

# Licensing of Physicians

**Sandra P. Wysocki Capplis, Esq.**

*Capplis, Connors & Carroll, PC, Boston*

**Sean E. Capplis, Esq.**

*Capplis, Connors & Carroll, PC, Boston*

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## Exhibits Available for Download

**EXHIBIT 11A—Federal Health Care Exclusion Notice**

**EXHIBIT 11B—OIG Program Exclusion Authorities**

## Scope Note

This chapter advises on how the Board of Registration in Medicine operates, its reporting requirements, its jurisdiction, and its authority regarding the criminal conduct of registered medical professionals. Consequences for physicians are set forth, as are practical strategies for avoiding federal program exclusion. Featured are Department of Health and Human Services documents, including “OIG Program Exclusion Authorities” and a sample notification to the physician of exclusion from participation in federal programs.

## § 11.1 QUICK TIPS

- Physicians have a duty to disclose criminal charges, even those not resulting in conviction. Failure to disclose criminal charges can result in disciplinary action.
- Convictions and continuances without a finding (CWOFFs) for criminal charges unrelated to the practice of medicine can impact a physician's license.
- For criminal charges involving the prescription of controlled substances, pre-trial probation on a felony charge, or a CWOFF on a reduced charge of simple possession may avoid exclusion from federal health-care program participation. Exclusion from participation in federal health-care programs effectively bars the practice of medicine for five years.
- The Board of Registration in Medicine cannot stay its proceedings pending the outcome of a criminal case.
- Statements made in Board of Registration in Medicine (BORIM) proceedings can be used by a prosecutor in a pending criminal case.

## § 11.2 INTRODUCTION

The licensure of physicians and the practice of medicine are regulated on the state and the federal levels by a number of different government agencies, which in turn derive their authority and governing rules from a long list of statutes, regulations, and policies. In addition to complying with an extensive list of formal government controls and oversight and applying for licensure, almost every practicing physician must obtain hospital privileges and approved provider status with the numerous private health-care organizations that offer medical insurance coverage to the citizens of the Commonwealth. In most instances, physicians must renew their hospital privileges and approved provider status every two years by filling out an extensive renewal application form. *See* G.L. c. 112, § 2. Almost every one of these initial or renewal application forms asks if the physician has been charged with any criminal offense. Every attorney representing a physician in a criminal case, therefore, must be aware that there are numerous potential collateral consequences that may arise from the issuance of criminal charges and from the resolution of those charges, which can adversely impact their client's ability to practice medicine. It would also be wise for criminal counsel, at the outset of representation, to seek the assistance of an attorney who specializes in representing physicians before the BORIM.

## § 11.3 CONSEQUENCES FOR PHYSICIANS

Your client is a young doctor with a promising career who became addicted to pain-killers and wrote prescriptions in the names of other family members to hide their habit. After much negotiation, you convince the assistant district attorney to recommend a one-year continuance without a finding on a single count of uttering a false prescription. The judge adopts the recommendation with the condition of continuing treatment. After one year, the case will be dismissed. On the courthouse steps, as you

wish your client well, you feel a sense of satisfaction in the work you did in this case. Understandably, you believe that through your skillful advocacy and negotiations with the police and the district attorney's office you have helped to protect that career. You might be correct if your client were not a physician, but your client *is* a physician and within three months of the day that you helped to resolve their criminal case with such a reasonable disposition, the BORIM has disciplined your client and suspended your client's license for six months; the Office of Inspector General of the Department of Health and Human Services has excluded them from participation in Medicare, Medicaid, and all federal health-care programs for a period of five years; the Federal Drug Enforcement Administration and the Massachusetts Department of Health have recalled their controlled substance registrations; the hospital where your client was on staff has terminated their privileges; and the health insurance plans that had listed your client as an approved provider have terminated their participation. What went wrong?

