

Disciplinary Actions Against Healthcare Providers - What are the Collateral Consequences, Including Managed Care, Medicare Action, Reporting and Others

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Former Member NYS Assembly

NYSBA Health Law Section

January 16, 2019

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**DISCIPLINARY ACTIONS AGAINST HEALTHCARE PROVIDERS
COLLATERAL CONSEQUENCES**

Panel

Moderator:

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Hon. Richard Brodsky - former Member NYS Assembly (1983-2010)

Douglas Nadjari - Partner, Ruskin Moscou Faltischek, P.C.

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NY State Professions

Title VIII NY State Education Law (Article 130)

General Provisions - Sect. 6500 *et seq.*

Professional licensing and regulation of practice is supervised by the Board of Regents, administered by Ed. Dept. assisted by a State Board for each profession

Ed. Dept. NY State Office of Professional Discipline (OPD) – professional discipline of Title VIII professionals except physicians, physicians assistants (P.A.), specialist assistants

NY State Dept. of Health Office of Professional Medical Conduct (OPMC)- prof. discipline of physicians, P.A., specialist assistants (see PHL sect.230)

Professional Misconduct Defined by Statute

Ed. Law Article 131-A misconduct defined as to physicians, P.A., S.A. (Ed. Law sect. 6530-6531)

PHL sect. 230 (OPMC statute)

Other Professions- misconduct definition: Ed. L. Article 130 General Provisions (Ed. L. sect. 6509) and Rules of the Regents 8 NYCRR 29.1, 29.2

Excerpt: BPMC Annual Report 2017, Executive Summary

“The State Board for Professional Medical Conduct (Board) was created by the New York State Legislature in 1976 and, with the Department of Health’s (DOH/Department) Office of Professional Medical Conduct (Office/OPMC), administers the State’s physician discipline program. Its mission is patient safety -- to protect the public from medical negligence, incompetence and other kinds of professional misconduct. The Board, through the OPMC, investigates complaints made against the over 112,500 physicians, physician assistants and specialist assistants, and prosecutes those charged with misconduct. It also monitors licensees who have been impaired or who have been placed on probation by the Board....”

BPMC 2017 (*excerpt*, BPMC Annual Report 2017)

“The Program achieved the following during 2017:

- The Board imposed 379 final actions. Of those, 78 percent (295) were serious sanctions, including the loss, suspension, or restriction of a physician’s medical license.
- The Office received 9,699 complaints, and closed 10,148 complaints. These closures include various administrative reviews, as well as full field investigations assigned to the Regional Offices and Investigative Units.
- 2,138 full field investigations were closed in 2017
- The average time to complete a full field investigation is 321 days
- The OPMC monitored 1,396 physicians, nearly the same as in 2016....”

Board for Professional Medical Conduct (BPMC)

Recent Statistics

2017 Annual report:

https://www.health.ny.gov/professionals/doctors/conduct/annual_reports/2017/docs/report.pdf

Collateral Consequences

Douglas Nadjari, Esq.

Ruskin Moscou Faltschek, P.C.

Andrew Zwerling, Esq.

Garfunkel Wild, P.C.

Impact of disciplinary action on physicians

Medical Society of the State of New York (MSSNY) role in physician discipline

Richard Brodsky, Esq.

former Member NYS Assembly (1983-2010)

Public Policy and Professional Discipline

striking a balance in protecting the public and the integrity of the profession

Is a replacement for the current system workable? What would it look like?

Is one being advanced?

A Tightening Noose: Collateral Consequences of Professional Discipline & other Catastrophic Events

*Presented to the
New York State Bar Association
Health Law Section
January 2019
By Douglas M. Nadjari, Esq.*

Smart Counsel. Straight Talk.

HEALTHCARE QUALITY IMPROVEMENT ACT OF 1996

Motivation for Legislation

- Dangerous & Incompetent physicians relocate easily
Angel of Death: Michael Swango, M.D.
60 deaths - multiple jurisdictions
- Rising number of malpractice cases & no corresponding increase in professional discipline
- Lawsuits quietly settled

What Must be Reported?

