

# RECENT TRENDS IN ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION ACTIONS

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<b>I.</b>	BACKGROUND .....	H-3
<b>II.</b>	OVERVIEW OF THE PROCESS .....	H-3
<b>A.</b>	Case Initiation.....	H-3
<b>B.</b>	Investigation.....	H-3
<b>C.</b>	Prosecutions.....	H-3
<b>1.</b>	Informal Conference/Disciplinary Hearing .....	H-4
<b>2.</b>	Consent Orders.....	H-4
<b>3.</b>	Formal Complaint .....	H-4
<b>4.</b>	Formal Hearing .....	H-4
<b>III.</b>	RESULTS.....	H-5
<b>IV.</b>	CURRENT TRENDS .....	H-5
<b>A.</b>	More Enforcement.....	H-5
<b>B.</b>	Rural Disparity .....	H-6
<b>C.</b>	More Reprimands .....	H-6
<b>D.</b>	Focus on Opioids and Other Narcotics.....	H-6
<b>E.</b>	Other States .....	H-6
<b>F.</b>	More CME .....	H-6
<b>G.</b>	More Fines .....	H-6
<b>H.</b>	More Turnover .....	H-7
<b>I.</b>	Less Predictability.....	H-7
<b>V.</b>	CONCLUSION .....	H-7

The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

# **RECENT TRENDS IN ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION ACTIONS**

## **I. BACKGROUND**

The Illinois Department of Financial and Professional Regulation (IDFPR) regulates the practice of over 100 professions and occupations in Illinois, including those licensed to render healthcare to patients. The Department has the authority to obtain information, investigate and discipline the license of an individual upon proof of a violation of the applicable licensing act under which the license was issued. Typically, this would be either the Illinois Medical Practice Act or the Illinois Nursing Practice Act.

## **II. OVERVIEW OF THE PROCESS**

### **A. Case Initiation**

When an allegation is received against a person licensed by IDFPR, the allegation is forwarded to IDFPR's Complaint Intake Unit. Typically, these allegations come from patients, hospital reports, medical malpractice settlement reports, or government agencies.

### **B. Investigation**

Once an allegation has been reviewed, it is assigned to an investigator who is responsible for determining if there has been a potential violation of a licensing law or Department rules and regulations. 225 ILCS 60/22(A)(1)-(43) sets forth the grounds upon which the IDFPR may seek disciplinary action against a physician. 68 Ill. Admin. Code Section 1285.240 sets forth the standards for three of the most frequently plead allegations: dishonorable, unethical or unprofessional conduct; immoral conduct; and gross negligence. An action must be brought pursuant to Section 60/22 in most actions against a physician within five years after receipt of a complaint or not more than two years after the receipt of the notification of a medical malpractice settlement or verdict. The five year limitation does not apply to alleged violations relating from practicing under a false name, fraud or misrepresentation in applying for or procuring a license or for cheating on the licensing examination.

After the investigator reviews relevant documents and talks to the personnel involved, the investigator refers the case to a prosecuting attorney.

### **C. Prosecutions**

Once a case is referred to the Prosecutions Unit, the Chief of Prosecutions reviews the case to determine whether additional investigation is necessary, whether the case can be closed subject to approval by the Medical Disciplinary Board, or assigns the case to a unit prosecutor for

further action. The IDFPR attorney handling the case can then either file a formal complaint or schedule the matter for a disciplinary conference/informal hearing. Even when a formal complaint has been filed, IDFPR attorneys are generally willing to schedule an informal conference/disciplinary hearing to attempt to resolve the matter prior to a formal hearing.

### **1. Informal Conference/Disciplinary Hearing**

An informal conference is an informal meeting (typically in Chicago) with the IDFPR attorney assigned to the case and a member or members of the Licensing Board of the licensee's profession. During the conference, the IDFPR attorney and any board member in attendance generally inquire about the licensee's background, experience, and specific care of the patient involved. The licensee and the attorney representing the licensee are then excused from the room while the IDFPR attorney and board member discuss the matter and formulate their recommendation to the Medical Disciplinary Board. The licensee and attorney are then called back into the room and are informed as to the recommendation which will be made to the Medical Disciplinary Board. The licensee is typically given one to two weeks to consider IDFPR's recommendation and determine whether or not to accept that recommendation.

### **2. Consent Orders**

If the licensee agrees to accept the recommendation, the IDFPR attorney will prepare a proposed Consent Order specifying the specifics of the resolution of the matter. A Consent Order must be approved by the licensee, the licensee's attorney, the Chief of IDFPR Prosecutions, the Medical Disciplinary Board, and the Director of IDFPR.

