Defending Physicians Charged With Misconduct

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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.

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. 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 and should be present, before the case can be prosecuted.

An investigator who finds misconduct under EL §6530 presents the

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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. Only when the compliant testifies at the hearing must BPMC turn over the complainant’s written statements for cross-examination. A closed investigation may be revived and prosecuted with current charges. Res judicata does not apply to closed matters. 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.”

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. 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.

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. The hearing is held before two physicians and a layperson, all Board members (Hearing Committee), and a DOH-appointed ALJ, 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. Thorough preparation is essential. The doctor will be concerned with administrative penalties under PHL §220-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, 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.

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 but not the public. A final determination of misconduct will be posted on OPDC’s Web site (www.health.state.ny.us) and in the (not yet created) physician profiles. Misconduct findings also may impact malpractice actions at which, subject to PHL §10 and a proper foundation, 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.

Summation statements 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. In rendering its ruling, the Hearing Committee considers whether the doctor met the standard of the reasonably prudent physician in similar circumstances. 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. 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. The underlying case may not be relitigated.

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.

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. 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. 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 or impose its own, possibly harsher, penalty.
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." 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. The Third Department will consider whether the determination is "supported by substantial evidence" and whether the hearing procedure was "shocking or arbitrary." Inconsistencies in evidence or conflicting testimony are exclusively for the Hearing Committee and, ultimately, ARB to resolve. A penalty will be modified if it "so incommensurate with the offense as to shock one's sense of fairness." 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.

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. 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 mentoried or monitored. A permanently incapacitated doctor may permanently surrender a license without admitting misconduct but may not seek reinstatement.

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.