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Discipline Process Is Under Review

Rights of licensees and powers of state board are among issues raised in courts and legislative reforms.

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ANYONE who represents physicians in matters under investigation by the State Board for Professional Medical Conduct is aware of how stressful these proceedings can be for clients, as well as counsel. The stakes are as high as they get. A client's lifetime of training and ability to support himself and family is on the line. Accordingly, it is worthwhile to review recent decisions and legislative proposals, which may affect this practice area. This article is designed to briefly review the structure within which these investigations are conducted, legislative reforms under review and recent cases of note.

An overview of the process is appropriate at the outset. The New York State Department of Health's Board for Professional Medical Conduct (BPMC) is authorized to receive and resolve complaints of misconduct concerning physicians, physicians' assistants and specialist assistants licensed in New York.[1] All other health care professionals are licensed and disciplined by the State Education Department.

The BPMC conducts investigations and hearings, makes final determinations in matters where specifications of professional misconduct are brought, and imposes penalties when findings are sustained. The board conducts these misconduct hearings by its committees on professional conduct (hearing committees). These committees consist of three persons — two physicians and one layperson[2] — and are presided over by an administrative law judge. Hearsay is admissible and the strict rules of evidence are not applicable.

The Office of Professional Medical Conduct (OPMC) and its staff, carry out the objectives of the board and is the office responsible for conducting investigations, prosecuting complaints before the hearing committees and monitoring practices. The role of the board and OPMC are defined in Public Health Law §230, and the definitions of professional misconduct are at §§6530 and 6531 of the Education Law.

The board is required to investigate all complaints it receives concerning allegations of professional misconduct by licensees and receives more than 6,000 such complaints annually.[3] The licensee must be afforded an opportunity to be interviewed by OPMC in order to provide an explanation of the issues under investigation.[4] After the investigation is concluded, if the director of OPMC, with the concurrence of an investigation committee, and after consultation with the executive secretary of the board, determines that a hearing is warranted, OPMC counsel is directed to prepare charges.[5] A majority of the cases do not proceed to hearings, as they are resolved by consent agreement. The possible sanctions which may be imposed on licensees, either by consent agreement or determination after hearing, range from license revocation to censure and reprimand.[6] Minor violations are resolved by non-disciplinary administrative warnings.

A licensee has certain obligations with respect to action by the board, and failure to meet those obligations can subject one to action by the board. For instance, failure to comply with an order of the board is itself misconduct.[7] A licensee is also required to cooperate with an investigation by the board, and failure to cooperate may result in an enforcement proceeding, and may also constitute professional misconduct.[8]

Licensees, as well as other identified individuals and groups, which include the Medical Society of the State of New York, The New York State Osteopathic Medical Society, every county medical society, physicians' assistants, specialist assistants, dentists, dental hygienists, pharmacists, LPNs, RNs, the CEO, chief of the medical staff and department chair of every Article 28 facility in the state are obligated to report to the board any information which reasonably appears to show that a licensee is guilty of professional misconduct.[9]

Physicians who fail to report misconduct, when required to do so, may also be subject to professional misconduct proceedings themselves. Hospitals and other facilities are also required in New York to report any diminution of employment or professional privileges and/or information, which

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reasonably appears to show that a physician is guilty of professional misconduct.[10] Even with mandatory reporting requirements, more than half of the complaints received by the board are from the general public, namely patients.[11]

Although most charges are resolved by consent agreement, for those which go to a full hearing, the determination of the hearing committee is deemed a final administrative determination. Thus, the licensee can pursue an Article 78 proceeding directly to the Supreme Court, Appellate Division, Third Department.[12] While not required, either party may also seek administrative review by the Administrative Review Board (ARB), prior to going to the Appellate Division.[13] While the ARB is bound by the record developed at hearing, they have the ability to modify the penalty imposed.

Legislative Reform Measures

The process by which complaints of professional misconduct are handled in this state has been the subject of reform legislation for several years. In 2004, both houses of the Legislature passed such legislation, which was ultimately vetoed by Governor George E. Pataki.[14] But similar legislation is expected to be introduced this year.

Several provisions of the legislation passed last year would have provided additional due process rights to licensees, who are the subject of complaints. These would include the right to more detail of the allegations under investigation when considering whether to be interviewed by OPMC, and the rights to stenographically record the interview, obtain a copy of the investigator's report and receive advance notice of information concerning expert witnesses. The licensee would also have been permitted to appear before the investigative committee that is considering whether to initiate misconduct charges, similar to the right of the subject of a criminal grand jury investigation.