### **3. Formal Complaint**

If the licensee refuses to accept the recommendation from the informal conference, a formal complaint will be filed specifying the details of the allegations against the licensee and the matter will proceed to a formal hearing.

### **4. Formal Hearing**

If the matter cannot be resolved via informal conference, the matter will proceed to formal hearing before an administrative law judge and member of the Medical Disciplinary Board. The rules of evidence are applied loosely to what, in essence, is a mini malpractice trial. Each side typically brings in witnesses, including expert witnesses. IDFPR has the burden of proof, and there are opening statements and closing arguments just as in a medical malpractice trial. After the formal hearing, the administrative law judge prepares a report called Findings of Fact, Conclusions of Law, and Recommendations which is forwarded to the members of the Licensing Board for their review. The Board then meets to determine whether it will accept or reject the administrative law judge's recommendations and ultimately makes its own recommendation to the Director of IDFPR.

Ultimately, the Director of IDFPR may accept or reject the Board's recommendation and signs an order for the result that he or she deems appropriate. The order of the Director, if unfavorable to the licensee, may be appealed to the Circuit Court.

### **III. RESULTS**

The most hoped for results of an informal conference or formal hearing are dismissal or a letter of concern. Both are considered to be nondisciplinary. A letter of concern is simply an administrative warning letter expressing concern about the care rendered in the particular case. A letter of concern remains in a licensee's file, but has no impact on the ability to practice medicine and does not need to be disclosed in response to credentialing questions inquiring about disciplinary actions.

A reprimand is the lowest form of discipline, but is still considered discipline. A reprimand must be reported in response to questions asking whether there has been discipline against the licensee's license but does not impact the licensee's ability to practice. Probation is much the same as a reprimand, although it is considered slightly more severe. Like a reprimand, it does have to be reported when asked about disciplinary action and does not affect the individual's ability to practice.

Suspension is a form of discipline whereby the licensee's license is suspended for a period of time or indefinitely. Revocation is a loss of the license.

Often, the various forms of discipline, other than revocation, are coupled with a fine and requirements for continuing medical education approved by IDFPR's Medical Director.

### **IV. CURRENT TRENDS**

#### **A. More Enforcement**

Several years ago, the Chicago Tribune ran an exposé on discipline of Illinois doctors. At the time, Illinois ranked 48th of the 50 states in terms of effective enforcement against physicians. This prompted the state to beef up enforcement by hiring more prosecutors and requiring more licensees to travel to Chicago for informal conferences. In the past, IDFPR was focused on what most would consider "bad docs." Those included physicians who moved from state to state leaving a path of patient destruction, as well as those who participated in billing fraud and abuse. Today, this has changed and even "good docs" are being brought before IDFPR. Typically, this is the result of National Practitioner Data Bank reports from hospitals concerning privilege actions and/or from insurance carriers or self-insureds regarding medical malpractice lawsuit payments. All of this results in an increased emphasis on the quality of care delivered.

## **B. Rural Disparity**

In a rural healthcare setting, there is often a tremendous disparity in availability of specialists and Medicaid providers which significantly impacts the timing and quality of care provided. Although IDFPR pays lip service to the fact that it recognizes this disparity, the majority of physicians asked to review cases for IDFPR are from major metropolitan areas where they practice at major teaching institutions which have no lack of availability of specialists. Despite this, these physicians are asked to establish the standard of care that should have been given in a rural setting.

## **C. More Reprimands**

More and more cases which would have simply received a letter of concern (nondisciplinary) in the past are now receiving reprimands (discipline). This allows IDFPR to increase its discipline rates. As a result, not only are more physicians being summoned to Chicago for informal conferences, but more and more are receiving reprimands which IDFPR suggests to physicians should be welcomed as "the least form of discipline."

## **D. Focus on Opioids and Other Narcotics**

Several IDFPR attorneys have focused their primary interest on addressing the opioid epidemic in our country. Frequently, well-intentioned physicians who truly believe they are helping their patients relieve significant pain issues with opioids get lulled into this trap. Often, they have not attempted alternative treatment, sought psychiatric counseling, or checked the website for narcotic drug administration on their patients. IDFPR is working much more closely and sharing information with other governmental agencies, including the Drug Enforcement Agency (DEA). In fact, DEA recently honored two IDFPR attorneys for their efforts in fighting the opioid epidemic.

