

Due Process for Doctors

A roadmap for medical professionals facing a potential disciplinary action

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THE ILLINOIS Department of Financial and Professional Regulation (IDFPR) has broad authority to issue a medical license, suspend or revoke a license, or otherwise discipline a license based on evidence of a violation of one or more licensing acts governing the profession at issue. In January 2016 alone, according to the IDFPR's monthly report, there were approximately 47 disciplinary actions issued by the IDFPR against medical professionals and licensed nurses. The offenses described in the IDFPR's monthly report, which led to those disciplinary actions, ranged from negligent performance of surgery to writing inappropriate prescriptions to failing to pay state income taxes.

However, the IDFPR cannot act tyrannically or arbitrarily. Illinois courts have long held that a license to practice medicine is a "property right" protected by constitutional guarantees of due process. "Due process of law presupposes a fair and impartial hearing before a fair and impartial tribunal" (*Smith v. Dept. of Reg. & Ed.*).

When the IDFPR receives information that a healthcare professional may have engaged in conduct warranting discipline, the IDFPR may open an investigation. Depending on the information gathered by the investigator, the IDFPR determines whether to close the file or forward the file to a prosecution unit for further action.

The Informal Disciplinary Conference

When a file is forwarded for prosecution it is assigned to an attorney who can either file a formal complaint or set an informal disciplinary conference. A disciplinary conference is an informal meeting with the IDFPR attorney and one or more licensing board members in the same profession as the individual whose license is subject to potential discipline. Although attendance is not mandatory, the disciplinary conference can be an opportunity to seek a resolution to the issues raised by the IDFPR without the formal complaint process. It is not recommended to attend the conference without an attorney. An attorney can appropriately prepare a respondent and assert the respondent's rights.

While no transcript of the conference will be taken, the IDFPR attorney and board members who attend will certainly be influenced by what is stated during the conference. The disciplinary conference often ends with the IDFPR presenting a formal settlement offer, which could take the form of an administrative letter of warning, which is not reportable to the National Practitioner Data Bank (NPDB), or could include formal discipline, which is reportable. The settlement offer is merely

an offer to resolve the case without further action and can be accepted, rejected or the respondent can make a counteroffer. If the settlement offer is accepted, a consent order will be prepared and then submitted to the full board and IDFPR director for approval.

The Formal Complaint

In many cases, a formal complaint is filed without the opportunity to participate in a disciplinary conference. If so, it is strongly recommended that the respondent retain an attorney soon after being notified of the complaint. A formal complaint will detail the charges and action sought by the IDFPR—probation, suspension or revocation of the license. The respondent must file an answer to the complaint. After the answer is filed, a preliminary hearing is set before an Administrative Law Judge (ALJ) to discuss schedules for discovery and hearings.

After the completion of discovery, the ALJ will conduct an evidentiary hearing, following procedural rules. The IDFPR must prove the alleged violation with clear and convincing evidence, which generally requires expert testimony in cases involving allegations of gross negligence. Respondents may present expert testimony and other evidence to rebut the IDFPR's assertions.

At the conclusion of the hearing, the ALJ will enter a recommended decision. The ALJ's recommendation will then be reviewed by the Medical Disciplinary Board, which may either affirm or reject the ALJ's decision. The director has the ultimate authority to adopt the Board's recommended decision.

Appeal to Circuit Court

The director's decision is considered the IDFPR's final order. If the decision is not favorable to the respondent, an appeal under the Administrative Review Law may be initiated in the appropriate circuit court. The circuit court judge may affirm or reverse the director's decision, which then may be appealed to the appellate court.

Medical professionals facing a disciplinary action before the IDFPR must be proactive in asserting their due process rights. Consulting with legal counsel early in the process is critical to ensuring those rights are protected.

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