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OUTSIDE COUNSEL

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From 1996 through 2000, New York's Office of Professional Medical Conduct (OPMC) of the Department of Health (DOH) completed 30,010 investigations against doctors. Over 1,600 doctors were disciplined; others received administrative warnings or consultations. To assist attorneys representing doctors in the administrative context, this article outlines medical misconduct investigations and proceedings in New York.

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Education Law (EL) §§6530-31 define misconduct applicable to physicians. Public Health Law (PHL) §230 explains how the Board for Professional Medical Conduct (Board) functions and delineates misconduct proceedings. OPMC investigates physicians and physician assistants. Another arm of DOH, the Office of Professional Discipline, prosecutes other medical professionals.

Misconduct cases arise from any source, including patients and co-workers. Hospitals, among others, must report misconduct.[1] Once lodged with DOH, a complaint is assigned to an OPMC investigator, who may interview witnesses and request charts and files. The investigator must give the doctor an opportunity for an interview, at which defense counsel may[2] and should be present, before the case can be prosecuted.

An investigator who finds misconduct under EL §6530 presents the matter to an Investigation Committee of two doctors and a layperson, which decides whether a hearing is warranted. If the evidence does not support misconduct or is minor or technical, OPMC may close the case, issue an administrative warning[3] or require a doctor to consult a peer-review panel.

If the Investigation Committee approves the case for a hearing, the matter goes to the Bureau of Professional Medical Conduct (BPMC), OPMC's legal arm. BPMC may issue subpoenas before drafting charges.[4] Doctors may not resist subpoenas by asserting doctor-patient privilege. For in camera subpoena review in Supreme Court, the complaint must be "authentic and ... of sufficient substance to warrant investigation."[5] BPMC may not secure a warrant for patient records.[6]

Misconduct charges in EL §6530 may focus on the doctor's skill, such as practicing with gross negligence or incompetence, while impaired by physical or mental disability, or while under the influence of chemical substances. Charges may focus on a doctor's character and conduct, such as refusing treatment based on race or gender, evidencing a moral unfitness to practice, filing a false report, improperly revealing patient information, or abandoning or abusing a patient. Misconduct may be specific to a specialty, such as psychiatrist-patient sexual contact under EL §6530(44).

BPMC typically sends the doctor a draft of the charges to encourage early settlement. If no settlement is reached, BPMC selects a hearing date and serves a Statement of Charges and Notice of Hearing on the doctor at least 20 days before the hearing.[7] The charges must outline the alleged misconduct and state the material facts but not the evidence by which the charges may be proved.[8] The doctor must serve a written answer on BPMC at least 10 days before the hearing.[9]

Petitioner-BPMC and the respondent-doctor receive limited, reciprocal disclosure under 10 NYCRR 51.8: witness names, a list and photocopies of documentary evidence and a brief description of physical evidence. No formal motion practice, bills of particulars, depositions or interrogatories are available. Ordi-

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narily, a pre-hearing conference is held at which exhibits are marked, copies distributed and admissibility arguments made. To protect complaining witnesses from intimidation or threat, DOH cannot be compelled to produce investigative documents.[10] Only when the complainant testifies at the hearing must BPMC turn over the complainant's written statements for cross-examination.[11]

A closed investigation may be revived and prosecuted with current charges. Res judicata does not apply to closed matters.[12] Collateral estoppel and double jeopardy are inapplicable. Supreme Court may not bar a misconduct proceeding: "absent extraordinary circumstances, courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency."[13]

Misconduct hearings and administrative appeals are confidential. The doctor's patients may never know about closed or failed proceedings. Summary license suspensions under PHL §230(12) are an exception to the confidentiality rule. If the DOH Commissioner and a Board committee determine that the doctor has placed the public in imminent danger, the doctor's license is suspended immediately and a hearing must begin within 10 days.[14] Such DOH action may appear in the press. A doctor may challenge in Supreme Court a summary suspension that exceeds statutory authority or is not rationally related to the belief that the doctor places the public in imminent danger.[15]

On rare occasions, instead of undergoing a rushed summary suspension process, the doctor and DOH may enter into an Order of Condition, in which the doctor does not admit guilt but stops practicing throughout the regular disciplinary process.

