

*Knowledge
replaces
fear.*

A Request to Surrender a DEA Registration

By Glen D. Crick, Attorney at Law

Note: Though this article concerns requests made by federal Drug Enforcement Administration investigators to surrender the federal authorization to order, store, prescribe, administer, and dispense controlled substances, the article is primarily addressed to those who hold professional licenses issued by the Illinois Department of Financial and Professional Regulation and by similar licensing agencies in other states. This article reflects the opinions of Glen D. Crick, an attorney licensed to practice in Illinois only, and is 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 and the Drug Enforcement Administration. 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 is wise to immediately retain legal counsel. The suggestions presented here 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.

IMPORTANT UPDATE: The Illinois Department of Financial and Professional Regulation recently instituted a new policy providing that any settlement offer made by the Department for a case in which a healthcare practitioner has surrendered his or her DEA registration must include some period of suspension of the practitioner's primary license and his or her Illinois Controlled Substance license.

Overview

Healthcare practitioners and veterinarians are often asked to surrender their federal Drug Enforcement Administration (DEA) registrations when they become the subjects of investigations conducted by DEA investigators or when DEA investigators assist professional licensing and other state investigators. **In the majority of cases, one should not even consider surrendering his or her DEA registration. The answer should be, "No".**

In my view, a registrant should consider surrendering his or her DEA registration in only two instances. First, it makes sense to surrender a

DEA registration when after consulting with legal counsel experienced in such matters, it is apparent that one has committed a serious violation of federal law concerning controlled substances, and a federal prosecutor is willing to guarantee that the registrant will not be prosecuted criminally or civilly if the registration is surrendered. Second, when the registrant is addicted to controlled substances and, in his or her opinion and/or in the opinion of those treating the addiction, not having a DEA registration will help to facilitate recovery, then it may be in the registrant's best interest to surrender the registration. In either case, **there is no urgency. The decision whether to surrender a DEA registration should never be made at the time the DEA investigator makes such a request.**

This article addresses some of the reasons why a request to surrender a DEA registration is made, the consequences of surrendering the registration, and other factors to be considered when deciding whether to surrender the registration.

DEA Investigations

The DEA may investigate a registrant based on information received from or allegations made by any source. Frequent sources of information are other healthcare practitioners, law enforcement officials, concerned or disgruntled employees, estranged spouses, and dissatisfied patients. Allegations often concern diversion of legally manufactured controlled substances to illegal use, impairment, prescribing for non-therapeutic reasons, or trafficking in controlled substances.

The DEA also analyzes data it collects from controlled substance manufacturers, distributors, and registrants themselves. Analysis of this data can lead to an investigation of a registrant's practice and/or an audit of the controlled substances records that registrants are required to maintain. An audit of the controlled substances on hand and records of all controlled substances purchased, transferred, administered, and dispensed are

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components of any investigation.

Who May Be Asked to Surrender a DEA Registration

A registrant who has been convicted of a crime that involves prescribing, administering, or dispensing controlled substances will be asked to surrender his or her registration when the DEA becomes aware of the conviction. Even registrants who have not yet been tried or convicted frequently are asked to surrender registrations if the DEA learns that they have been charged or are being investigated. Persons convicted of crimes related to professional practice that did not involve controlled substances (such as Medicaid fraud) may also be asked to surrender their DEA registrations. Further, it is conceivable that a person convicted of a sex offense, for driving under the influence, or another offense not related to professional practice might also be asked to surrender his or her registration. However, in my experience, most requests to surrender a registration are not made after a registrant is charged with or convicted of a criminal offense, but rather when a registrant initially is interviewed as part an investigation, inspection, or audit.

Unannounced Visits

In Illinois, DEA investigators often present themselves at the office of a registrant without any prior notice. Frequently, they are accompanied by investigators from the Illinois Department of Financial and Professional Regulation (IDFPR).

Request to Waive an Administrative Inspection Warrant

Upon arrival at a registrant's practice, DEA investigators typically will display their credentials to staff and ask to see the registrant. The investigators advise the registrant that they want to ask some questions, and that he or she may consent to an inspection of the premises or can insist that an Administrative Inspection Warrant be obtained. Usually, there is little to be gained by insisting that a warrant be obtained. Warrants are routinely issued and the inspection most likely will only be delayed by a day or two. In some instances, the investigator will have obtained an Administrative Inspection Warrant prior to the visit, and will present the

warrant to the registrant at the time of the visit.

