

Physician, Defend Thyself!

*In the professional medical misconduct process,
ignorance is not bliss for either doctors or their lawyers.*

BY BARRY B. CEPELEWICZ

THE SITUATION frequently begins with the following scenario. A physician receives a letter from an investigator with the New York State Department of Health (DOH) Office of Professional Medical Conduct (OPMC) informing him that it is investigating his patient care and requesting medical records. The physician provides the records.

A short time later, the investigator contacts the physician and asks him a few questions; wanting to help, the physician answers the questions without giving them much thought.

Shortly thereafter, the physician receives a second letter requesting that he make himself available for an interview. Still under the belief that he did nothing wrong, the physician agrees to go to OPMC's office, where for nearly two hours he is questioned by the investigator and a physician-consultant. He leaves the interview confident that he had answered all their questions honestly and to everyone's satisfaction.

Three months later, the physician is notified by OPMC that it is charging him with negligence on more than one occasion and that it will be seeking to revoke his license to practice medicine.¹ The physician finally consults with an attorney.

This all-too-common story illustrates how ignorance of the process can turn a well intentioned physician into a respondent in a physician misconduct proceeding.

Since nothing threatens the foundation of a physician's practice more than the prospect of such a scenario, any contact from a representative of the state must be taken very seriously. Unfortunately, the combined effects of misinterpretation and misguided actions leave many physicians vulnerable to a procedure that can effectively strip them of their ability to earn a living.

Even a well seasoned attorney with many years of court experience must learn how OPMC functions in order to provide the most effective counseling. Learning the intricacies of the OPMC process can greatly assist counsel in advising their physician-clients and ensure the continued viability of their practices.

Understand the Process

The entity authorized to investigate, charge, deliberate and decide cases of alleged physician misconduct is the DOH's Bureau of Professional Medical Conduct (BPMC) and its prosecutorial arm, OPMC.²

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Under its mandate to protect the general public, BPMC has the authority to investigate, charge, try and sentence physicians relating to nearly four dozen types of "professional misconduct."³ The most common charges are:

- (1) practicing medicine fraudulently or beyond its authorized scope;
- (2) practicing with negligence on more than one occasion;
- (3) practicing with gross negligence on a particular occasion;
- (4) practicing with incompetence on more than one occasion; and
- (5) practicing with gross incompetence.⁴

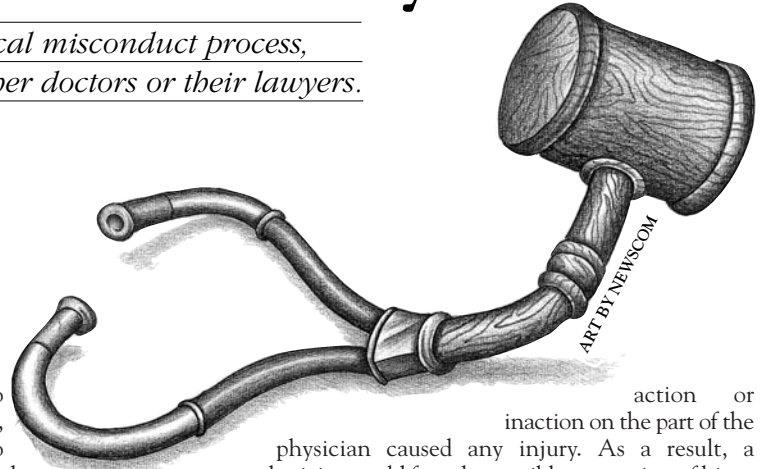
Physicians can also be investigated for practicing the profession while impaired by alcohol, drugs, physical or mental disabilities; being convicted of a crime under New York state or federal law; fee splitting; using testimonials in advertising; willfully harassing, abusing or intimidating a patient, either physically or verbally; inadequate record keeping; and ordering excessive or unnecessary tests.⁵

However, physicians will also be investigated if any patient files a complaint with DOH. In some cases these complaints are justified, but other times they are frivolous and vindictive.

By way of example, patients who attempt to file a medical malpractice action against a physician but are unable to do so (no attorney will accept the case), may file a complaint with OPMC in an attempt to punish the physician. In addition, physicians who are accused of insurance fraud may find themselves the subjects of an OPMC investigation. In fact, over the past few years, OPMC has become an effective weapon for patients, payers, law enforcement agencies, and others to use against physicians.

