

FOR THE DEFENSE

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What You Need to Know About

REPRESENTING THE HEALTHCARE PROFESSIONAL

Moore v. Texas: Science or Fiction in Intellectual Disability Determinations?

Gideon's Mandate and Justice Reinvestment: Addressing Pennsylvania's Prison Population Growth



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About Are Professional

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When a healthcare professional is arrested on any charge, the fall-out from the criminal case can have a much more severe impact on that licensee's professional standing and in turn, their livelihood, than the criminal charge itself.

A typical scenario for you may be as follows. A nurse comes into your office after having been arrested for a DUI. She has researched online what could happen with her nursing license. She has read several reviews of the Impaired Nurses Program and thinks her career as a nurse is over. This is her first criminal arrest and is probably an ARD case. She will tell you that she has been unable to sleep since her arrest. She asks you "what is going to happen to my nursing license?" "Do I have to tell my job?" "Are they going to put me in that Impaired Nurses Program?"

As in any criminal case, you have to do your best to allay the healthcare professional's fears. It is important to be able to walk them through the investigative process of their respective Healthcare Board in order to put the client at ease. As an example, in most cases, for first offense DUIs, the Impaired Nurses Monitoring Program can be avoided, which allows the client to continue to work with no restrictions.



The Pennsylvania Department of State, through the Bureau of Professional and Occupational Affairs ("BPOA"), provides administrative and legal support to 29 professional and occupational licensing boards and commissions. The enabling acts are found in Title 63 of Purdon's Pennsylvania Statutes Annotated, and regulations in Title 49 of the Pennsylvania Code. Anyone holding a healthcare license in Pennsylvania is subject to Department of State rules and regulations. Defense counsel must therefore be concerned with whether an arrest must be self-reported and what happens after the arrest is reported, which may include board requests for mental/physical examinations and/or mandated drug and alcohol treatment, as well as ultimately disposing of the criminal case in a manner having the least amount of impact on the healthcare professional's license.

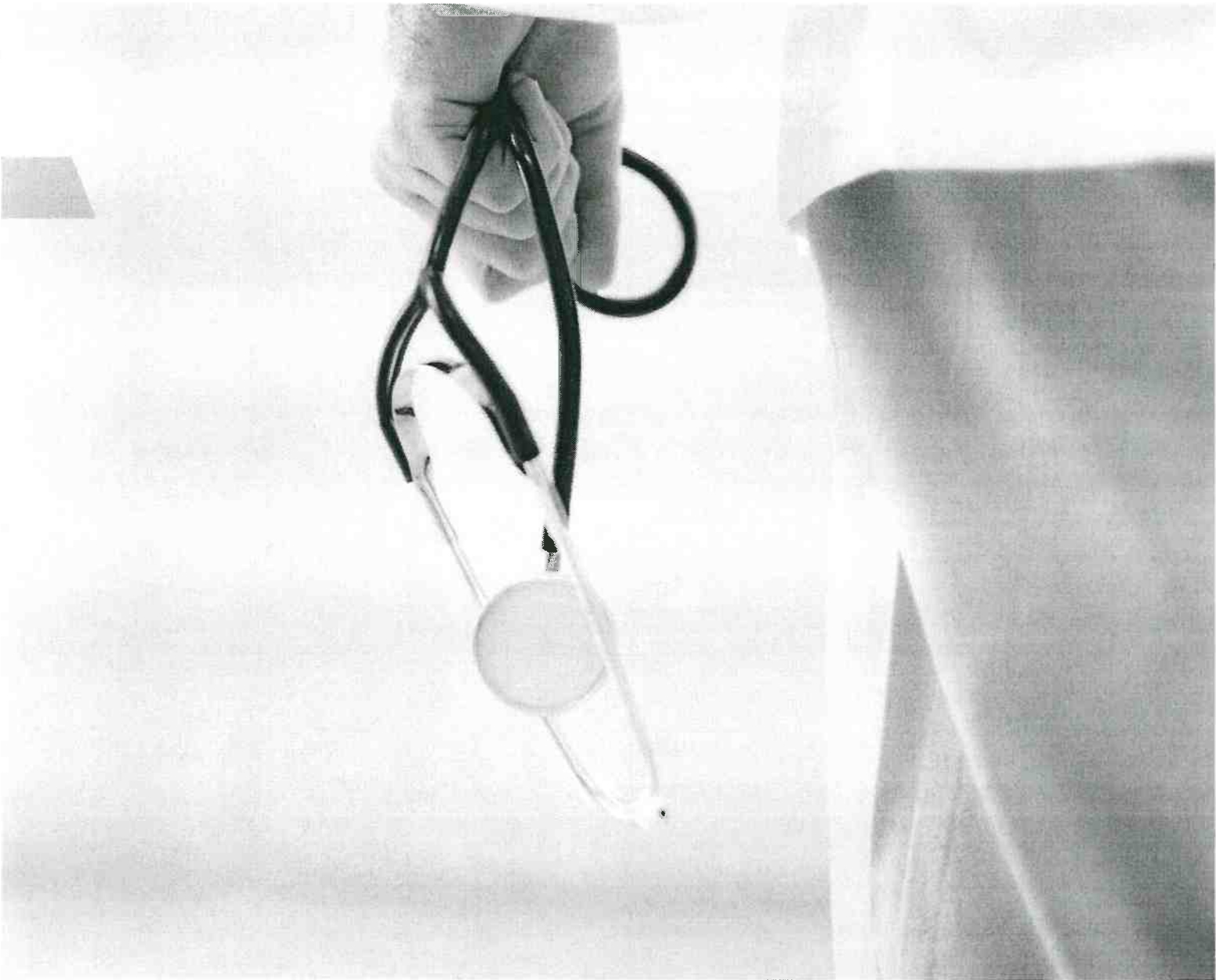
When renewing their license biennially, the healthcare licensee is required to disclose any arrest since their last renewal. Historically, unless the arrest was self-reported; the Board may not have known about the arrest until the renewal was processed; and, in many cases involving an ARD disposition, the board may not have known at all because the matter may have been expunged prior to renewal.