- Malpractice Judgments and Settlements
- Findings of Professional Misconduct
- Termination of Provider Agreements
- DQ/Exclusion from Medicaid & Medicare
- Hospital Adverse Actions for Professional Competence or Conduct that effect clinical privileges (and which last more than 30 days)
- Resignation in lieu of, during or to avoid hospital investigation
- Denial of applications for clinical privileges
- Healthcare or HC Audit related convictions

Mandated Reporters: Action by One May Trigger Action by All

- Hospitals
- Health Insurers
- Malpractice Carriers
- Peer Review Organizations
- State and Federal Prosecutors
- Licensing Boards
- OIG & OMIG
- Also available to credentialing entities

Collateral Consequences 2.0

- Actions by 3rd Party Pharmacy Benefit Managers
- DEA Surrender & Exclusion
- More vigilant Follow-up by Workers' Compensation Board
- Preclusion from on-line booking platforms

Proactive Strategies

Avoid Problems in the First Place

- The Hanging Trio*- Controlled Substances, Sexual Boundaries & Fraud
- Scope of Practice & Supervision
- Pain management and No-Fault
- Chaperones, Compliance Plans and Audits
- Medicaid Compliance & test audits

Proactive Strategies

Criminal Pleas: Explore non- healthcare and other offenses that will not trigger exclusion (Tax, FBR, Travel Act)

Medical Staff Proceedings:

- Timing of resignation or nonrenewal
- Negotiate or “suggest” wording of NPDB entry
- Counterstatements

OPMC

- Avoid Charges
- Explore N-Doc
- Pre-screen with OMIG
- Aggressive use of experts in investigative stage
- Due Process and vigorous hearing

Proactive Strategies

Termination of Provider Agreements

- Take it to hearing before peers

OMIG and OIG

- Explore lesser sanctions or early removal from excluded provider list

Malpractice Settlements

- Pay out of packet

Or ...

We shall go on to the end ... We shall fight on the seas and oceans ... We shall fight on the beaches, we shall fight on the landing grounds, we shall fight in the fields and in the streets, we shall fight in the hills; we shall never surrender.

Winston Churchill June 4, 1940

Questions

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Annual Meeting 2019
Health Law Section
January 16, 2019**

“The MSSNY/OPPC Relationship”

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MSSNY AND THE OPMC

**A Strong Collaborative Relationship
Forged By Shared Objectives**

EXAMPLES IN WHICH MSSNY AND THE OPMC ACT COLLABORATIVELY

- **Wellness and leadership programs for physicians**
- **Committee For Physician Health**

One Basis For The Perception Of Institutional Tension Lines

**MSSNY's Myriad Efforts To Ensure That The
Disciplinary Process Does Not Impose Outcomes That
Are Disproportionate To The Professional Misconduct
Alleged To Be Involved**

ONE EXAMPLE OF MSSNY EFFORTS TO STRIKE A PROPER MIDDLE GROUND

MSSNY's 2017 OPPOSITION TO BUDGET PROVISIONS DESIGNED TO INCREASE THE POWER OF THE DOH TO INVESTIGATE ALLEGED PHYSICIAN MISCONDUCT

EFFORTS BY MSSNY TO OFFSET THE COLLATERAL CONSEQUENCES OF OPMC SANCTIONS

250.995 OPMC and Medicaid:

MSSNY should encourage the Office of Medicaid Services to discontinue its policy of excluding physicians from its panel solely because they are on probation with the Office of Professional Medical Conduct. (HOD 2007-93; Reaffirmed HOD 2017)

175.972: OPMC Inform Physicians of Untended Consequences

Utilizing legislative, regulatory or other relief against the Office of Medicaid Inspector General, the Medical Society of the State of New York will seek a prohibition from removing a physician from the State Medicaid program solely on the basis that the physician entered into a consent order with the Board of Professional Medical Conduct. (HOD 2014-100)

EFFORTS BY MSSNY TO OFFSET THE COLLATERAL CONSEQUENCES OF OPMC SANCTIONS (CONTINUED)

175.979: consequences of Involuntary Termination of Medicaid Participation:

MSSNY will work with the New York State Office of Professional Medical Conduct (OPMC), the New York State Office of Medicaid Inspector General (OMIG), The Joint Commission, the Healthcare Association of New York State (HANYS) and the Greater New York Hospital Association (GNYHA) to remedy the situation where disciplined physicians are allowed by OPMC to retain their medical licenses but are effectively relieved of any ability to treat their patients because of the regulatory cascade imposed by OMIG, hospitals and third party payers. (HOD 2010-69)