The legislation would have also allowed licensees, who have lost their license, to reapply to OPMC to re-open a case when new evidence, which would have produced a different result, becomes available and limit the discretion of the ARB to modify discipline imposed by a hearing committee and reinstate dismissed charges.

Interestingly, two provisions, which were contained in prior versions of this legislation, were omitted in the one that was passed last year. First, it would have changed the standard of proof in board proceedings from a "preponderance of the evidence" to the higher "clear and convincing" standard. Second, it would have created a statute of limitations in discipline cases when currently there is none. There is good reason for the governor, the legislature and all interested parties to come together, agree upon and implement these reforms.

Cases of Note

In 2004 and the early part of 2005, there have been a number of cases decided, which concerned issues involving BPMC prosecutions and investigations, which are worth noting. They have particular effect on the power of OPMC to gain access to licensee records, to make discipline actions public and to consider the interplay between criminal prosecutions and OPMC investigations.

The New York Public Health Law[15] permits the director of OPMC to authorize a comprehensive medical review (CMR) of patient and office records of a licensee under circumstances detailed in the statute. Licensees also have an obligation to cooperate with an investigation by OPMC.[16] The executive secretary of the board, likewise, has the authority to issue subpoenas for records relevant to an investigation.[17]

These provisions were all brought to a head in the case of *Michaelis v. Graziano*.[18] After commencing an investigation and interviewing the physician in question, OPMC initiated a CMR of his patient records. The physician originally agreed to participate in the review, but prior to its commencing, changed his mind and sought an order to annul the CMR Order. He took the position that the board must issue a subpoena for such records.

The Third Department disagreed and ordered the physician to comply with the CMR. The court, while acknowledging the executive secretary of the board's subpoena power over such records, held that the statute's grant of authority to order a CMR did not require a subpoena. To require a subpoena by the board secretary, in these circumstances, the court reasoned, would "make the director's CMR power superfluous."[19] The court reaffirmed, as well, that a licensee's failure to cooperate with a valid CMR can itself be professional misconduct.[20]

One should not, however, conclude that the board has unfettered authority to use its subpoena power in the proverbial fishing expedition. In *Anonymous v. Novello*,[21] decided in December of last year, the Appellate Division, Second Department, sustained the Supreme Court's order quashing, in large part, the scope of a subpoena issued to a licensee for records in the course of an investigation being conducted, based upon a confidential complaint. The court found that the records sought were not related to the complaint being investigated, "but instead sought general information regarding any possible other wrongdoing…."[22]

In a reminder that a licensee has an obligation to cooperate with board investigations, the Third Department, early this year, sustained a license revocation for a physician who, among other things, willfully refused to sign a release for his medical school records, as requested by the board.[23]

The physician's contention that he was relieved of any obligation regarding the records, as they were in the control of the foreign medical school he attended, was rejected out of hand, and the ARB's determination that his conduct was part of his "repeated fraudulent conduct to conceal information,"[24] was sustained. He was found to be in violation of his obligation "to make available any relevant

records with respect to any inquiry or complaint about the licensee's professional misconduct."[25] It is worth noting that the court also sustained the ARB's use of an adverse inference against the physician based on his decision not to testify regarding the charges.[26]

Findings of professional misconduct, whether after a hearing or as a result of a consent agreement, are published on the state Department of Health's Web site,[27] which can be accessed by the general public. The DOH takes the position that it is appropriate to publish the complete text of final determinations and orders, including those charges which may have been dismissed when others were sustained. A physician who was cleared of all serious allegations of misconduct, but found guilty of one minor charge unrelated to the others, objected to the publication of all the facts and charges on the DOH Web site.[28]

The Court of Appeals found in favor of the physician and held specifically that "the statutes governing physician disciplinary proceedings require confidentiality, even after the termination of the proceedings, where no charge against the doctor is sustained."[29] The Court further noted that in the instant case, where only one charge was sustained, the department had an obligation to separate it from the dismissed charges and only make public the former.[30]

The Court's holding concerning the obligation to redact dismissed charges was not absolute. In some instances, the department would be justified in refusing to redact, according to the Court.[31] While the Court of Appeals resolved the issue of publishing determinations after hearing, left unresolved was the question as it related to consent agreement settlements between licensees and the board. In March of this year, a New York Supreme Court justice indicated that such agreements would be handled in the same manner as hearing determinations.[32]

