

*Knowledge
replaces
fear.*

Deciding Whether to Accept a Settlement Offer

By Glen D. Crick, Attorney at Law

Note: This article is addressed to those who hold professional licenses issued by the Illinois Department of Financial and Professional Regulation. Depending on the laws regulating the professions in force in a particular state, this article may also be applicable in other states. However, one is well advised to check with local counsel or with Mr. Crick regarding the applicable law in a jurisdiction other than Illinois. This article reflects the opinions of Glen D. Crick, an attorney licensed to practice in Illinois only, based on his twenty-seven years' experience investigating, directing investigations and prosecutions, and defending those who become the subject of investigations and prosecutions conducted by regulatory and administrative agencies in Illinois and other states. These suggestions will apply to a greater or lesser extent depending on the individual circumstances of a case. Whatever the circumstances, however, one who becomes the subject of an investigation would be wise to immediately retain legal counsel. The suggestions presented are not to be considered "legal advice" and by reading this article, no attorney/client relationship is formed with Mr. Crick or Glen D. Crick, Ltd.

Whether to accept or reject a settlement offer involving the reprimand, probation, suspension or revocation of a professional license is one of the most difficult decisions a licensee faces when he or she becomes the subject of a disciplinary case before the Illinois Department of Financial and Professional Regulation or any regulatory or administrative agency. In Illinois and in other jurisdictions, the vast majority of discipline imposed on licensed professionals comes as the result of a settlement offer made during the course of settlement negotiations usually during "disciplinary" or "informal" conferences. It should be noted that a settlement offer can be made at any time, even after a formal hearing has commenced.

The stated purpose of a disciplinary or informal

conference is to allow the accused an opportunity to speak on his or her behalf regarding the allegations under investigation. However, many prosecutors consider a conference to be a "plea bargaining" session during which they and a member of the board or committee review allegations with the respondent, determine what type of discipline is appropriate, and advise the respondent of their decision.

During a typical calendar year, the Illinois Department of Financial and Professional Regulation imposes discipline on 3,000 or more licensees, yet less than 200 formal evidentiary hearings are held. A similar situation exists in other jurisdictions. In the majority of cases, discipline is imposed because the accused agrees to settle, but this is not to say that the accused would prevail if the case had been defended at hearing. The point is that most discipline is agreed to by the accused and such agreements are not always in the best interest of the licensee.

Reasons to Accept a Settlement Offer Providing for Discipline of a License

In general, it makes sense to accept a disciplinary offer when such an offer is reasonable under the circumstances, and if it is likely that the discipline imposed following a hearing would be more severe. The following factors should be considered when making that determination:

- whether a careful review of the case reveals that the Department has the evidence necessary to prove its case
- whether the witnesses to be called by the Department are credible and likely to appear and testify at a hearing
- whether the Department is willing to

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- commit the necessary resources to prosecute the case to its conclusion
- whether it appears likely the Department will prevail if the matter proceeds to a formal hearing

Unfortunately, cases often are settled due to a lack of necessary financial resources to adequately defend the case, the unwillingness to undergo the inevitable stress of a contested hearing, or to avoid the aggravation of going through a hearing.

Reasons to Refuse to Accept a Disciplinary Offer

The primary reason not to accept a disciplinary offer is the individual's belief that he or she has not done anything wrong. Another reason is that the offer of discipline is too severe, given the circumstances. In either instance, accepting the settlement offer only will lead to regret and recrimination. Instead, it is better to force the Department to prove its case and allow a board or committee of one's peers to determine if discipline is warranted.

When a careful analysis of a case indicates there is a strong possibility the Department will not be able to prove the allegations, then the accused should consider rejecting a settlement offer and force the Department to prove its case at a formal evidentiary hearing.

During a hearing, an accused licensee is not required to prove anything. The Department must prove that the accused violated a provision of the licensing act that regulates his or her profession. The Department must prove its case through clear and convincing evidence, and that is not always easy.

Some people by nature are risk-takers who are willing to gamble. The odds are easy to calculate. If one agrees to have his or her license

disciplined, there is a 100% chance it **will** be disciplined. If one does not agree to accept an offer of discipline and instead defends the case at a hearing, there at least is **some** chance the Department will not be able to meet its burden of proof, in which case the license will **not** be disciplined. There also is the chance that the discipline imposed after a formal evidentiary hearing will be more favorable than the rejected offer.