## § 11.4 THE BOARD'S MISSION

The BORIM is the licensing authority for physicians in the Commonwealth of Massachusetts. G.L. c. 112, § 2. The BORIM was established in 1894 and is the chief administrative authority that governs the practice of allopathic and osteopathic medicine in Massachusetts. The BORIM consists of five physicians and two public members who are appointed by the governor for three-year terms. G.L. c. 13, § 10. The primary mission of the BORIM is to ensure that only qualified individuals are licensed to practice medicine in the Commonwealth. The purpose of the BORIM's actions against licensees is not penal, but to protect the public from incompetent practices. *Levy v. Bd. of Registration in Med.*, 378 Mass. 519, 520 (1979); *see also Kobrin v. Bd. of Registration in Med.*, 444 Mass. 837, 841 (2005). As described below, there are a number of ways in which the BORIM may find out about criminal charges brought against physicians.

In matters of medical practice and licensure in the Commonwealth of Massachusetts, all roads eventually lead to the BORIM. For this reason, the role and the jurisdiction of the BORIM are reviewed in detail below. Physicians must report any criminal involvement they have had on their initial application for a medical license in Massachusetts. Moreover, at each two-year renewal cycle, they must report whether they have been charged with a criminal offense other than a minor traffic violation within the preceding two years. The license renewal question requests information as to whether the physician has been *charged* with any criminal offense, irrespective of whether the physician was ever *convicted* of the offense. Should a physician provide a false answer to this question on a renewal application, the BORIM could subject the physician to professional discipline for fraudulent procurement of a medical license or its renewal. *See* G.L. c. 112, §§ 2, 5; 243 C.M.R. § 1.03(5)(a)(1); *see also In re Bonetsky, M.D.*, Adjudicatory Case No. 89-21-SU (Final Decision and Order, Nov. 6, 1991). Be aware that the BORIM may seek to discipline a physician for providing a false answer on an application or renewal form, even if the information that was omitted from the application would not have provided a basis for discipline.

However, the fact that a physician provides a mistaken answer to a question on the applications does not equate with fraud. Conferring with counsel experienced in representing physicians in BORIM matters can be instrumental in saving a license by rebutting the BORIM's position that a physician procured it fraudulently. *See Bd. of Registration in Med. v. Freedman*, No. RM-07-143-DALA (recommended decision Mar. 28, 2008).

## § 11.5 THE BOARD'S JURISDICTION

The BORIM has independent jurisdiction to discipline physicians for conduct that evidences a lack of good moral character or for conduct that undermines public confidence in the integrity of the profession. *Raymond v. Bd. of Registration in Med.*, 387 Mass. 708, 713 (1982); *Levy v. Bd. of Registration in Med.*, 378 Mass. 519 (1979). The ability to practice medicine includes not only technical competence but also the unswerving dedication to employ it to preserve life, restore health, and alleviate suffering. *Raymond v. Bd. of Registration in Med.*, 387 Mass. at 712. The Supreme Judicial Court has held that the BORIM's discipline of physicians for lack of good moral character or for conduct that undermines public integrity in the profession is reasonably related to the public health, safety, and welfare. *Raymond v. Bd. of Registration in Med.*, 387 Mass. at 712.

The BORIM also has multiple statutory and regulatory jurisdictional bases for disciplining physicians for criminal behavior. The BORIM has broad jurisdiction to discipline physicians for conduct that brings into question the physician's competence, such as "gross misconduct in the practice of medicine." G.L. c. 112, §§ 5, 61; 243 C.M.R. § 1.03(5)(a)(3). The BORIM also has specific statutory jurisdiction to discipline a physician who "has been convicted of a criminal offense which reasonably calls into question" their ability to practice medicine. G.L. c. 112, § 5. The BORIM's regulations also authorize it to discipline a physician for being convicted of *any* crime. 243 C.M.R. § 1.03(5)(a)(7). Under these specific statutes and regulations, the grounds for discipline are based on the conviction itself. The physician is not entitled to challenge the facts underlying the conviction before the BORIM. *In re Gold, M.D.*, Adjudicatory Case No. 84-9 (15, citing *Aetna Cas. & Sur. Co. v. Niziolek*, 395 Mass. 737 (1985)); *Sherry v. Bd. of Registration in Med.*, Supreme Judicial Court, No. 82-10 (memorandum of decision Mar. 3, 1983). A no-contest plea qualifies as a conviction. *In re Norman, M.D.*, Adjudicatory Case No. 88-25-SU (final decision and order June 6, 1990).