The Hearing

A misconduct hearing is closed to the public, and strict rules of evidence do not apply.[16] The hearing is held before two physicians and a layperson, all Board members (Hearing Committee), and a DOH-appointed ALJ,[17] who does not participate in the determination, made by majority vote, but who rules on evidentiary questions and may preclude evidence for failure to disclose timely.[18]

Thorough preparation is essential. The doctor will be concerned with administrative penalties under PHL §230-a, which include censure and reprimand with or without a fine; license suspension, which may be stayed and imposed with probation and conditions such as monitoring and records review;[19] and license revocation and annulment. The doctor also will be concerned about service of the Hearing Committee's Determination and Order on the doctor's practice and insurance plans and where the doctor maintains hospital privileges.[20]

Additionally, the name of a doctor found guilty will appear in the National Practitioner Data Bank, where actions against licenses and malpractice findings are available to healthcare entities and licensing boards[21] but not the public. A final determination of misconduct will be posted on OPMC's Web site (www.health.state.ny.us) and in the (not yet created) physician profiles.[22] Misconduct findings also may impact malpractice actions at which, subject to PHL §10 and a proper foundation, plaintiffs may introduce misconduct findings relevant to factual issues.[23]

Misconduct charges in EL §6530 may focus on the doctor's skill, such as practicing with gross negligence or incompetence, while impaired by physical or mental disability, or while under the influence of chemical substances.

BPMC has the burden to go forward to prove its case to a preponderance of the credible evidence. Unlike in a civil matter, BPMC need not prove proximate cause or damages to prevail. Neither must it prove injury, as it would be "untenable" to wait for an injury if a doctor's behavior would "assuredly result in such injury."[24]

After the first day of the hearing, which often includes opening statements and the introduction of evidence, the matter may be adjourned for weeks. A reporter provides transcripts of each day's testimony. Under PHL §230(10)(f), the hearing must be completed within 120 days, except for good cause. Evidence going to guilt and punishment is introduced at the same hearing; there is no separate penalty phase. Doctors who do not testify are subject to an adverse inference.[25]

Summations are offered at the ALJ's discretion, but petitioner and respondent must submit proposed findings of fact and conclusions of law, with citations to the transcript. The Hearing Committee issues a written Determination and Order, drafted by the ALJ, which includes findings of fact, conclusions of law and any penalty.[26] In rendering its ruling, the Hearing Committee considers whether the doctor met the standard of the reasonably prudent physician in similar circumstances.[27]

A variation on the hearing process is the direct referral, in which BPMC need only offer documentary proof of the doctor's previous misconduct or criminal conviction from New York or elsewhere.[28] The defense may seek merely to mitigate the penalty by highlighting the doctor's character and work record, unless, for example, the out-of-state crime has no New York equivalent.[29] The underlying case may not be relitigated.[30]

Appeal and Review

Either party may pursue an Administrative Review Board for Professional Medical Conduct (ARB) appeal of the Hearing Committee's Determination and Order. ARB is composed of three physicians and two laypersons.[31] Administrative appeals are unavailable for summary suspensions.

An ARB appeal stays the Hearing Committee's Order unless a revocation, annulment or suspension without a stay was ordered.[32] The party seeking review must notify its adversary and ARB within 14 days of receiving the Hearing Committee's Determination and Order. The parties must submit briefs to ARB within 30 days of review-notice service. Responsive briefs are due within 7 days thereafter.

ARB hears no oral argument. Review is limited to whether the underlying determination and penalty adhere to the facts and conclusions of law below and whether the penalty was appropriate under PHL §230-a. ARB will issue a written decision on majority vote and may remand for reconsideration[33] or impose its own, possibly harsher, penalty.[34]

Following an ARB appeal, or instead of one, the doctor may petition the Appellate Division, Third Department, under CPLR Art. 78. The Attorney General will argue for the state. The Third Department may stay a penalty if it finds a "substantial likelihood of success."[35] The Art. 78 review standard is whether the determination violated lawful procedure; was affected by an error of law; or was arbitrary, capricious or an abuse of discretion.[36] The Third Department will consider whether the determination is "supported by substantial evidence" and whether the hearing procedure was "shocking or arbitrary."[37] Inconsistencies in evidence or conflicting testimony are exclusively for the Hearing Committee and, ultimately, ARB to resolve.[38] A penalty will be modified if it "so incommensurate with the offense as to shock one's sense of fairness."[39] After Art. 78 review, either side may seek leave to the Court of Appeals. A doctor who did not receive a full and fair opportunity to litigate under Art. 78 may then file a federal §1983 action.[40]

The Impaired Physician

Practicing while impaired by an addiction or medical condition is misconduct under EL §6530(7). A doctor who has not harmed a patient may surrender the license temporarily while undergoing treatment.[41] Confidential assistance is available through the NYS Medical Society's Committee for Physician Health. A temporary surrender is not an admission of disability or misconduct, but renders a license inactive. A temporary surrender bars a misconduct proceeding for impairment or substance abuse.