In an interesting intersection of a criminal case and an OPMC investigation, an attempt to stay the automatic sealing of the records of a defendant's acquittal, in order to assist OPMC in a subsequent investigation of the same allegations, was prevented by the Appellate Division, First Department.[33] The physician/defendant was acquitted of one count of sexual abuse in the third degree and, upon oral application of the prosecutor, the trial judge stayed the sealing of the record for 30 days, and the matter was referred to OPMC. When the People sought to extend the stay in light of an ongoing OPMC investigation, the trial judge again extended it.

The First Department reversed, nunc pro tunc, as of the date of the acquittal, and noted that "the OPMC has sufficient information to conduct a thorough investigation, including interviews with defendant and access to the person alleging the sexual misconduct."[34] It should also be noted that OPMC has specific authority to refer evidence of criminal conduct to law enforcement, even when they take no action.

A decision from January of last year reminded attorneys, who represent physicians holding licenses in multiple states, that action in one state with respect to their client's license can, and oftentimes does, have adverse effects in New York. In *D'Ambrosio v. Department of Health of the State of New York*,[35] the physician was charged in Nevada with various counts of professional misconduct with respect to his medical practice. Since the physician had already moved his practice to California, he, apparently on the advice of counsel, voluntarily surrendered his Nevada license, thus ending the proceedings in that state.

The surrender of a medical license in another state to avoid disciplinary charges in that state concerning allegations which, if committed in New York, would constitute misconduct will subject the licensee to charges in New York in what is called a referral proceeding.[36] In a New York referral proceeding in *D'Ambrosio*, the physician was charged with misconduct stemming from his voluntary surrender of his Nevada license.

The Hearing Committee dismissed the charges due to a lack of evidence that the physician had actually committed the acts alleged in Nevada. However, the ARB overturned the dismissal stating that the physician's voluntary surrender to avoid litigation of the charges raised the inference that the charges, in fact, had merit. The physician appealed the determination, and the Third Department affirmed the ARB decision. The physician appealed to the Court of Appeals, and the Court ultimately upheld the proposition that proof of guilt is not required as a prerequisite to a finding of misconduct in a referral case.[37]

Changes in the way that professional misconduct cases are investigated and prosecuted in this state are likely to continue to occur, resulting from legislation or court decisions. Counsel who represent physicians in these matters need to keep apprised of these changes and also consider advocating for changes which would provide increased due process for their clients.

1. PHL §230.
2. PHL §230(6).
3. PHL §230(10)(a)(i).
4. PHL §230(10)(a)(iii).
5. PHL §230(10)(a)(iv).
6. PHL §230-a.
7. Education Law §6530(15).
8. Education Law §6530(28).
9. Public Health Law §230(11).
10. Public Health Law §2803-e.
11. BPMC – 2001 Annual Report.
12. PHL §230-c(5).
13. PHL §230-c(1).
14. S. 4148A (Hannon) and A. 4274B (Gottfried).
15. PHL §230(10)(a)(iv).
16. PHL §230(10)(o).
17. PHL §230(10)(k).
18. 786 N.Y.S.2d 461 (2d Dept. 2004).
19. Id. at 464.
20. Id. (citing Educ. Law §6530(15)).
21. 787 N.Y.S.2d 379 (2d Dept. 2004).
22. Id. at 381.
23. *Kleinplatz v. Novello*, 788 N.Y.S.2d 505 (3d Dept. 2005).
24. Id. at 507.
25. Id. (citing Educ. Law §6530(28)).
26. Id. At 507.
27. www.health.state.ny.us
28. *Anonymous v. Bureau of Professional Medical Misconduct*, 2 N.Y.3d 663 (2004).
29. Id. at 671.
30. Id.
31. Id. at 671.
32. *Anonymous v. Commissioner of Health*, 2005 WL 55179 (Sup. Ct. New York Co.) (citing 10 NYCRR §51.10(b)).
33. *People v. Anonymous*, 776 N.Y.S.2d 282 (1st Dept. 2004).
34. Id. at 284-285.
35. 3 A.D. 3d 706, 769 N.Y.S.2d 917 (3d Dept. 2004).
36. PHL 6530(9)(d).
37. 4 NY3d 133 (2005).