Physicians (and their counsel) who have grown accustomed to the burden of proof by which alleged cases of medical malpractice are judged are often surprised that these standards do not necessarily apply to an action for alleged misconduct. In a case for medical malpractice, for example, the patient must establish, through a preponderance of credible evidence, that the physician departed from the standard of care, and that the departure caused an injury.

In an action for alleged physician misconduct, it is not necessary for OPMC to demonstrate that any



action or inaction on the part of the physician caused any injury. As a result, a physician could face the possible revocation of his or her license even if the subject patient suffered absolutely no untoward outcome.

Physicians and their counsel also need to understand and appreciate that when facing the possibility of physician discipline, BPMC acts as investigator, expert, prosecutor, judge and jury. Accordingly, counsel who find themselves defending their physician-clients need to be informed, prepared, and aggressively proactive.

The Investigation

BPMC does have a well-defined blueprint it is required to follow.

This process commences with an investigation, at which time consultants, who may include nurses or other healthcare professionals, assist the OPMC investigation to collect information regarding any suspected or alleged instance of physician misconduct.⁶ Typically, the physician under investigation receives a letter from an OPMC investigator requesting medical records, often with an additional request for a verbatim transcription of any handwritten entries.

At this point, the physician should not discuss any details with the investigator. The physician should immediately contact counsel and also notify his or her medical malpractice insurance carrier that may cover some or all of the legal costs associated with the investigation.

The Interview

If the case is referred to an investigative committee, the physician is provided an opportunity to be interviewed.⁷

This event provides the physician with the first and often best opportunity to mount a successful defense, as it is the interview that often determines whether formal charges will be brought. For this reason, physicians are well advised to exercise their right to obtain legal counsel.⁸

Counsel should prepare their clients for the OPMC interview in much the same rigorous manner they would prepare a client for a deposition. Although one hopes that counsel will be able to remain relatively quiet during the interview, any

physician who permits the interview to take place without the assistance of counsel is taking an unnecessary and frequently foolish risk.

The interview is typically conducted by a physician who may or may not practice in the same specialty as the physician being investigated. Moreover, in many cases, the physician will not even know the focus of the investigation until the interview.

As a result, inadequate preparation will not only reflect badly on a physician's overall competency, but also squander an opportunity to end the investigation at that point. Thus, any physician submitting to an interview (preferably with counsel) must be knowledgeable about all the care provided to the specific patients and all the pertinent areas of medicine involved.

The physician may submit written comments or expert opinions to OPMC at any time.⁹ For this reason alone, it would be wise to locate and retain a medical expert, if appropriate, sooner rather than later.

Decision Required in 90 Days

Within 90 days of the interview, a decision must be made whether to convene an investigation committee on professional misconduct.¹⁰ It is only following the interview stage that the physician is entitled to receive a written notice of the issues identified.¹¹ If more than 90 days passes without a decision, BPMC must afford the physician another opportunity for an interview.

If, however, a decision is made to convene an investigation committee, a majority of the committee, together with the executive secretary, must vote whether a hearing is warranted.¹² If a majority does not concur, the physician should be notified that the investigation has concluded. If the committee votes that a hearing is warranted, OPMC is then directed to prepare charges, which must contain the substance of the alleged misconduct and a clear and concise statement of material facts, but not the evidence by which the charges are to be proven.¹³

The next step is the preparation of a notice of hearing, which must specify the time and place of the hearing, the physician's rights to be represented by counsel, to produce and cross-examine witnesses, and to file an answer up to 10 days prior to the scheduled hearing, and that a stenographic record of the hearing will be made.¹⁴

The notice of hearing and statement of charges must be served on the physician at least 20 days before the scheduled hearing.¹⁵ As such, physicians will frequently have less than three weeks to prepare their defense, which may include contacting witnesses and retaining experts to testify at the hearing. Again, this underscores the importance of engaging counsel at the first indication of an investigation.

Once the notice of hearing is served, an attorney working for OPMC acts as the prosecutor. After the hearing is noticed and charges are filed, there may be an opportunity to reach a settlement. However, physicians are advised that any settlement (called a consent decree) becomes a matter of public record.