The Inspection and/or Audit

During an inspection of a registrant's practice, the investigator must be given free access to all areas within the facility where controlled substances are stored. However, if certain substances are maintained in a sterile environment, the investigator should be so advised and the substances should be removed from the environment for inspection. All records of controlled substances ordered, received, dispensed, administered, wasted, and destroyed must also be produced for inspection. DEA investigators have the right to copy any record they inspect.

Two copies should be made of any document requested. One copy is given to the investigator, and one copy should be kept separately by the registrant to maintain a record of the documents requested and provided. In those rare instances when the investigator insists on taking original documents, it is particularly important to make two copies. One copy should be placed into the record from which it was removed, and one copy should be filed separately to maintain a record of the original documents seized.

Questions by Investigators

A registrant is not required to submit to an interview by DEA investigators. However, during the course of an inspection, a registrant will be asked questions. Innocuous procedural questions such as, "Who do you order controlled substances from?" and "Where do you keep the controlled substance samples you receive?", should be answered. When questions go beyond the procedural, however, and particularly if they become accusatory, a registrant should advise the investigator that he or she wishes to consult with legal counsel before answering any more questions. **Above all, do not lie!** It is a felony offense to lie to a federal agent. A registrant is wise to only answer questions posed by federal agents in writing after consulting with legal counsel or under other carefully controlled circumstances.

The Request to Surrender a DEA Registration

After the controlled substances on hand are

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inventoried and records of controlled substances ordered, received, administered, and dispensed are audited, a registrant is usually advised what the inspection and audit has revealed. DEA investigators also usually tell the registrant about any allegations that led to the investigation. During such a discussion, the registrant frequently is asked to surrender his or her DEA registration.

The request to surrender a DEA registration may be accompanied by a suggestion of dire consequences if one does not immediately surrender the registration. The suggestion may be subtle, such as, “It is in your best interest to surrender your registration,” or “If you do not agree to surrender the registration a Rule to Show Cause will be issued.” Suggestions may also be forceful, such as, “You can be fined up to **x** dollars for each violation,” or “You can go to jail for up to **y** years for each violation.” Whether subtle or forceful, the purpose of the suggestion is to prompt a registrant to surrender his or her DEA registration based on fear of the consequences if he or she does not. However, **knowledge replaces fear**, and a decision whether to surrender the DEA registration should be based on knowledge rather than fear. What follows in this article is information upon which a rational decision about whether to surrender a DEA registration may be based.

Urgency of the Request

The DEA investigator didn’t just happen to be in the neighborhood. A failure to schedule an appointment or, if an appointment has been scheduled, failing to advise a registrant that he or she is under investigation at the time the appointment was made is calculated to catch the registrant off guard. The request to surrender the DEA registration is treated by the investigator as if it is extremely urgent. On occasion, investigators will even present a completed DEA registration surrender form to the registrant for signature, making it seem as if signing the form and surrendering the registration is the only option available. **There is no urgency.** The DEA will accept the surrender of a registration tomorrow or next week as readily as it will today. The surrender

will be accepted at any time because it makes things considerably easier for the DEA.

Reapplying for a DEA Registration

When a request to surrender a DEA registration is made, investigators often minimize the seriousness of the request by advising the registrant that he or she can reapply for a registration. It is true that a registrant can re-apply for a registration at any time, however, the reapplication process may take years. In states such as Illinois where one is required to have a state-issued controlled substance license as well as a DEA registration (called “dual registration” states), the DEA will not issue a new registration until the matter has been resolved by state controlled substance licensing authorities. Those processes also take time.

The Consequences of Surrendering a DEA Registration

Most hospital bylaws require a staff member to have a valid DEA registration; therefore, surrender of a DEA registration will result, in most cases, in the loss of hospital privileges. Further, certain retail pharmacy chains use providers’ DEA registration numbers for tracking purposes. The surrender of a DEA registration will cause one’s DEA number to be voided and may make it difficult for a practitioner to have prescriptions filled for non-controlled substances such as antibiotics and birth control pills.

In Illinois and other dual registration, states the mere fact that one has surrendered a DEA registration often is erroneously viewed as proof of a violation of state-controlled substance licensing laws. Further, Illinois prosecutors have on occasion taken the position that one cannot hold a state controlled substance registration unless one has a DEA registration, and that the surrender of the DEA registration will automatically lead to the loss of the Illinois controlled substance license. In reality, an Illinois registrant can legally hold a state controlled substance registration without having a valid DEA registration. However, he or she cannot prescribe, administer, or dispense controlled substances unless he or she holds both registrations. While the underlying facts and

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circumstances that lead a DEA investigator to request a registrant to surrender his or her DEA registration may be a basis to discipline an Illinois controlled substance registration, charges must be filed and the IDFPD must prove its case, unless a settlement is negotiated.