## § 11.6 REPORTING REQUIREMENTS

The BORIM may discover that a physician has been involved in criminal behavior from any number of sources. It may receive a complaint against a licensee from any individual. It may learn of criminal allegations through newspaper reports or other sources. The BORIM may receive a statutory report from a health-care provider who becomes aware that a physician has engaged in conduct that is grounds for professional discipline. Moreover, with regard to criminal proceedings in Massachusetts, G.L.

c. 221, § 26 specifically requires that “the clerk of any court in which a physician registered in the commonwealth is convicted of any crime . . . shall, within one week thereafter, report the same to the board of registration in medicine together with a copy of the proceedings in the case.” The statute also applies this reporting requirement to pleas of *nolo contendere*, where sufficient facts of guilt are found, and when the matter is continued without a finding. Finally, a physician may report their involvement in a criminal matter at the time of their application for a license or its renewal.

There are certainly many instances in which physicians have faced criminal charges and the BORIM never finds out about these charges, even when they result in a guilty finding. In practice, Massachusetts courts’ compliance with the statutory reporting requirement does not appear to be consistent. Keep in mind that for a court to even be aware of the obligation to report the proceeding, it first needs to know that your client is a physician. Moreover, a charge may have arisen in another jurisdiction, which would not trigger a reporting obligation. Even if a court does not fulfill, or is not subject to, an obligation to report the matter to the BORIM, however, it is important to remember that your client still has an independent obligation to report the charge to the BORIM. Although there are often negative consequences with the BORIM, which are discussed in the following sections, for the physician who has engaged in criminal conduct, there are also potential benefits when they “self-report” an adverse matter, including criminal charges, to the BORIM. The BORIM will engage in negotiations with a physician who wishes to voluntarily agree to surrender their license, consents to discipline on more favorable terms, or both. It is imperative that your client carefully explain the relevant facts to the BORIM when self-reporting criminal conduct in such negotiations. These are other areas where consulting with counsel who has experience representing clients before the BORIM can be instrumental in helping your client.

## § 11.7 THE BOARD’S PRECEDENT

The BORIM has interpreted its subject matter jurisdiction over criminal matters broadly. The BORIM has disciplined physicians for offenses that are directly related to the practice of medicine, such as the following:

- drug diversion (*In re Jackson, M.D.*, Adjudicatory Case No. 99-07-DALA (Final Decision and Order, Mar. 10, 1997); *In re Rowland, M.D.*, Adjudicatory Case No. 95-33-DALA (Order, Jan. 2, 1997); *In re Pike, M.D.*, Adjudicatory Case No. 96-20-DALA (Final Decision and Order, Apr. 15, 1988));
- insurance fraud (*In re Englisch, M.D.*, Adjudicatory Case No. 88-15-TR (Final Decision and Order, Mar. 16, 1998); *In re Skodnek, M.D.*, Adjudicatory Case No. 94-42-DALA (Dec. 27, 1995); *In re Zadrozny, M.D.*, Adjudicatory Case No. 93-5-DALA (Final Decision and Order, June 8, 1994); *In re Payne, M.D.*, Adjudicatory Case No. 92-14-DALA (Final Decision and Order, Dec. 16, 1992); *In re Ali, M.D.*, Adjudicatory Case No. 876-9-GE (June 3, 1987)); and

- sexual assault on patients (*In re DeGuzman, M.D.*, Adjudicatory Case No. 96-25-DALA (Oct. 7, 1998); *In re Moore, M.D.*, Adjudicatory Case No. 93-6-DALA (Final Decision and Order, Mar. 23, 1994); *In re Wood, M.D.*, Adjudicatory Case No. 93-3-DALA (Final Decision and Order, Aug. 25, 1993); *In re Keefer, M.D.*, Adjudicatory Case No. 89-13-SU (Final Decision and Order, Nov. 20, 1991); *In re Helfant, M.D.*, Adjudicatory Case No. 87-17 (Final Decision and Order, June 3, 1987); *In re Mamay, M.D.*, Adjudicatory Case No. 85-15-LI (Final Decision and Order, July 10, 1986)).