The hospital where the doctor maintains privileges and the Education Department's Division of Professional Licensing Services will learn of the "inactive" license. Patients need know only that the doctor has temporarily stopped practicing. Doctors may apply to the Board for reinstatement on sufficient proof that they are no longer incapacitated. A license may be restored with reasonable conditions, such as being mentored or monitored. A permanently incapacitated doctor may permanently surrender a license without admitting misconduct but may not seek reinstatement.[42]

Conclusion

As the public becomes more actively involved in healthcare, complaints against doctors are increasing. OPMC is responding. Summary suspensions rose from 23 in 1999 to 43 in 2000. The high stakes require that a doctor's counsel provide zealous representation.

(1) PHL §2803-e.
(2) PHL §230(10)(a)(iii).
(3) PHL §230(m)(ii).
(4) *Atkins v. Guest*, 607 NYS2d 655, 657 (1st Dept. 1994).
(5) PHL §230(1), (10)(k); *Mtr. of Levin v. Murawsi*, 59 NY2d 35, 38 (1983); *Mtr. of Bier v. Novello, NYLJ*, Oct. 6, 2000, at 27, col. 3 (Sup. Ct., NY Co.).
(6) *Mtr. of Shankman v. Axelrod*, 73 NY2d 203, 204 (1989).
(7) PHL §230(10)(d).
(8) PHL §230(10)(b).
(9) PHL §230(10)(c).
(10) *Mtr. of Anon. v. DOH*, 569 NYS2d 500, 501 (3d Dept. 1991).
(11) *Mtr. of McBarnette v. Sobol*, 83 NY2d 333, 341 (1994).
(12) *Lombardo v. DeBuono*, 650 NYS2d 423, 426 (3d Dept. 1996).
(13) *Doe v. St. Clare's Hosp. & Health Ctr.*, 598 NYS2d 253, 254 (1st Dept. 1993); accord *David v. Biondo*, 92 NY2d 318, 322 (1988); *Sherman v. OPMC*, 522 NYS2d 772, 775 (Sup. Ct., NY Co. 1987).
(14) PHL §230(12).
(15) *Mtr. of John P. v. Axelrod*, 61 NY2d 891, 892 (1984).
(16) Admin. Proc. Act §306(1); *Doe v. OPMC*, 81 NY2d 1050, 1052 (1993); *Mtr. of Ackerman v. Ambach*, 530 NYS2d 893, 895 (3d Dept. 1988), aff'd, 73 NY2d 323 (1989).
(17) PHL §230(10)(e).
(18) 10 NYCRR 51.8(b)(3).
(19) *Caselnova v. DOH*, 91 NY2d 441, 445 (1998).
(20) PHL §230(10)(h).
(21) 42 USC §1101 et seq.; 42 CFR 60.
(22) PHL §2995-a.
(23) *Maraziti v. Weber*, 713 NYS2d 821, 822 (Sup. Ct., Dutchess Co. 2000). A misconduct finding has no preclusive effect on a malpractice action. *Sanchez v. Orozco*, 578 NYS2d 145, 147 (1st Dept. 1991).
(24) *Mtr. of Morfesis v. Sobol*, 567 NYS2d 954, 956 (3d Dept. 1991).
(25) *Steiner v. DeBuono*, 657 NYS2d 485, 486 (3d Dept. 1997).
(26) PHL §230(g), (h).
(27) *Bogdan v. Bd. for Prof. Med. Conduct*, 606 NYS2d 381, 382 (3d Dept. 1993).
(28) EL §6530(9); PHL §230(10)(p).
(29) *Jacobs v. DeBuono*, 699 NYS2d 842, 843-44 (3d Dept.1999).
(30) *Mtr. of Singla v. DOH*, 646 NYS2d 421, 424 (3d Dept. 1996).
(31) PHL §230-c(2).
(32) PHL §230-c(4).
(33) Id.
(34) *Mtr. of Wapnick v. Bd. for Prof. Med. Conduct*, 611 NYS2d 41, 43 (3d Dept. 1994).
(35) PHL §230-c(5).
(36) CPLR 7803(3); *Mtr. of Finelli v. Chassin*, 614 NYS2d 634, 637 (3d Dept. 1994).
(37) *Reisner v. Bd. of Regents*, 535 NYS2d 197, 200 (3d Dept. 1988) (citing *Pell v. Bd. of Educ.*, 34 NY2d 222, 232 (1974)).
(38) *Mtr. of Spartalis v. Bd. for Prof. Med. Conduct*, 613 NYS2d 759, 761 (3d Dept. 1994).
(39) *D'Amico v. Comm'r of Educ.*, 563 NYS2d 326, 328 (3d Dept. 1990).
(40) *Hachamovitch v. DeBuono*, 159 F3d 687, 695 (2d Cir. 1998).
(41) PHL §230(13)(a).
(42) PHL §230(13)(b).