Any discipline of a state-issued controlled substance registration that follows the surrender of a DEA registration, whether after a hearing or as a result of settlement negotiations, will create a number of other problems. First, as a matter of policy, the Illinois Department of Financial and Professional Regulation will not accept the surrender of an Illinois controlled substance license in lieu of discipline. Therefore, discipline imposed on the state controlled substance license will be a matter of public record. Second, the same facts and circumstances that led to the discipline of the state controlled substance license may be used to seek to discipline a registrant's professional license. (For a discussion concerning the long-term and often unexpected implications of the discipline of a professional license, see the article, "Effects of Discipline of a Healthcare Practitioner's License," on our web site, www.cricklaw.com.) To complete the vicious circle, at the time one seeks to reapply for a federal DEA registration, the fact that disciplinary action was taken against an applicant's state controlled substance license may be used as grounds to deny the application, since one who practices in a dual registration state must have a valid state controlled substance license to be issued a DEA registration.

Further, the vast majority of criminal prosecutions, civil lawsuits, and administrative actions such as Rule to Show Cause hearings are resolved through negotiation. When a registrant surrenders his or her DEA registration, he or she cannot then use the willingness to agree to have restrictions imposed on the registration, or the willingness to surrender the registration as a "bargaining chip" in negotiations. By initially surrendering the registration, the registrant greatly weakens his or her bargaining position.

Important Note: The Illinois Department of

Financial and Professional Regulation recently instituted a new policy providing that **any** settlement offer made by the Department for a case in which a healthcare practitioner has surrendered his or her DEA registration **must** include some period of suspension of the practitioner's primary license **and** his or her Illinois Controlled Substance license. **In light of this new policy and, as discussed in this article, under very few circumstances should an Illinois practitioner even consider surrendering his or her DEA registration.**

Initial Response to a Request

Before responding to the request to surrender, a registrant is wise to consult with legal counsel experienced in these matters. All circumstances must be evaluated to determine how to proceed. A registrant should politely advise the DEA investigator that he or she will review the matter with legal counsel and get back to the investigator within a reasonable time.

The "Best Interest of the Registrant"

An investigator's suggestion that surrendering a DEA registration is in the best interest of a registrant is easily addressed: **it is not in any practitioner's best interest to not have a DEA registration.** In addition to not being able to prescribe, administer, and dispense controlled substances, there are a number of other possible severe consequences. (See the "Consequences" section, above.) The only reason it would be in one's best interest to immediately surrender a DEA registration would be if one could avoid potentially worse consequences by doing so. For the reasons explained below, it is unlikely that the surrender of a DEA registration will preclude worse consequences.

Criminal Prosecution

The possibility of criminal prosecution has some basis in fact. Under federal and state laws, it is a felony to prescribe, administer, dispense, use, or obtain controlled substances for non-therapeutic reasons. Upon conviction of a felony, one can be sentenced to serve time in prison. Fines also can be assessed. However, **the investigator**

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requesting the surrender does not “convict” anyone of anything and perhaps even more importantly, neither can he or she “pardon” any violation. The decision to prosecute is made based on a number of considerations, which may include the severity of the offense, the likelihood of conviction, and the resources available to prosecute the case. Whether one has agreed to surrender a DEA registration would be a relatively minor consideration. Conversely, it may be viewed as an admission of guilt. Again, a DEA investigator cannot “pardon” criminal conduct, and **a case may be prosecuted regardless of any conversation or understanding the registrant has with the investigator.**

Civil Penalty

The possible imposition of a civil penalty also has some basis in fact. A civil monetary penalty may be imposed upon entry of a judgment that one has violated federal law regulating the manufacture, distribution, prescription, administration, or dispensing of controlled substances. The decision to file a lawsuit and seek a civil penalty is made by a supervisor in the Civil Division of the United States Attorney’s Office after considering the same factors as those considered when deciding to prosecute a criminal case, with the additional consideration of whether the government will be able to collect the civil penalty. **The investigator does not decide in which cases a civil lawsuit is filed and has no authority to waive a civil penalty.**