The BORIM has also disciplined physicians who have committed serious felonies such as the following:

- rape (*In re Hussain, M.D.*, Adjudicatory Case No. 95-3-H (Final Decision and Order, Sept. 29, 1982); *In re Lefkowitz, M.D.*, Adjudicatory Case No. 95-3-L (Final Decision and Order, Sept. 29, 1982); *In re Sherry, M.D.*, Adjudicatory Case No. 95-3-S (Final Decision and Order, Sept. 29, 1982));
- voluntary manslaughter (*In re Kartell, M.D.*, Adjudicatory Case No. 99-04-DALA (Final Decision and Order, Dec. 21, 2000); *In re Barran, M.D.*, 87-14-CA (Final Decision and Order, Oct. 5, 1998));
- larceny (*Levy v. Bd. of Registration in Med.*, 378 Mass. 519 (1979); *In re Ginard, M.D.*, Adjudicatory Case No. 99-17-XX (Final Decision and Order, Nov. 9, 1995); *In re Kreplick, M.D.*, 85-2-MI (Final Decision and Order, Jan. 18, 1989)); and
- the illegal sale of firearms (*Raymond v. Bd. of Registration in Med.*, 387 Mass. 708, 708 (1982)).

The BORIM's jurisdiction over criminal behavior is not limited to cases involving serious felonies or crimes that are directly related to the practice of medicine. The BORIM has disciplined physicians for conviction of offenses such as the following:

- OUI (*see Bd. of Registration in Med. v. O'Connor*, Docket No. RM-20-0121-DALA (Recommended Decision, May 26, 2021));
- subornation of perjury and conspiracy (*In re Stryker, M.D.*, Adjudicatory Case No. 2009-013 (Final Decision and Order, May 6, 2009));
- lewd and lascivious behavior (*In re Viegas, M.D.*, Adjudicatory Case No. 1370 (Final Decision and Order, Feb. 18, 1987); *In re D'Auria, M.D.*, Adjudicatory Case No. 87-4-CA (Final Decision and Order, Sept. 7, 1988));
- failure to file tax returns (*In re Teschke, M.D.*, Adjudicatory Case No. 99-21-DALA (Final Decision and Order, Apr. 20, 2000); *In re Jakubowicz, M.D.*, Adjudicatory Case No. 98-04-DALA (Final Decision and Order, July 1, 1998); *In re Zuckerman, M.D.*, Adjudicatory Case No. 89-22-ST (Final Decision and Order, Nov. 1, 1989); *In re Poser, M.D.*, Adjudicatory Case No. 87-43-CA (Final Decision and Order, Apr. 6, 1988); *In re Alfaro, M.D.*, Adjudicatory Case No. 87-21-SU (Final Decision and Order, June 2, 1987)). The BORIM is specifically prohibited by statute from renewing the license of a physician who

has failed to pay their state income taxes as required by law. G.L. c. 62C, § 49A; and

- criminal contempt (*In re Teschke, M.D.*, Adjudicatory Case No. 99-21-DALA (Final Decision and Order, Apr. 20, 2000) (psychiatrist disciplined, in part, for multiple traffic violations, including vehicular homicide); *In re Goldman, M.D.*, Adjudicatory Case No. 00-10-XX (Final Decision and Order, Mar. 8, 2000); (*In re Rydzewsky, M.D.*, Adjudicatory Case No. 97-25-XX (Final Decision and Order, Oct. 8, 1997)).

