

BEWARE OF, AND BE READY FOR, THE NEW, STRONGER, OFFICE OF PROFESSIONAL MEDICAL CONDUCT

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In announcing the recent “landmark” empowerment of the Office of Professional Medical Conduct (“OPMC”), Governor David Paterson described new legislation as bringing “important changes to our system of disciplining physicians ensuring that cases of misconduct are uncovered, reported and acted upon.”¹

To achieve such goals, the new law dramatically strengthens the State of New York’s ability to discipline physicians by mandating the following:

- That in circumstances where the Investigation Committee of OPMC votes to serve charges upon a physician, then the OPMC must make those charges public five business days after they have been served upon the licensee. Even in cases where the OPMC does not vote unanimously to proceed with a hearing, the law allows a committee of OPMC to decide whether or not such charges should be made public.
- That physicians are required to more regularly update their physician profiles which contain information such as educational background, practice area, and legal actions (which are available to the public at www.nydoctorprofile.com) by making these updates a condition of re-registration and failure to do so shall constitute misconduct.
- That OPMC, in certain circumstances, can obtain a physician’s own personal medical records if there is reason to believe that he or she may be impaired by alcohol, drugs, physical disability or mental disability or has a medical condition that may be relevant to an inquiry into a report of a communicable disease.
- That DOH disclose information to the public as needed regarding public health threats that come to light in the course of an OPMC investigation, notwithstanding otherwise applicable confidentiality provisions.
- That DOH direct a physician to cease any activity uncovered during a communicable disease investigation that constitutes an imminent danger to health.
- That OPMC continuously review information regarding medical malpractice claims and payouts for new cases of misconduct.
- That referrals to OPMC be increased by requiring health plans and managed care organizations to report the termination of a physician contract premised on impairment or misconduct and require courts to report sentences imposed against physicians for criminal activity.
- That the Board has the authority to require an impartial evaluation of a physician’s competency when called into question.

¹ See http://www.state.ny.us/governor/press/press_0623082.html, referenced on September 7, 2008.

The bill also addresses communicable diseases and infection control by increasing the State's ability to obtain and disseminate information (and thereby enhance enforcement) through:

- Facilitating communicable disease investigations by providing that if a physician "fails to respond" to communications, or provide records requested by the State or local health department in conjunction with such investigation, that failure shall constitute professional medical misconduct - and may well be cast as criminal conduct.
- Requiring physicians who practice in certain office-based surgery settings to report the transmission of health care disease upon learning of the transmission.

Clearly, this dramatic expansion of the powers and purview of OPMC can only result in a similar, and equally dramatic, rise in the number of investigations, actions and disciplinary sanctions against physicians across the state of New York. In response, every physician should come to realize certain new realities of the practice of medicine.

- Every aspect of a physician's professional life is interwoven with OPMC
- Every "inquiry" is an investigation
- Every investigation is subject to disclosure
- Every investigation carries inherent, and potentially devastating, risk

In response to such harsh realities, every physician must employ, and rigidly adhere to, certain basic measures – each while armed with the benefit of and supervision by healthcare counsel whose experience in OPMC has been vetted and verified:

- Never reply to a demand for medical records without first reviewing the records at issue
- Never "amend", "correct", "augment" or otherwise alter a medical record
- Never speak to any investigator regardless of source, investigating agency or claimed nature of the inquiry
- Never attend a hospital or non-OPMC agency proceeding without proper efforts in preparation

Faced with the ever increasing level of scrutiny, and the rapid progression of OPMC from an administrative agency to a law enforcement entity, physicians need to realize that the risk of a medical malpractice claim (for which they hold insurance coverage) pales by comparison to the risk of having their license damaged and their career thereby destroyed.

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