However, in 2014, the Department of State, overseeing all Pennsylvania healthcare licensing boards, entered into a contract with the Pennsylvania Justice Network ("JNET"). The contract obligates JNET to provide records to the appropriate Boards of any arrest or criminal summary citation for Pennsylvania licensed healthcare workers. Since the time that JNET has been reporting arrests, arrests or citations of Pennsylvania licensed healthcare workers in Philadelphia are often reported within a week. The same notifications may take several months in counties outside Philadelphia.

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The self-reporting requirements for healthcare workers have changed and it is best to review the statutes regarding your particular healthcare worker for each case. For instance, 40 P.S. §1303.903 (4) requires a physician to report to the State Board of Medicine or the State Board of Osteopathic Medicine, within sixty (60) days of an arrest relating to the provisions of 18 Pa.C.S.A. §2501 et seq. (relating to criminal homicide); (ii) 18 Pa.C.S.A. § 2702 (relating to aggravated assault); (iii) 18 Pa.C.S.A. §3101 et seq. (relating to sexual offenses); (iv) 35 P.S. § 780-101 et seq. (a violation of The Controlled Substance, Drug, Device and Cosmetic Act).

In contrast, 49 Pa. Code §21.29a, §21.156b, and §21.723a require Registered Nurses (RNs), Licensed Practical Nurses (LPNs), Certified Registered



Nurse Practitioners (CRNPs), Licensed Dietician Nutritionists (LDNs), and Clinical Nurse Specialists (CNSs), to notify the State Board of Nursing about pending criminal charges and criminal dispositions (including a guilty plea, conviction following a trial, probation without verdict and Accelerated Rehabilitative Disposition). Specifically, Registered Nurses must report pending criminal charges and criminal dispositions within 30 days of the action or on the biennial renewal application, whichever is sooner. Failure to make a timely report may result in the imposition of a disciplinary sanction.

When the BPOA learns of an arrest, the matter is referred to the Professional Health Monitoring Program ("PHMP") a department within the BPOA, which administers two programs: the Voluntary Recovery Program ("VRP")

and the Disciplinary Monitoring Unit ("DMU"). The VRP provides a method by which professionals suffering from a mental or physical disorder, such as a substance use disorder, can be directed to appropriate treatment and receive monitoring to ensure that they remain capable of practicing safely. To be eligible for VRP enrollment, a licensee must agree to enter into a Consent Agreement with the licensing board for a period of not less than three (3) years. The Consent Agreement stipulates that disciplinary action, including suspension or revocation, will be deferred so long as the licensee adheres to the terms and conditions of the agreement and maintains satisfactory progress in the program. When a licensee successfully fulfills the terms of the Consent Agreement and completes the VRP,

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no disclosure, publication or public record is made of the participant's involvement in the VRP or the events precipitating their enrollment. The DMU is essentially the same as the VRP; however, it is public discipline. Participation in the DMU will remain on a licensee's record indefinitely. More information about these two programs can be found at www.dos.pa.gov/pages/search.aspx.

