

Legal representation

It virtually always is prudent for a physician who is the subject of a potential corrective action prosecution to obtain a qualified attorney. Corrective action can jeopardize or limit the physician's ability to practice medicine in Pennsylvania and may adversely affect the physician's license in other jurisdictions, participation in managed care networks, and privileges to practice at hospitals and other facilities. In addition, the physician's defense of a related professional liability or criminal action could be compromised by disclosures, admissions, or findings in the licensing proceeding. Due to the seriousness of these potential consequences, a well conceived and executed defense is essential, and this generally requires more than a layman's legal knowledge and abilities.

In some cases, different attorneys will represent a physician in related proceedings. For example, if the physician is accused of substandard care, the physician may be charged with professional misconduct in a licensing proceeding while simultaneously being a defendant in a professional liability action. Or, if the physician is accused of sexual misconduct, the physician may be charged with professional misconduct in a licensing proceeding, be the defendant in a professional liability action, and be the defendant in a criminal action. In such an event, it is critical that the physician make all of his or her attorneys aware of the related proceedings so that they can coordinate their defenses, as disclosures, admissions, or findings in one proceeding may affect another proceeding.

How can physicians find an attorney to represent them in a licensing proceeding?

The Pennsylvania Medical Society does not make referrals, but has a list of attorneys whose scope of practice includes representing physicians in licensing proceedings. Members can obtain the list by contacting the Legal Department at (800) 228-7823, Ext. 1050. Many firms with a substantial health law practice have attorneys who represent physicians in licensing matters. Physicians also can check with their personal attorney for a referral. A key area to discuss with a prospective

attorney is the attorney's expertise and experience specific to physician licensing proceedings.

How much will it cost to retain defense counsel for a licensing proceeding?

A physician who has been formally charged normally should expect legal fees in the thousands of dollars. If the physician has been charged with having provided substandard care, the physician also most likely will need to pay for a physician expert. Attorneys generally charge an hourly rate, based in part on the breadth of their expertise and experience. Depending upon the circumstances, a physician may be able to negotiate a flat rate to cover designated stages of the proceedings. Attorneys often will provide an initial consultation at no charge.

Do physicians have a right to be represented by counsel in a licensing proceeding?

Physicians are entitled under Pennsylvania law to be represented by an attorney in a formal licensing proceeding. However, they do not have a constitutional right to effective counsel, akin to the right in a criminal proceeding, such that the imposition of corrective action can be reversed if their counsel is ineffective. Nor are they entitled to free counsel if they are indigent.

Does professional liability insurance cover the legal and other costs incurred in connection with a corrective action investigation or prosecution?

Generally, professional liability insurance policies do not require the insurer to provide a defense for licensing investigations and prosecutions, absent a rider that provides such coverage for an additional premium. However, some insurers do automatically provide coverage. For example, effective January 1, 2006, PMSLIC will provide coverage for defense costs incurred in connection with a physician licensing board investigation or proceedings that is directly related to a medical incident covered by the PMSLIC policy.

The PMSLIC coverage has a \$25,000 annual limit and there is a 25% coinsurance requirement if the physician's defense counsel is not part of PMSLIC's approved panel. Physicians with questions regarding the PMSLIC coverage should contact the PMSLIC Marketing Department.

In any event, it often is in the insurer's best interests to help an insured defend charges of substandard care in a licensing proceeding because of the potential adverse collateral consequences [see p. 15-16]. Minimally, the insurer may be willing to pay for certain costs that it is likely to incur anyway to defend a related professional liability claim. An example would be the fee for an expert report. Consequently, it generally is advisable to seek the insurer's assistance with licensing defense costs as early as possible in the licensing proceedings. It may be necessary to educate the insurer as to its interest in the licensing matter.

Does a physician need to consult with an attorney when the physician self-reports a professional liability complaint?