If a settlement is not reached, the next stage in the process is the administrative hearing. The hearing committee is comprised of two physicians and one lay person which, with the assistance of an administrative officer, such as an administrative law judge (who rules on all motions and objections, but is not entitled to vote), determines whether the charges have been established by a preponderance of the evidence.¹⁶

The hearing must be convened within 60 days of

the service of charges, and the last day must be held within 120 days of the first hearing day.¹⁷ While conducted like a trial in a court of law, the parties are not required to adhere to the rules of evidence.¹⁸ After each side is afforded an opportunity to present its case, question and cross-examine witnesses and prepare proposed findings of fact and conclusions of law, a decision, referred to as a determination and order, must be issued within 60 days of the last hearing date.¹⁹

If the hearing committee determines that OPMC has sustained its charges, it will issue a penalty ranging from censure and reprimand to permanent license revocation.²⁰ The physician may also be required to pay an administrative fine and/or retain the services of an independent physician to serve as a "practice monitor."²¹ In almost all circumstances, the penalty becomes a matter of public record and can be accessed by anyone through the DOH's Web site.²²

The Appeal

If either the physician or OPMC is not satisfied with the findings of fact and conclusions of law or the penalty imposed, they can appeal to what is known as the Administrative Review Board (ARB), which is also part of the DOH.²³ The ARB will assess whether the determination and penalty are consistent with the findings of fact and conclusions of law and whether the penalty is appropriate.²⁴

The ARB can sustain the findings of the hearing committee or modify (in any way) those findings, and, unlike a traditional appellate process, a physician seeking a reversal or lesser penalty from ARB might actually face an increased penalty after going through the ARB process.

After the ARB issues its decision, the only remaining option for either physician or OPMC is to seek a judicial review of the decision.

Under New York state law, any judicial appeal of a physician discipline determination must be brought as an Article 78 proceeding before the Appellate Division.²⁵ The standard used by this court in considering any such appeal is whether the physician has a "substantial likelihood of success."²⁶ As a result, more often than not, the determination of the ARB is likely going to be upheld.

Advising Physician-Clients

The first thing to keep in mind is that BPMC places a significant emphasis on medical documentation and record keeping. If it is not written, BPMC presumes it did not happen. Accordingly, physicians should be counseled that any effort towards improving the quality of their progress notes will only inure to their advantage. This is a prophylactic measure worth remembering.

As soon as the physician is contacted by OPMC relating in any way to the care he renders to his patients, he must assume that he is under

investigation, and both physician and counsel should prepare accordingly and aggressively. Both must quickly ascertain the focus of the investigation and determine whether the medical records sufficiently support the physician's position.

Retaining the appropriate experts in a prompt fashion will better enable the physician to respond to the investigator's and consultant's questions at the interview, and if charges are ultimately made, counsel will be in a far better position to defend his client.

Lastly, during this entire process, careful attention needs to be paid to any and all responses made when answering questions on licensure applications and hospital and third-party payer credentialing applications, which inquire about professional misconduct investigations.

Physicians today are being bombarded with controversy, increased malpractice lawsuits, third-party payer audits followed by increasingly larger overpayment demands, and qui tam whistleblower litigation from disgruntled former employees. Many of these alleged aggrieved patients, payers and others also turn to OPMC to redress their grievances.

Accordingly, knowing how the OPMC process works, and mounting an early and effective defense, represents the best opportunity for surviving a professional discipline investigation and hearing with the client's license intact.

1. In certain instances, if DOH concludes that the physician is engaging in conduct that "constitutes an imminent danger to the health of the people," the physician's license can be summarily suspended. PHL §230(12).

2. PHL §230.

3. Educ. Law §§6530 and 6531.

4. Educ. Law §6530(2)-(6).

5. Educ. Law §6530(7), (9), (19), (27), (31), (32) and (35). See also, Educ. Law §6531.

6. PHL §230(10)(a).

7. PHL §230(10)(a)(iii).

8. Id.

9. Id.

10. Id.

11. Id.

12. PHL §230(10)(a)(iv).

13. PHL §230(10)(b).

14. PHL §230(10)(c).

15. PHL §230(10)(d).

16. PHL §230(10)(e), (f).

17. PHL §230(10)(f).

18. Id.

19. PHL §230(10)(g), (h).

20. PHL §230-a.

21. Id. and PHL §230(17).

22. There are exceptions. For example, violations of a minor and technical nature, which do not directly affect or impair patient health, can be resolved by an expedited hearing that may result in the issuance of an administrative warning that is confidential and not a matter of public record. PHL §230(10)(m) and Educ. Law §6510(2).

23. PHL §230-c.

24. PHL §230-c(4)(b).

25. PHL §230-c(5) and Educ. Law §6510(5).

26. Id.

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