Moreover, a pattern of violating laws relating to public safety may be indicative of an impairment that is inconsistent with the safe practice of medicine (*In re Teschke, M.D.*, Adjudicatory Case No. 99-21-DALA (psychiatrist disciplined, in part, for multiple traffic violations, including vehicular homicide)).

## § 11.8 NO DELAY PENDING CRIMINAL PROSECUTION

The BORIM is prohibited by statute from deferring action on a complaint based on alleged criminal conduct pending the outcome of the criminal case, and a complaint before the BORIM will not delay a criminal prosecution. G.L. c. 112, § 63. The Supreme Judicial Court explicitly refused to recognize a constitutional right to have administrative proceedings stayed pending the outcome of a criminal case against a physician. *Arthurs v. Stern*, 560 F.2d 477 (1st Cir. 1977). The BORIM has authority under 243 C.M.R. § 1.03(11) to immediately suspend a physician pending a decision on the merits of a criminal case if it finds that the physician's continued practice of medicine represents a threat to the public health, safety, and welfare. As a matter of practice, in cases where a physician has been the subject of a serious indictment or a series of indictments, the BORIM has exercised its authority to summarily suspend the physician's license when the complained-of behavior would represent an immediate and/or serious threat of harm to the physician's patients, subject to a postdeprivation hearing in seven days. See *In re Greineder, M.D.*, Adjudicatory Case No. 00-09-DALA (Final Decision on Summary Suspension, Aug. 23, 2000); *In re Sharpe, M.D.*, Adjudicatory Case No. 00-29-DALA (Final Decision and Order on Summary Suspension, July 19, 2000); *In re Jackson, M.D.*, Adjudicatory Case No. 99-07-DALA (Final Decision and Order on Summary Suspension, Mar. 22, 2000); *In re Ramos, M.D.*, Adjudicatory Case No. 99-03-DALA (Final Decision and Order on Summary Suspension, Sept. 22, 1999); *In re Kartell, M.D.*, Adjudicatory Case No. 99-04-DALA (Final Decision and Order on Summary Suspension, Sept. 8, 1999); *In re Giraud, M.D.*, Adjudicatory Case No. (Final Decision and Order on Summary Suspension, Aug. 9, 1995); *In re Rowland, M.D.*, Adjudicatory Case No. 95-33-DALA (Final Decision and Order on Summary Suspension, July 12, 1995); *In re Keefer, M.D.*, Adjudicatory Case No. 89-13-SU (Final Decision and Order, Nov. 20, 1991); *In re Girgis, M.D.*, Adjudicatory Case No. 92-5-DALA (Final Decision and Order on Summary Suspension, Sept. 23, 1992).

The issuance of an indictment alone is one piece of evidence that, when considered in the light of other evidence, may be sufficient to support a summary suspension. *In*

*re Ramos, M.D.*, Adjudicatory Case No. 99-03-DALA (Final Decision and Order on Summary Suspension, Sept. 22, 1999); *see also In re Ellis*, 425 Mass. 332, 340 (1997) (indictments against attorneys, coupled with the evidence underlying those indictments, could support their suspension from the practice of law).