In the initial notification, the Healthcare licensee will receive a letter from the PHMP requesting the licensee to call for a drug and alcohol evaluation, even if the licensee is only cited with a summary offense. It is not unusual for healthcare professionals issued citations for public drunkenness or disorderly conduct to receive a letter from PHMP requesting that they submit to an evaluation after the licensee pled guilty to the summary offense. The PHMP will advise the licensee that in order to avoid disciplinary action against their healthcare license and be eligible for participation in the VRP, the licensee must immediately stop working until an evaluation is completed. In some instances, the results of these evaluations could take weeks or even months. Additionally, any admissions made by a client during an evaluation may not be privileged. Experience tells that most of the individuals who go for these evaluations are determined to be in need of treatment. The PHMP will then require that the licensee sign a very stringent three (3) year Consent Agreement obligating the licensee to enter inpatient or outpatient treatment, participate in several AA or NA meetings per week and submit to random urine screens. Additionally, the licensee must advise their employer that they are participating in the PHMP program. If the licensee fails to comply, the Board may suspend the license without a hearing.

Depending on your client's situation and the pending criminal charges, it may tactically be best not to schedule that evaluation. Your client can continue to work. A refusal to schedule the

examination will trigger the respective State Board prosecutor to petition for an Order compelling the licensee to attend a mental/physical exam with a psychiatrist. This exam is complex, the results of which will shape the Board prosecutor's approach in the licensing proceedings. Since this exam will not occur until several months after an arrest, with proper preparation and guidance, the licensee is more likely to pass this evaluation.

No comprehensive discussion of the consequences of a criminal arrest on the healthcare licensee can be made without familiarity with 35 P.S. § 780-123 of the Controlled Substance, Drug Device and Cosmetic Act (Drug Act). That section governs the revocation of licenses of healthcare licensees, the most relevant part reads as follows:

(c) The appropriate licensing boards in the Department of State shall automatically suspend, for a period not to exceed one (1) year, the registration or license of any practitioner when the person has pleaded guilty or nolo contendere or has been convicted of a misdemeanor under this act. The district attorney of each county shall immediately notify the appropriate licensing board of practitioners subject to the provisions of the section. However, the provisions of such automatic suspension may be stayed by the appropriate state licensing board in those cases where a practitioner has violated the provisions of this Act only for the personal use of controlled substances by the practitioner and the practitioner participates in the impaired professional program approved by the appropriate state licensing board for a period of between three (3) and five (5) years, as directed by the appropriate licensing board. If the practitioner fails to comply in all respect with the standards of such a program, the appropriate licensing board shall immediately vacate the stay of the enforcement of the suspension provided for herein.

Automatic suspension shall not be stayed pending any appeal of a conviction. Restoration of such license shall be made as in the care of a suspension of license. (Emphasis added).

Pursuant to this provision, if your client pleads guilty, *nolo contendere*, or has been convicted of any misdemeanor under the Drug Act, including paraphernalia, the Board is authorized to automatically suspend a healthcare license, for a period not to exceed one year.¹

Under 35 P.S. § 780-117, Probation Without a Verdict, once the terms and conditions of probation are fulfilled, the Court shall discharge the case without adjudication of guilt and it shall not constitute a conviction for any purpose; however, it is also important to note that a plea under § 780-117 of the Drug Act is considered a conviction under the licensing statutes. As such, entry of a plea under this statute will also trigger an automatic suspension.² Entry into the ARD Program for paraphernalia or any other charge will not trigger the automatic one (1) year suspension.

Be aware that 35 P.S. § 780-123(c) permits a stay of the suspension by the appropriate state licensing board if the licensee participates in the impaired professional program. Therefore, if your client is going to plead guilty to a misdemeanor under the Drug Act, it may be beneficial for your client to enroll in the PHMP to avoid the automatic suspension.

Prior to the entry of the plea, you may want to contact the appropriate board prosecutor and request an agreement to place your client in the DMU. Recall that the Disciplinary Monitoring Unit (“DMU”) is essentially the same as the Voluntary Recovery Program (“VRP”), but the DMU is public discipline. Participation in the DMU will remain on a licensee’s record indefinitely. Since the VRP is a confidential program, the prosecutor will not have been aware of your client’s involvement in the VRP before they file for an automatic suspension. The VRP is not available to a licensee who has been convicted of a misdemeanor crime under the Drug Act. Therefore, if the VRP agreement is changed to

a DMU agreement, your client can avoid the automatic license suspension.

