on in determining whether a violation of the Public Health Code occurred.

The administrative law judge presiding over the hearing will rule on any objections regarding evidentiary issues. Witnesses are examined and cross-examined in a manner consistent with the Michigan Rules of Evidence.

Counsel should bear in mind that the ultimate fact-finder in an administrative hearing is *not* the presiding administrative law judge. Rather, it is the disciplinary subcommittee of the relevant healthcare board, which is comprised of both public and professional members. The administrative law judge will issue a "proposal for decision" after conclusion of the hearing. This document will list the exhibits admitted into evidence and identify the proposed "findings of fact" and "conclusions of law."¹¹

The administrative law judge is prohibited from recommending or imposing a disciplinary penalty.¹²

This document is presented to the healthcare board's disciplinary subcommittee at a public meeting. The committee members will review the findings of fact and conclusions of law and either accept or reject the findings.¹³ If the subcommittee finds that grounds for imposing a penalty exist, it will impose a relevant sanction under Section 16226.

Because the ultimate finder of fact is not present at an administrative hearing, it is crucial that evidence be presented in a clear, concise manner. Public members may not understand the technicalities of practice in a particular field, so the alleged violations and defenses must be clearly conveyed. Professional members who practice in the relevant area will be familiar with standards of practice and are less likely to be swayed by attempts to play on emotion.

Since the administrative law judge will summarize what occurs at the hearing and the summary will be presented to the disciplinary subcommittee, counsel should emphasize any important points they wish to have included in the judge's proposal for decision. Brevity is a plus, as the administrative law judge must condense the proceedings in a written document and will highlight evidence that stood out during the hearing. Witnesses should avoid using overly technical terms and instead speak in a manner that is understandable and will be easy for the judge to condense into writing.

In cases involving complicated issues, counsel should give a closing argument summarizing the main points of the case and tying together the evidence presented. This helps build a framework for the judge when he or she is issuing the written proposal for decision.

Post-hearing proceedings

A final decision of a disciplinary subcommittee is appealable by right to the Michigan Court of Appeals.¹⁴ If a party wishes to appeal a decision by a board's disciplinary subcommittee following an administrative hearing, the appeal must be filed

in the Court of Appeals and not the circuit court. Under MCR 7.204(A)(1)(a), the appeal must be filed 21 days after entry of the order to be appealed. Thus, counsel should obtain a copy of the final order entered by the board's disciplinary subcommittee and file an appeal within 21 days after the order has been signed.

A final note

Litigating a health professional licensing action requires familiarity with the Michigan Public Health Code and Administrative Procedures Act. Attorneys representing a health professional who is the subject of a disciplinary action must perform due diligence and be aware of any exceptional circumstances in the case as well as unique statutes and rules that may apply and will likely differ from litigating in circuit court under the Michigan Court Rules. With attention to detail, counsel can successfully navigate their way through a licensing action and provide competent representation. ■

This article represents the opinions of the author and does not necessarily reflect the views of the Department of Attorney General.



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ENDNOTES

1. MCL 333.1101 *et seq.*
2. MCL 333.16221.
3. MCL 24.201 *et seq.*
4. Mich Admin Code, R 792.10706.
5. MCL 24.274(2).
6. MCL 333.16226.
7. MCL 16231(5).
8. MCL 16216(1).
9. Mich Admin Code, R 338.7005.
10. MCL 24.275.
11. MCL 333.16231a(2).
12. MCL 333.16231a(2).
13. MCL 333.16232(c) and MCL 333.16237(1).
14. MCL 333.16237(6).