Rule to Show Cause Hearings

In the majority of cases where investigations, audits, or inspections reveal evidence of violations of the laws that regulate controlled substances, criminal charges are not filed and civil penalties are not sought. However, a Rule to Show Cause may be issued. At a Rule to Show Cause Hearing, the Attorney General attempts to demonstrate that the DEA registration issued to a registrant should be suspended or revoked because a registrant has: (1) materially falsified an application for registration; (2) been convicted of a felony relating to controlled substances; (3) had a state controlled substance license or registration suspended, revoked, or denied or is no longer authorized by state law to

manufacture, distribute, prescribe, administer, or dispense controlled substances; (4) committed such acts as would render his or her **registration inconsistent with the public interest**; or (5) been excluded from participation in certain federal programs.

At the hearing, a party is entitled to present his or her case or defense by oral or documentary evidence, to submit rebuttal evidence, and to cross-examine adverse witnesses. Evidence is presented before one or more administrative law judges who are charged with the responsibility of conducting the hearing in a fair and impartial manner. The burden of proof is on the Attorney General to show, by a preponderance of the evidence, that a violation occurred and that a DEA registration should be suspended or revoked because it is not consistent with the public interest. At a Rule to Show Cause Hearing, the government may not be able to prove its case or, during negotiations, a settlement that affects only certain schedules of controlled substances may be reached.

Time Necessary to Complete a Rule to Show Cause Hearing

All Rule to Show Cause cases throughout the United States are prosecuted by the Office of the Chief Counsel of the Drug Enforcement Administration in Alexandria, Virginia. As of December 2006 and the writing of this article, that unit had one supervising attorney and five staff attorneys. For the past several years, only 30 to 40 Rule to Show Cause hearings have actually been held during each calendar year. The average length of time from the initiation of an investigation to the issuance of a Final Order following a Rule to Show Cause hearing was from one to three years. Unless a registrant’s DEA registration has been summarily suspended, he or she can continue to prescribe, administer, and dispense controlled substances unless and until a Final Order revoking the registration is issued. The passage of time can be used to the advantage of the registrant. A registrant can obtain treatment for a controlled substance addiction if such a problem exists. The time also can be used to obtain continuing education in the area of ethics and record keeping which, in turn,

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can be used to demonstrate a good faith effort to become educated about mistakes a registrant may have made and to show his or her desire and willingness to ensure that such mistakes will not be repeated. Further, the time may be used to discuss settlement in hopes of reaching an agreement that will resolve the case in a manner that allows the registrant to continue to prescribe, administer, and dispense controlled substances, if even on a limited or restricted basis.

Summary Suspension of a DEA Registration

In extreme cases where the Attorney General finds that there is imminent danger to the public health or safety, a DEA registration may be suspended on an emergency basis until the conclusion of the Rule to Show Cause proceedings. While the “emergency suspension” is drastic, at least a hearing is held and a registrant is given the opportunity to present evidence and engage in settlement negotiations. If one surrenders his or her DEA registration, the opportunity to present evidence and/or negotiate settlement terms is lost.

Effects of Prior State Action on a Rule to Show Cause

In dual registration states such as Illinois, if the state licensing entity has already taken action on the state controlled substance license based on the same underlying facts and circumstances, and restrictions or limitations have been imposed on that license, a settlement may be negotiated whereby the same restrictions and limitations are imposed on the DEA registration.

The Decision

The decision whether to surrender a DEA registration should not be made in haste, and should only be made after a careful review of all the circumstances with legal counsel who is well-versed in such matters. What is to be gained by surrendering the registration? If a review of all the circumstances indicates that one clearly has violated federal and/or state laws concerning prescribing, administering, dispensing, or use of controlled substances, if the violation is of a serious nature that could easily be proved, and if a federal prosecutor will guarantee that the case will not be

prosecuted either criminally or civilly if the DEA registration is surrendered, then it makes perfect sense to surrender the registration. Otherwise, it does not. In any event, **the decision should never be made at the time one is initially confronted by a DEA investigator.**

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 predecessor agency of the Illinois Department of Financial and Professional Regulation 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.

For more information, contact Mr. Crick at:

GLEN D. CRICK, LTD.
205 W. WACKER DRIVE, SUITE 1220
CHICAGO, ILLINOIS 60606

TELEPHONE: 312-335-8860
FACSIMILE: 312-335-9482

E-MAIL ADDRESS: GCRICK@CRICKLAW.COM
WEB SITE ADDRESS: WWW.CRICKLAW.COM

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