Some additional reasons to refuse to accept a disciplinary offer are:

- the ill effects that merely admitting the conduct alleged will have on one's career or business
- the severity of the discipline offered causes the offer to be unacceptable

In some instances, it makes sense to refuse a settlement offer and defend the case at a formal hearing, even if the Department is likely to prevail and even if the discipline imposed after a hearing would potentially be more severe.

In the normal course of events, it takes over one year from the time a disciplinary case is initiated until all of the necessary components of an evidentiary hearing are completed. Those components include:

- recommendations of the administrative law judge and the board or committee are prepared and reviewed
- the Director signs an Order imposing discipline
- any post-hearing motions are heard
- the Order goes into effect

If the decision is appealed in circuit court in an "action for administrative review," the imposition of discipline is delayed even further. Therefore, in cases where the accused is near retirement, it might make sense to force the

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matter to hearing. Also, when the disciplinary offer made by the Department includes the loss of one's professional license for a substantial period of time, it might also make sense to force the Department to prove its case at hearing to gain more time to gather resources and prepare for the time that one will be out of practice.

A final reason for refusing to accept a settlement offer and choosing to defend the case at hearing is simply the opportunity to have one's "day in court." A disciplinary offer typically is made by the Department attorney assigned to the case with some input from a board or committee member. The offer is based on a review of the investigative reports in the Department's file and a brief question-and-answer session with the accused during a conference. However, if the same case is tried at a formal evidentiary hearing, the accused has an opportunity to tell his or her full story and to call witnesses and introduce evidence to support his or her position. There also is the opportunity to cross-examine witnesses who testify against the accused. After all witnesses for both sides have testified and the story has been heard, the full board or committee reviews a transcript of the hearing, the Findings of Fact, Conclusions of Law, and the Recommendations of the Administrative Law Judge who conducted the hearing. Then, the board or committee prepares a recommendation to the Director of the Department concerning what, if any, discipline should be imposed. Thus, discipline imposed after a formal hearing is based on the collective judgment of one's peers rather than an offer made by the assigned prosecutor.

The effect that discipline has on one's ability to conduct business also is a reason to refuse an offer to settle. This reason is especially true for physicians and dentists in general, and even more for those who hold licenses in other states. Any disciplinary action taken against a physician's or dentist's license is reported to the

National Practitioner Data Bank and also is reported to the Healthcare Integrity and Protection Data Bank. Additionally, the discipline of a professional license must be reported to the licensee's malpractice insurance carrier and to insurance companies for whom the licensee is a provider. A number of insurance companies view a disciplinary action as a reason to exclude an individual from being a provider. License renewal applications, recertifying applications, DEA renewal applications, and board recertification applications all require a declaration statement about whether discipline has been imposed on a professional license. In addition, all state licensing statutes usually have what are known as "sister state" provisions that allow one state to discipline a physician's or dentist's license, based on the imposition of discipline in another state.

The ultimate effects of having a professional license disciplined are far-reaching, whether the agreement comes as a result of a negotiated settlement or after a formal hearing. Discipline may affect a licensee's ability to retain hospital privileges, to recertify in a board specialty, to obtain reimbursement from patients' insurance providers, and to retain malpractice coverage.

In summary, any licensee faced with the decision whether to accept or reject a settlement offer is advised to consider and review the following factors with legal counsel:

- the nature and seriousness of the allegations
- the evidence available to prove the allegations
- the likelihood of a better outcome after hearing
- the potential consequences of the license being disciplined
- time factors
- financial constraints

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- the reasonableness of the settlement offer made

The decision whether to accept a settlement offer that does not provide for the discipline of a professional license or any other negative consequence is easy. One need only smile and say, “Thank you.”

About the Author

Glen D. Crick is an attorney who, since 1987, has concentrated his practice in representing healthcare and other licensed professionals before the Illinois Department of Financial and Professional Regulation (IDFPR), the federal Drug Enforcement Administration (DEA), and other regulatory and administrative agencies in Illinois and in other states. Mr. Crick served as Director of Enforcement for the Department from 1980 to 1987, and was responsible for overseeing all investigative and prosecutorial activities of the Department. Prior to that, he was the supervisor of the Northern Illinois Fraud Investigations Unit of the Illinois State Police, Financial Fraud and Forgery Bureau.

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