



Representing Licensed Health Care Professionals Accused of Alcohol- or Drug-Related Crimes

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Fast Facts

Licensed health care professionals must report alcohol- or drug-related convictions within 30 days.

The collateral consequences for an alcohol- or drug-related conviction can include suspension or revocation of the professional license. Publication of the conviction can economically devastate a licensed health care professional.

Zealous and knowledgeable advocacy can significantly limit and in some cases eliminate the potential collateral consequences.

While the sanctions imposed for even a first alcohol- or drug-related offense are strict for all offenders, when the client is an acupuncturist, physician, athletic trainer, dentist, therapist, nursing home administrator, pharmacist, social worker, or other licensed health care professional, the sanctions can be decidedly devastating. A licensed health care professional is required to report a criminal conviction to the Michigan Department of Licensing and Regulatory Affairs within 30 days of the conviction.¹ Depending on the nature of the reported offense, the department can impose sanctions that include revocation of the license to practice and up to a \$250,000 fine.²

While either the punitive sanctions or publication of the offense are potentially problematic, the collateral consequences often have far more serious and long-lasting repercussions.

Accordingly, the ethical and zealous criminal representation of licensed health care professionals requires advocates to take the time to carefully advise clients of the potential collateral consequences that may affect their professional licenses after an intoxicated driving or other alcohol- or drug-related criminal conviction. The purpose of this article is to help both lawyers and clients understand how an alcohol- or drug-related criminal conviction, including intoxicated driving, may have a disproportionately punitive impact on licensed health care professionals and how these issues may impact the overall defense of the case.

Law Specifically Applicable to Licensed Health Care Professionals

The terms “health occupation” and “health profession” are rather broadly defined in Michigan’s Public Health Code,³ which provides for both licensure and regulation of the licensed health care professional through the creation of various boards.⁴ Generally, these boards will impose professional discipline when the individual’s criminal activity has the potential to affect his or her professional performance such that it might fall below the “minimal standards of acceptable and prevailing practice.”⁵

Examples of crimes and misdemeanors other than intoxicated driving that require a report to the Department of Licensing and Regulatory Affairs specifically include all felonies,⁶ misdemeanors punishable by imprisonment for a maximum term of two years, controlled substance violations, criminal sexual conduct, mishandling patient charts, and various unethical business practices.⁷ Intoxicated driving is not specifically enumerated, meaning intoxication by alcohol, by any drug, or by any of the newly created categories of “intoxicating substances”⁸ is treated the same. Instead, the Public Health Code more obliquely refers to the “[c]onviction of a misdemeanor that is reasonably related to or that adversely affects the licensee’s ability to practice in a safe and competent manner.”⁹ It is worth noting there is no caselaw in Michigan that definitively states intoxicated driving is an offense that is “reasonably related to or adversely affects” the ability to practice in a safe and competent manner. Nevertheless, experience shows that defense counsel should expect an intoxicated driving conviction will produce the same consequences as any of the specifically enumerated offenses.

Importantly, disciplinary sanctions are mandatory against a licensee convicted of one of these offenses.¹⁰ These sanctions may include one or more of the following, in descending order of severity: revocation of license, suspension of license, limitation of license, probation, community service, or fine.¹¹

Possible Punitive and Collateral Consequences of a Conviction

Sanctions imposed on licensed health care professionals generally flow from one of two specific categories. The first category includes the punitive sanctions that result directly from the disciplinary process. The second category includes those resulting from, but collateral to, the publication of the offender’s name. Because published disciplinary reports list only a short description of the reason a licensee was disciplined, such as “substance abuse” or “lack of good moral character,” it is up to the reader to surmise if it was an intoxicated driving or some other criminal offense. While either the punitive sanctions or publication of the offense are potentially problematic, the collateral consequences often have far more serious and long-lasting repercussions.

The judge presiding over the criminal case is not the only one who can impose punishment. Punitive sanctions can also be imposed directly by the boards after they are notified of the conviction, and they have historically taken a very strict approach when imposing them. As previously stated, the sanctions can include revocation, suspension, or limitation of the professional license. Consequently, it is clear that the boards have the power to impose serious sanctions that can affect the licensee’s ability to practice.

However, for the first alcohol- or drug-related criminal conviction of an individual with no prior discipline, the boards rarely suspend or revoke the individual’s professional license. Instead, the licensee is commonly ordered to complete a lengthy probationary period combined with a mandatory substance-abuse evaluation, monitored treatment, and periodic reports to a board member or department representative. In this way, the sanctions are similar to the conditions of probation typically ordered by most judges in comparable criminal cases.



When representing a repeat offender, it is important to understand that with a second or subsequent offense, there is a very real possibility of a suspension from practice because the sanctions are determined by the disciplinary subcommittee appropriate for the licensee.¹² This means that a particular subcommittee will have full access to prior records of alcohol- and drug-related convictions and other violations of the code.