Merely self-reporting a professional liability complaint, as required under the Mcare Act, normally does not trigger an essential need for legal representation regarding a potential formal licensing charge. The physician licensing board's review of the overwhelming majority of such complaints ends after a preliminary investigation and triage evaluation, with no adverse effect on the physician. Under current prosecution practice, the physician normally is not even made aware of the status or extent of the review until a decision is made as to whether to file formal charges, discontinue further review, or otherwise dispose of the matter.

On the other hand, in some cases, a proactive strategy of volunteering the physician's side of the story (e.g., the physician's version of the facts, an expert opinion supporting the quality of the physician's care, or legal defenses to the charges) or proposing a settlement may result in a more favorable outcome than would have resulted from a sit-back-and-wait strategy. An attorney can be helpful in evaluating the best strategy under the

circumstances. A physician ordinarily should consult with an attorney before the physician volunteers any information or makes a settlement proposal. Consequently, some physicians may want to have a preliminary consultation with an attorney when they self-report a professional liability complaint.

HIPAA privacy rule confidentiality requirements

During the course of a corrective action investigation or prosecution, the physician may need to disclose patient information for defense purposes. For example, the physician may need to:

- Provide patient information as part of the physician's response to the allegations,
- Reveal patient information to the physician's defense counsel,
- Introduce patient information during a corrective action hearing, or
- Include patient information in briefs and other filings.

The HIPAA privacy rule permits a physician to disclose patient information for these corrective action defense purposes without a patient authorization. As in the case of disclosures for professional liability defense purposes, such disclosures fall under the health care operations exception to the patient authorization requirement. However, as in the case of disclosures to professional liability defense counsel, a physician should have a "business associate agreement" with an attorney to whom the physician makes disclosures for corrective action defense purposes. In addition, the physician must make reasonable efforts to limit the disclosures to the minimum necessary to accomplish the intended purpose. Medical Society members may obtain further information regarding HIPAA on our Web site (www.pamedsoc.org).

Special laws and regulations provide heightened confidentiality protections to certain information, including: HIV-related information, mental health information, and drug and alcohol abuse treatment information. It generally is prudent to consult with legal counsel before disclosing these types of information for corrective action defense purposes, in the absence of a valid patient authorization or judicial order.

Should a physician agree to be interviewed by, or to provide information to, a BPOA investigator without consulting an attorney?

It generally is unwise to be interviewed, to respond to the allegations of the complaint, or to otherwise provide information to an investigator without first consulting an attorney. An attorney can help the physician to determine what, if any, information to provide, to present the information in a light most favorable to the physician, and to avoid inadvisable admissions, omissions, or conflicting statements. If contacted by an investigator for information, usually a physician's best course is to obtain the investigator's contact information and advise the investigator that his or her attorney will contact the investigator. Investigators and prosecutors typically recognize that this response is a legitimate exercise of the physician's legal rights and will not view the physician as failing to cooperate or otherwise penalize the physician.

Should a physician obtain legal representation if subpoenaed to produce medical records for a physician licensing investigation of the physician's care?

A subpoena to produce medical records normally means that the prosecutor has at least concluded that evaluation by a medical expert is warranted. It does not necessarily mean that the prosecutor is seriously considering filing formal charges. The prosecutor

may have been unable to make a decision based upon the one-sided allegations of the complaint and determined that further review is warranted. However, as discussed, it may be advisable to take a proactive strategy even before there is an indication of potential charges. Consequently, physicians may want to have a preliminary consultation with an attorney at this stage.

Should a physician retain the attorney defending the physician against a professional liability claim to represent the physician in a related licensing proceeding?

Using the same attorney for related professional liability and licensing proceedings generally can minimize the physician's out-of-pocket costs by reducing duplication of effort and can ensure a coordinated defense. On the other hand, while the defense of a professional liability claim and representation against a related formal licensing charge are similar in some respects, representation in a licensing proceeding requires unique legal expertise. Not all professional liability defense attorneys have expertise in licensing proceedings. Also, resolution of the licensing proceeding in a manner that is in the physician's overall best interest may differ from the insurer's goals in the professional liability action. Some professional liability attorneys may decline an extensive dual role to avoid the perception of a conflict of interest.