## § 11.9 ACQUITTAL NO BAR TO BORIM PROSECUTION

The BORIM may discipline a physician for criminal behavior even where the physician has been acquitted of the criminal charge for the same alleged misconduct. Such proceedings do not offend the double jeopardy clause of the U.S. Constitution. *Arthurs v. Bd. of Registration in Med.*, 383 Mass. 299 (1981); *In re Fischer, M.D.*, Adjudicatory Case No. 92-25-DALA (Final Decision and Order, Dec. 12, 1996) (physician found guilty of raping a woman after similar criminal charges against him had been nol prossed by the district attorney); *see also In re Eplett, M.D.*, Adjudicatory Case No. 85-2 (Final Decision and Order, Dec. 30, 1985) (the BORIM may proceed against a physician after admission to sufficient facts and continuance without a finding). Principles of collateral estoppel do not prevent the BORIM from attempting to prove that a physician has engaged in the same conduct for which they were acquitted in criminal proceedings, because different procedural rights apply to criminal and administrative proceedings. *Arthurs v. Bd. of Registration in Med.*, 383 Mass. 299 (1981). The BORIM retains jurisdiction to discipline a licensee for criminal behavior even though the physician allows their medical license to lapse. *Sherry v. Bd. of Registration in Med.*, S.J.C. No. 82-410 (Memorandum of Decision, Mar. 3, 1983). The BORIM may not, however, impose a fine against a physician for the same behavior for which that physician was fined in a criminal proceeding. *Kvitka v. Bd. of Registration in Med.*, 407 Mass. 140 (1990) (BORIM's \$10,000 fine against a physician who had also been fined in connection with criminal proceedings against him was punitive in nature and violated double jeopardy clause).

## § 11.10 DUE PROCESS CONSIDERATIONS

The procedural rights of physicians are more limited in administrative proceedings before the BORIM than they are in criminal proceedings. In order to sustain the imposition of formal discipline against a physician for criminal behavior, the BORIM need only prove that the physician engaged in the criminal behavior by a preponderance of the evidence. This is in stark contrast to the burden of proof required for criminal prosecutors, who must prove the charges beyond a reasonable doubt. *Craven v. State Ethics Comm'n*, 390 Mass. 191, 200 (1983) (quoting *Herman & McLean v. Huddleston*, 459 U.S. 375, 389 (1983)).

The BORIM must honor a physician's assertion of the right to remain silent under the Fifth Amendment to the U.S. Constitution. Administrative proceedings before the BORIM are civil in nature, however, and the board may draw an adverse inference against a physician who exercises their Fifth Amendment right. The physician's due process rights are not offended by the fact that they are forced to choose between



exercising the Fifth Amendment privilege or divulging their defense to criminal prosecutors. *Arthurs v. Stern*, 560 F.2d 477 (1st Cir. 1977).

The BORIM has taken the position that the exclusionary rule does not apply to administrative proceedings and has disciplined physicians based on evidence that was illegally obtained and excluded from criminal proceedings against the same physician. *In re Waksal, M.D.*, Adjudicatory Case No. 980-CA (Final Decision and Order, Jan. 6, 1988) (physician convicted of illegal possession of cocaine upon the same evidence that had been excluded from the criminal proceedings against him).

## **§ 11.11 FEDERAL HEALTH-CARE PROGRAM PARTICIPATION—CONTROLLED SUBSTANCE CHARGES**

One of the most common ways for physicians to find themselves in the role of defendant in a criminal case is illustrated in the opening scenario of this chapter. Most physicians write prescriptions for controlled substances for their patients. It can become far too easy for a physician who is feeling physical or emotional pain to justify writing a prescription for themselves. The BORIM regulations prohibit physicians from self-prescribing medications in schedules II through IV, and state and federal laws provide that a prescription is valid only when issued by a practitioner while acting in the course of their professional practice. Given the easy access to prescriptions, the stress of the profession, and the simple reality of human nature, at any given time there are many physicians in the Commonwealth who are addicted to controlled substances obtained through fraudulent prescriptions. Some of these physicians will be caught and charged with fraudulent prescribing. If one of these physicians comes to you to defend them, it is essential that you be aware of the federal regulations that govern participation in and exclusion from all federal health-care programs, including the two largest programs, Medicare and Medicaid.

### **§ 11.11.1 The National Practitioner Data Bank**

Congress established the National Practitioner Data Bank (NPDB) to collect and release information regarding “certain final adverse actions” taken by state and federal agencies and health plans against physicians. Reportable “final adverse actions” include “Federal or State criminal convictions related to the delivery of a health care item or service” and “actions by Federal agencies responsible for the licensing and certification of health care.” 42 U.S.C. § 1320a-7e. The NPDB also applies to final adverse actions taken by state licensing or certification authorities such as the BORIM. 45 C.F.R. §§ 60.2, 60.9.