It is also important that you be aware of the ramifications of Drug Treatment Court. In some counties, such as Montgomery County, a defendant enters Drug Treatment Court (DTC), and if she/he successfully completes DTC, all charges are withdrawn.

In other counties, such as Bucks County, the defendant enters a guilty plea to all charges and after successful completion of DTC, the Commonwealth typically withdraws most of the charges. The defendant is sentenced on one charge, usually paraphernalia which is a misdemeanor. Remember, even if your client pleads guilty to only one criminal conviction, any misdemeanor Drug Act conviction will trigger a one (1) year suspension of the healthcare license.

An example of how to avoid the above suspension and DMU in the context of a recent DTC disposition: a nurse entered a DTC in a county where the defendant is required to enter a guilty plea to all charges. The defendant diverted drugs from her job at a hospital. She entered a guilty plea to all charges, including Section (A)(12) of the Drug Act, a felony, charging her with acquisition of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge. Sentencing is being deferred until the client completes DTC. Our agreement with the District Attorney’s office is that upon successful completion of DTC, the paraphernalia charge will be amended to a disorderly conduct, and the client will be found guilty and sentenced to administrative probation on the disorderly conduct charge; this will allow the client to avoid suspension of her nursing license when she is eventually sentenced after completion of DTC. More importantly, this will allow the client to remain in the VRP, a confidential program.

Regarding felony offenses, you should check the healthcare worker’s statute that applies to your client. These begin at 63 P.S. 42.1 which governs the Podiatry Practice Act and run through 63 P.S.1901 which is the Social Workers, Marriage and Family Therapist and Professional Counselors Act. Each Act has one or more sections which govern

discipline, suspensions, revocations, and reissuance of a professional license. As a rule of thumb, any felony conviction under the Drug Act will result in a license revocation.

Historically, if a nurse with a felony conviction was in the PHMP, the Nursing Board would not request a suspension. In 2013, the Nursing Board re-interpreted the provisions of Sections 15.1(b) and 15.2 of the Nursing Law and decided that a felony conviction mandated an automatic ten year license suspension, rather than giving the Board case-by-case discretion. The issue of whether the Board has the discretion to enforce a 10 year suspension is currently before the Pennsylvania Supreme Court. In *Angela Maria Packer, RN. v. BPOA, State Board of Nursing*,³ the Commonwealth Court held that the State Board of Nursing had discretion to enforce a ten year suspension. On August 24, 2016, in *McGrath v. BPOA, State Board of Nursing*,⁴ the Commonwealth Court reversed *Packer*. A petition for allowance of appeal was filed by the Commonwealth in *McGrath*.⁵ As of the writing of this article, no decision has been reached. Nonetheless, the State Board of Nursing is currently issuing an automatic suspension for any nurse convicted of a felony under the Drug Act.

Navigating the licensee through the professional licensure disciplinary process when there is an arrest is complex. Many of the healthcare professionals you represent will also have underlying drug and/or alcohol issues. Although drug and/or alcohol treatment may often benefit the licensee charged with a crime at sentencing, it may work against that person in the professional licensure forum. A diagnosis of substance or alcohol abuse may force the licensee into a very rigid monitoring program with the licensing board. It is important to weigh all options in strategizing your game plan. 🗡️

Notes

1. 35 P.S. § 780-123(c).
2. 35 P.S. § 780-123(c).
3. *Packer v. BPOA, State Board of Nursing*, 99 A.3rd 65 (Pa. Cmwlth. 2014), *petition for allowance of appeal denied*, 109 A.3d 680 (Pa.2015),
4. *McGrath v. BPOA, State Board of Nursing*, 146 A.3d 310 (Pa. Cmwlth. 2016).
5. *McGrath*, 365 WL 2016 (Sept. 21, 2016).

About the Author



Brian E. Quinn, concentrates his practice on the representation of healthcare professionals in disciplinary proceedings before the Pennsylvania Bureau of Professional and Occupational Affairs, as well as defense of healthcare professionals in criminal cases. He has been handling criminal cases for over 30 years. His practice includes consultation with criminal attorneys who are representing healthcare professionals in criminal cases. For more information, please visit The Law Offices of Brian E. Quinn website.

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