EFFORTS BY MSSNY TO OFFSET THE COLLATERAL CONSEQUENCES OF OPMC SANCTIONS (CONTINUED)

175.980 Physicians as Medicaid Providers While in Supervised Recovery: MSSNY will:

1) request that the New York State Office of Professional Conduct (OPMC) and the New York State Office of the Medicaid Inspector General (OMIG) should work together cooperatively to permit physicians who are participating in a program of rehabilitation that includes practicing only in a monitored setting to maintain enrollment as a participating provider in the New York State Medicaid Program; and

2) urge the New York State OMIG to recognize the plan of rehabilitation developed by the OPMC and Committee for Physician Health to permit physicians to return to the practice of medicine in a monitored setting and reinstate such physicians in the New York State Medicaid Program. (HOD 2009-111)

MAXIMIZING PHYSICIAN INVOLVEMENT

230.999 Maximizing Involvement of Physicians and Physician Organizations in Review Process:

MSSNY is continuing to evaluate the physician discipline process as revised by Chapter 606 of the laws of 1991, and, if determined to be necessary, to make recommendations on additional legislative refinements that will further the principles of maximizing the involvement of licensed physicians and recognized physician organizations in the process pursuant to which professional conduct of physicians is reviewed, so as to expedite and simplify this process, thus making it more fair to the accused physician and to the public. (HOD 1991-9; Reaffirmed HOD 2014)

MAXIMIZING PHYSICIAN INVOLVEMENT

250.993: Physicians Serving on the OPMC Hearing Committee

MSSNY will seek legislation or regulation requiring that at least one of the two physicians serving on the hearing committee of the OPMC charged with the responsibility of listening to and reviewing written and oral testimony alleging possible physician misconduct, be in active practice and of the same or similar specialty of the physician being charged, thereby assuring that the physician in question is being truly evaluated and judged by his peers and that the facts, as presented, are reviewed based upon appropriate sound medical decisions. (HOD 2013-119)

PHYSICIAN PROFILE UPDATES

250.992 Amendment to OPMC Reporting Requirement Associated with Physician Profile Updates

Under New York State Law, failure of a physician to update his/her profile within six (6) months of license renewal, can be considered as professional misconduct and reportable to the OPMC for immediate action. The Medical Society of the State of New York will seek regulation/legislation to allow a 60-day grace period for physicians to comply after receipt of a warning letter, and if a physician still does not comply after the 60 days grace period, then and only then should it be considered a reportable event. MSSNY, county and specialty societies will immediately begin to notify their members about the importance and urgency of updating their individual profiles in a timely and expeditious manner.

In an effort to ensure that physicians comply with the requirement of updating their profile, MSSNY will request there be notification with a direct link to www.nydoctorprofile.com which must be completed prior to submission of the registration renewal when a physician renews his/her license online and for those physicians who may still renew their registration via paper, a copy of their updated profile must be included and sent together with the registration renewal. (HOD 2014-102)

OTHER MSSNY EFFORTS

250.991 Modernizing OPMC

The Medical Society of the State of New York will continue working with the New York State Department of Health and the Office of Professional Medical Conduct (OPMC) to educate physicians about the procedures and activities of the OPMC. MSSNY will seek to have any complaint that has been determined by OPMC to be invalid or dismissed after a period of two years expunged. (HOD 2018-61)

250.997 Changes to OPMC Procedures:

MSSNY will seek legislation and/or regulation which create a statute of limitations on all investigations and hearings of the OPMC. Such legislation will provide that any accused physician receive within a reasonable period of time, in advance of any interview, a copy of all documentary evidence (including expert witness reports) which can be admissible at any hearing of the OPMC and that the physician be informed of his/her right to bring counsel to an interview along with receiving a transcript of the interview. MSSNY support any changes designed to reform the activities of the OPMC which protect the public against incompetent and impaired physicians while protecting due process rights of such physicians. (HOD 2003-51; Reaffirmed HOD 2004-56, HOD 2006-77 & HOD 2007-92)