Lost Income as the Potentially Devastating Collateral Consequence of Publication

Of all the potential punitive and collateral consequences, the one that often strikes the most fear in the heart of the licensed health care professional is publication. And this fear is not derived from sheer vanity. When an alcohol- or drug-related criminal conviction becomes public, there is often a direct impact on the individual's income. Not only is there a social stigma, but colleagues may face personal liability for making negligent referrals and, therefore, are likely to be reluctant to refer patients to a professional who has been disciplined. Income can also be lost because of the specter of negligent credentialing and its chilling effect on employment prospects. Because of this, a licensee faced with a criminal conviction may be most concerned about avoiding publication of the offense rather than other available sanctions.

Unfortunately, the publication of an alcohol- or drug-related criminal conviction, including an intoxicated driving conviction, is nearly inevitable. The various boards are required by law to publish a list of all individuals subjected to discipline under the act.¹³ This list is provided to both federal and state agencies including the National Practitioner Data Bank, the Health Integrity Protection Data Bank, and the fiscal authorities for federal health care programs (e.g., Centers for Medicare & Medicaid Services).

Ultimately, this information is available to all potential health care employers, including hospitals. Thus, an alcohol- or drug-related criminal conviction can also cause a licensed health care professional to lose income through lost employment opportunities because, in the event of a medical malpractice case against a staff member or licensee with privileges, past alcohol- or drug-related convictions can lead to a charge against the hospital for negligent credentialing.¹⁴ Negligent credentialing is a breach of the hospital's duty to screen its health care professionals to ensure that only competent professionals practice.¹⁵ This possibility is often enough to deter many hospitals from offering employment and may cause others to terminate existing employment.

Publication of the offense also has the potential to affect malpractice insurance rates because the list is reported to the Commission of Insurance. In addition, most professional liability insurance policies contractually require insureds to self-report

any disciplinary actions taken against them, and failure to do so usually results in termination of coverage. Consequently, insurers know if your client was convicted and, like car insurance companies, may significantly raise your client's rates or cancel coverage altogether with proper notice.

Additionally, as with other professionals such as lawyers, this information might be published in a monthly trade journal, thereby subjecting your client to possible repercussions among his or her peers. Finally, the names of all disciplined individuals are available on request and are even posted on the various departments' websites or directly on the site maintained by the state of Michigan. These reports usually include the individual's name, licensing information, a brief description of the reason for the discipline, and the disciplinary action taken by the licensing board.

The Internet poses one final problem. With the advent of sites such as AVVO¹⁶ and HealthGrades,¹⁷ disciplinary information is available to the public with a click of the mouse. Since much of the information populating these independent websites comes from individuals and not official reporting sources, often it is not completely accurate and can cause many headaches for licensed health care professionals.

A Court's Duty to Report a Licensed Health Care Professional's Intoxicated Driving Conviction

When a lawyer is convicted of intoxicated driving, judges, prosecutors, and defense attorneys have an absolute and well-established duty to notify in writing both the Attorney Grievance Commission and the Attorney Discipline Board within 14 days of the conviction.¹⁸ There is a similar, but very different, obligation for courts to notify the State Licensing Authority about a medical professional's intoxicated driving conviction. This duty is set forth in the Code of Criminal Procedure and requires the clerk of the court to make a report to the Department of Licensing and Regulatory Affairs within 21 days of the conviction.¹⁹ The statute directs the clerk to use a "form²⁰ prescribed and furnished by that department." It is interesting to note that the court clerk must report the conviction a full 9 days before the licensee, who has 30 days to report it. Also, similar to a lawyer's duty to report a known violation of our code of professional responsibility, a licensed health care professional also has a responsibility to report the known conviction of a fellow licensee.²¹

Avoiding Publication as a Tangible Benefit to the Licensed Health Care Professional

For many licensed health care professionals, the economic consequence of even a single alcohol- or drug-related conviction

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can easily run into six figures. While some may argue that this level of consequence might positively impact the individual's prospects of lasting recovery, others believe it is wildly disproportionate to the crime committed. In either event, from the licensee's perspective, there are many tangible benefits to avoiding publication of the offense.

Sometimes this can be achieved through an informal proceeding known as a compliance conference.²² After a complaint has been issued by a disciplinary subcommittee, a licensee may voluntarily schedule a compliance conference under the Health Professions Disciplinary Proceedings Administrative Rules.²³ These conferences are informal proceedings where licensees can show compliance with the rules of their profession per Section 92 of the Michigan Administrative Procedures Act.²⁴ In the absence of showing compliance, a licensee also has the opportunity to resolve the case without a formal hearing.²⁵ Once a potential resolution is reached, the disciplinary subcommittee may accept the recommendation, suggest other terms, or require that formal proceedings be started.²⁶

Representing the Licensed Health Care Professional Charged with Intoxicated Driving

Aside from winning the alcohol- or drug-related case, there is no way to avoid all disciplinary action because the reporting requirement is mandatory, and any failure to meet this requirement subjects the licensee to a separate licensing violation.²⁷ As with lawyers, the sanctions imposed for failing to report are often worse than those that follow the actual conviction and may include a suspension of the professional license for a period of time, usually 30 to 60 days.