## **E. Other States**

When an individual is disciplined in one state, the discipline often follows to other states where the individual is licensed. In effect, the various state licenses of the individual fall like dominoes. Often, this can be aggravated by an individual not reporting discipline in other states to IDFPR.

## **F. More CME**

IDFPR has significantly increased continuing medical education requirements (CME) in its Consent Orders. Typically, CME must be approved by the Medical Director of IDFPR and completion of CME requirements must be reported to IDFPR as part of a Consent Order.

### **G. More Fines**

In the last five years, IDFPR has dramatically increased both the number and amount of fines upon licensees. In some cases, licensees have been fined even though the case against them was recommended for dismissal. It is not unusual to see fines of \$5,000 to \$10,000 or more.

### **H. More Turnover**

There has been a great deal of turnover of IDFPR attorneys. Many career IDFPR attorneys have decided to leave the Department due to state funding uncertainty. As a result, many experienced attorneys with institutional history of how various situations were to be dealt with are no longer present.

### **I. Less Predictability**

For many of the reasons discussed above, there is far less predictability in the outcome of similar cases before IDFPR.

## **V. CONCLUSION**

Navigating one's course through the Illinois Department of Financial and Professional Regulation can be challenging, and often, frustrating. The best chance to obtain a favorable result is at the informal conference stage. Unfortunately, that stage can also be highly unpredictable since it is dependent upon the "luck of the draw" as to the particular Medical Disciplinary Board member who will be in attendance. Rarely are Disciplinary Board members at informal conferences of the same specialty in question. Although there can certainly be no guarantees of a favorable outcome, experienced representation can greatly increase the probability of a good result. This is done primarily through preparation of the licensee so that that individual will have a realistic understanding of the system and will be well prepared to address the issues in the case in a professional manner.



## Roger R. Clayton

- Partner

Roger is the Chair of the firm's statewide Healthcare Practice and Professional Regulation/Licensure Practice, and co-Chair of the Qui Tam (Whistleblower) Practice. His primary focus is healthcare law, representing physicians, hospitals, long-term care facilities, and other healthcare organizations in a broad range of issues including licensure, fraud and abuse, corporate compliance, contracting, policies and procedures, staff concerns, and defense of malpractice and other litigation.

Roger is also a leader in the use of technology in the legal profession. He has developed two iPad apps for attorneys: "Second Chair Mobile," a case/file management tool and "Second Chair Mobile Jury," a jury selection app (see <http://secondchairmobile.net/>). He has tried multi-week complex medical malpractice cases completely paperless, and he frequently travels across the country for expert witness depositions carrying nothing more than his iPad.

Roger's extensive litigation experience includes defending more than 700 medical and hospital cases, taking a significant number to verdict. In recent years, he has developed a special focus on brain-injured infant cases and other catastrophic loss cases. Many of his cases are against leading Chicago and national counsel where damages sought against his target defendants often reach tens of millions of dollars. Although always prepared to try these cases when necessary, Roger is a skilled negotiator and has had great success mediating many of these cases.

Roger has taught master's-level courses in healthcare law and is a frequent national speaker on healthcare issues, medical malpractice, and risk prevention to insurers, medical associations, professional groups, and healthcare institutions. He co-authored the chapter on trials in the *Medical Malpractice Handbook* published by the Illinois Institute for Continuing Legal Education. Roger also co-authored a chapter for *The Law of Medical Practice in Illinois* published by Thomson Reuters. He also authors the "Health Law" column in the *Illinois Defense Counsel Quarterly*.

Roger has spent his entire legal career with Heyl Royster, beginning in 1978 in the Peoria office. He is a

Past President of the Illinois Association of Healthcare Attorneys, which consists of more than 600 healthcare attorneys from throughout the state. He is also a Past President of the Illinois Society of Healthcare Risk Management and the Abraham Lincoln Court.

Roger is ranked an AV preeminent by Martindale-Hubbell; he has been named one of the Best Lawyers in America (Medical Malpractice – Defendants) since 2015; he is a Leading Lawyer in Illinois (based on a survey of Illinois attorneys conducted by the Chicago Daily Law Bulletin); and has been ranked an Illinois "Super Lawyer" since 2014.

