

Legal Q/A

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Q: *I've heard that new legislation has changed the procedures for disciplinary actions by OPMC. What are those changes and how might they impact physicians?*

A: Yes, indeed, there are major changes in the law that was signed by Governor Paterson on August 5, 2008. For years, the legal framework for disciplinary actions by the Office of Professional Medical Conduct (OPMC) has been fraught with gaps in its procedures, and at least according to other government agencies and consumer groups, lacking in sufficient enforcement authority. The new law enacts tougher enforcement procedures against physicians who engage in professional misconduct while ensuring appropriate due process for physicians. In addition, it is the intent of the legislature to help patients become better informed consumers about the quality of the physicians who treat them, by making information about particular professional misconduct proceedings available to consumers.

Allegations of suspected professional misconduct by physicians, physician assistants and specialist assistants are investigated by the OPMC and can

lead to charges being filed against a licensee by the State Board for Professional Medical Conduct (Board). Licensees are entitled to a full due process hearing, and the findings of fact and conclusions of law from the hearing may be reviewed by the Administrative Review Board (ARB), and are subject to judicial review. Although OPMC was generally able to obtain information protected under HIPAA, it could not obtain such information, absent a court order, when the patient whose records were needed was the physician under investigation, and there were allegations that the physician might be impaired by alcohol, drugs, physical disability or mental disability. The new law permits a Committee on Professional Conduct to serve as an "administrative tribunal" and to issue an order permitting OPMC to obtain a physician's medical records if the Committee has reason to believe the physician may have such an impairment or when there is concern about possible transmission of a communicable disease.

Current OPMC regulations require service of charges and a notice of hearing upon a physician, but are silent as to when the charges of professional misconduct are made public, and the Court of Appeals has held that absent clear statutory direction, charges in physician

disciplinary hearings should not be made public until they are finally determined. In many cases it could take months for a case to be resolved, and patients therefore were not able to access any information about the charges.

The new legislation provides that the charges in misconduct proceedings will be made public five business days after they are served upon the physician, and requires that there be a statement advising that the charges are allegations which may be contested by the licensee in a hearing. However, charges will be made public only if the investigation committee is unanimous in its concurrence that a hearing is warranted or, in cases when the investigation committee is not unanimous in such concurrence, if all of the committee members vote in favor of publication. It is highly debatable whether public disclosure of mere *allegations* of professional misconduct enhances consumers' information about the quality of care available from their physicians.

Current law does not permit publication of the Committee's findings, conclusions, determination and order unless the order mandates the annulment, suspension without stay, or revocation of the license. The new law permits publication upon issuance in all misconduct cases, but requires that publication include a statement advising that the further review of the order may be sought.

There are several provisions giving physicians greater due process rights than before. During the investigation stage, the OPMC must give the physician an opportunity to be interviewed in order to provide an explanation of the issues under investigation. The new law requires that prior to the interview the OPMC must furnish written notice to the physician (1) describing the issues relating to the conduct that have been investigated, (2) the time frame of the conduct under investigation, (3) the identity of each patient whose contact or care by the physician is relevant to the investigation, and (4) the fact that the physician may be represented by counsel and may be accompanied by a stenographer to transcribe the proceeding. The law does not, however, change the current policy of keeping the identity of the complainant confidential.

In the past, the OPMC was not required to disclose evidence that might tend to favor a finding of innocence on the part of the physician. Now, the OPMC must disclose all exculpatory evidence in its possession before any formal hearing is conducted.

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