When representing licensed health care professionals, there is no substitute for an aggressive and knowledgeable defense. While being a zealous advocate in the context of most criminal cases includes engaging in plea negotiations, meaningful reductions are quite rare when representing licensees accused of intoxicated driving. The most typical reduction to a charge of operating while visibly impaired has no "collateral" benefit to the client because

the boards will treat this "less serious" crime just as seriously as if the client had been convicted of the principal crime.²⁸

What is somewhat less clear is if there is any benefit in a reduction to a charge of reckless driving. Because reckless driving is a misdemeanor, the licensee is required to report the conviction to the governing board if it "is reasonably related to or adversely affects the licensee's ability to practice in a safe and competent manner."²⁹ It is not clear, however, whether a reckless driving conviction would be considered reasonably related to, or will adversely affect, a licensee's ability to safely practice. However, in reporting the conviction, the licensee will be required to state the background of the offense, and it is likely that, once the board learns of the underlying facts and circumstances, the same or similar sanctions will be imposed. Additionally, the department or disciplinary subcommittee may request and receive information from a court as to a felony or misdemeanor conviction against a licensee.³⁰ In the best-case scenario, reducing a charge of intoxicated driving to a civil infraction such as careless driving should avoid all reporting requirements.

The Benefits of Early Recovery

The public policy behind the often strict board treatment of licensed health care professionals is that they are in a position of public trust, and, as a society, we can't allow alcohol- or drug-addicted professionals to treat patients. This is true whether or not the criminal conviction in any way directly involves patient care. Thus, one way to address this legitimate concern is for a licensee to demonstrate, through treatment, that any underlying drug or alcohol problem is under control and likely to stay that way.

Perhaps the best way to accomplish this is to have the licensee begin treatment immediately after your first meeting. Notwithstanding such early recovery, however, a licensee convicted of an alcohol- or drug-related crime, including intoxicated driving, may be required to participate in the Health Professional Recovery Program.³¹ This fairly intense substance-abuse monitoring program establishes agreements typically lasting one to three years.³² Because this program is almost always more rigorous than anything that would be imposed by a judicial court, it should be argued that the convicted licensee receive credit for the program against any sentence ordered by the court.

It is advisable to suggest that the accused voluntarily submit to the Health Professional Recovery Program *before* the conviction. The potential benefit to self-reporting to the recovery program in mitigating disciplinary action should not be ignored. The individual will almost always be referred to the recovery program without incurring disciplinary action on a first alcohol- or drug-related conviction or intoxicated driving conviction *as long as* the conviction is reported as mandated. And this is another way to potentially avoid publication of the conviction. Although the boards have authority to pursue disciplinary action, it is often not pursued if the licensee follows court orders and reports the conviction. However, licensed health care professionals must understand they will face disciplinary action for failure to report a conviction or for any subsequent convictions.

Conclusion

In today's highly regulated health care environment, convictions for alcohol- or drug-related crimes, including intoxicated driving, can (and most often will) create licensing problems for licensed health care professional clients. As should now be clear, representing licensees for any of these crimes is significantly more complicated than for nonlicensed individuals, and a conviction carries with it the potential for many dire consequences. Often, the only way to avoid these consequences is to win the case. At the very least, attorneys should provide licensed professional clients with a clear understanding of these issues so they can make informed decisions about their recoveries, plea negotiations, and the overall defense of their cases. ■



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ENDNOTES

1. MCL 333.16222(3).
2. MCL 333.16226.
3. See MCL 333.16105.
4. MCL 333.16101 *et seq.*
5. MCL 333.16106a.
6. MCL 333.16221.
7. MCL 333.16221.
8. MCL 257.625(25).
9. MCL 333.16221(b)(xi).
10. MCL 333.16226(1).
11. *Id.*
12. MCL 333.16226(2).
13. MCL 333.16241.
14. See generally *Ferguson v Gonyaw*, 64 Mich App 685; 236 NW2d 543 (1975).
15. *Id.*
16. <www.avvo.com>. All websites cited in this article were accessed September 11, 2013.
17. <www.healthgrades.com>.
18. See MCR 9.120(A)(1).
19. See MCL 769.16a(7).
20. *Id.* Form available at <<http://courts.michigan.gov/Administration/SCAO/Resources/Documents/other/Reporting%20Materials/LARA-HPR-003.pdf>>.
21. MCL 333.16222(1).
22. 1996 AC, R 338.1608.
23. MCL 333.16231(4).
24. Rule 338.1608(1).
25. Rule 338.1608(6).
26. *Id.*
27. MCL 333.16221(h).
28. See MCL 333.16226.
29. MCL 333.16221(b)(xi).
30. MCL 333.16243(1)(c).
31. MCL 333.16105a.
32. See Health Professional Recovery Program <www.hprp.org>.