### Significant Cases

- *Witherell v. Weimer*, 85 Ill. 2d 146 (1981) - Estoppel to assert statute of limitations based upon ongoing treatment with defendant physicians; also allowed testimony of pharmacist on a physician duty of care in prescribing medications.
- *Walter v. Hill*, 156 Ill. App. 3d 708 (3d Dist. 1987) - Failure to file affidavit of merit with medical malpractice complaint when filed did not preclude filing affidavit after statute of limitations had run.
- *Hartford v. Gulf*, 837 F.2d 767 (7th Cir. 1988) - Interpretation of conflicting additional insured clauses in insurance policies.
- *Fawcett v. Reinertsen*, 131 Ill. 2d 380 (1989) - Extent of allowable questioning of a defendant physician.
- *Batten v. Retz*, 182 Ill. App. 3d 425 (3d Dist. 1989) - It was not an abuse of discretion by the trial court in a medical malpractice action to dismiss plaintiff's complaint with prejudice and deny leave to amend even though required certificate of merit was only two days late in being filed.
- *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207 (2007) - Time that elapses between voluntary dismissal of a plaintiff's complaint and its refiling pursuant to the limitation saving statute is not to be considered by a court when ruling on a motion to dismiss based on plaintiff's failure to exercise reasonable diligence to obtain service.



- *Post v. Methodist Medical Center of Illinois* (3d Dist. 2008) - Interpretation of 735 ILCS 5/622 certificate of merit requirements.
- *Helpers-Beitz v. Degleman*, 406 Ill. App. 3d 264 (3d Dist. 2010) - Hospital not responsible for physician's acts of sexual misconduct nor for negligent hiring, credentialing or retention where hospital made reasonable inquiry.

#### Transactions

- Represented physicians and nurses in disciplinary proceedings before the Illinois Department of Financial and Professional Regulation.
- Represented large multi-specialty physician group in sale of group to hospital.
- Represented hospitals and physicians in purchase of physician practices.
- Drafted medical staff bylaws, codes of ethics, HIPAA and corporate compliance programs, and contracts for numerous hospitals.
- Represented hospitals and physicians in medical staff privilege proceedings.
- Represented hospitals against actions by governmental agencies including, but not limited to, charity care, cost reporting, and EMTALA violations.

#### Publications

- "Hospitals Beware: Apparent Agency Claims May Arise From Treatment Rendered at Offsite, Independent Clinics," *Illinois Defense Counsel Quarterly* (2017)
- "Timeshare Arrangements Exception to Stark Law Offers Opportunities in Rural/Underserved Communities," American Bar Association, *Health Law Litigation* (2016)
- "Appellate Court Addresses Issue of First Impression Concerning Apparent Agency, Consent Forms and a Non-English Speaking Patient," *Illinois Defense Counsel Quarterly* (2016)
- "Illinois Supreme Court Addresses Various Privilege Claims in the Case of a Negligent Credentialing Claim in *Klaine v. Southern Illinois Hospital Services*," *Illinois Defense Counsel Quarterly* (2016)

#### Public Speaking

- "Physician Lease Arrangements: New Rules" Illinois Critical Access Hospital Network (ICAHN), Annual Conference (2016)

- "Legal Options for Specialty Physician Contracting" Illinois Critical Access Hospital Network (ICAHN) Webinar (2016)

#### Professional Recognition

- Rated AV Preeminent by Martindale-Hubbell
- Chosen as one of the Best Lawyers in America (2015-2017): Medical Malpractice Law – Defendants
- Selected as a Leading Lawyer in Illinois. Only five percent of lawyers in the state are named as Leading Lawyers.
- Named to the Illinois *Super Lawyers* list (2014-2017). The *Super Lawyers* selection process is based on peer recognition and professional achievement. Only five percent of the lawyers in each state earn this designation.
- Mentioned in *Chicago Daily Law Bulletin* and *Chicago Lawyer* magazine for successful resolution of hospital catastrophic injury case.

#### Professional Associations

- Illinois Association of Healthcare Attorneys (Past President)
- Illinois Society of Healthcare Risk Management (Past President)
- Abraham Lincoln Court (Past President)
- Illinois Association of Defense Trial Counsel (*IDC Quarterly* Health Law columnist)
- American Health Lawyers Association
- Defense Research Institute
- American Society of Law, Medicine and Ethics
- American Bar Association
- Illinois State Bar Association
- Peoria County Bar Association

#### Court Admissions

- State Courts of Illinois
- United States District Court, Central and Northern Districts of Illinois (Trial Bar)
- United States Court of Appeals, Seventh Circuit

#### Education

- Juris Doctor, Southern Illinois University, 1978
- Bachelor of Arts-Business (*magna cum laude*), Bradley University, 1975