### **§ 11.11.2 Strategies to Avoid Federal Program Exclusion**

Title 42 U.S.C. § 1320a-7(a)(4) provides that “[a]ny individual . . . convicted for an offense which occurred after August 21, 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution,

prescription, or dispensing of a controlled substance” faces mandatory exclusion from participation in all federal health-care programs for a minimum period of five years. Title 42 U.S.C. § 1320a-7(b)(3) provides for discretionary exclusion for a minimum period of three years for a misdemeanor conviction relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. It is critical to know that Section 1320a-7(i) provides definitions of what constitutes a “conviction.” Along with the circumstances that most attorneys would expect to be included as a conviction, Section 1320a-7(i)(4) states that “when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld,” it is to be considered a conviction for the purpose of this statute. This means that the otherwise very reasonable agreement for a CWOFF on the one felony charge of uttering a false prescription in the example above will lead to a mandatory minimum five-year exclusion from participation in all federal health-care programs. With few exceptions, this means that your client will not be able to find employment as a physician for at least five years. To put this into context, the BORIM rarely takes a physician out of practice for more than six months for a first-time offense of writing fraudulent prescriptions due to a drug addiction, assuming there is no patient harm related to the drug use.

Given the draconian consequences a conviction can have on the ability to practice medicine, as defined under the federal guidelines, for a felony relating to the prescription of controlled substances, there are two alternatives when the evidence dictates a negotiated resolution to the charges, and both are dictated by the specific language of 42 U.S.C. § 1320a-7(a), (b)(i). First, the five-year mandatory exclusion for a felony is tied to the statute’s definition of conviction. In these situations, counsel experienced in representing physicians in BORIM can assist you in informing the assistant district attorney about the consequences to the physician of even a CWOFF. Such counsel can help you accomplish this with a memo (see **Exhibit 11A**, Federal Health Care Exclusion Notice) and a copy of the relevant sections of the federal law. The disposition of pretrial probation, pursuant to G.L. c. 276, § 87, does not constitute a conviction even under the broad definition of 42 U.S.C. § 1320a-7(i)(4). While many assistant district attorneys would not otherwise entertain an agreement to this disposition, even on a first-time offense, they may be more open to it when they understand that the sanction imposed on the physician for a federally defined conviction will be much more severe than anything they would be asking to be imposed by the Massachusetts court. Even without the agreement of the assistant district attorney to pretrial probation, the option exists to request a *Brandano* hearing and put the matter directly before the judge. *Commonwealth v. Brandano*, 359 Mass. 332 (1971). The second option is to seek a reduction in the charge from the felony of unlawful prescribing to a misdemeanor charge of unlawful possession of a controlled substance. Remember that the federal statute calls for exclusion for crimes relating to manufacture, distribution, prescription, or dispensing. The statute does not provide for exclusion for simple possession. Therefore, a CWOFF or even a guilty finding for possession should not result in the physician’s exclusion as a provider for federal health-care programs. There may be an additional benefit to a reduction in charge from a felony

to a misdemeanor as it relates to health insurance and hospital credentialing, as some application forms for these entities ask the applicant if they have had any felony charges or convictions but do not ask for information relating to misdemeanors. Note, however, that the BORIM initial application for licensure and renewal forms ask the broad question regarding any criminal charges. Even where a case is dismissed, if charges ever issued, the BORIM's licensure forms require disclosure.

For a list of mandatory and permissive program exclusions from the Department of Health and Human Services, see **Exhibit 11B**, Office of Inspector General Program Exclusion Authorities.

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## Exhibits Available for Download

*The following exhibits are available for download from the MCLE website. See the Electronic Forms Download page for instructions.*

**EXHIBIT 11A—Federal Health Care Exclusion Notice**

**EXHIBIT 11B—OIG Program Exclusion Authorities**