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MEDICAL/LEGAL NEWSLETTER

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WHAT'S ON THE OPMC RADAR SCREEN?

Two of the greatest fears for practicing physicians are getting sued for malpractice and being investigated by the Office of Professional Medical Conduct (OPMC) for misconduct. Both can have severe consequences, but an OPMC action can often signal the end of a physician's professional career since it directly affects the license to practice medicine.

Professional misconduct is defined in 47 separate categories under the Education Law -- covering everything from professional competency to improper advertising practices to fee-splitting. What kinds of misconduct most frequently result in disciplinary actions by OPMC and are there types of conduct or business relationships that might not be readily apparent as improper but which have been on the OPMC radar screen? We decided to find out.

We recently completed a research project in which we analyzed over 2000 disciplinary cases decided by OPMC from 1997 through 2003. The cases are readily available for review by the public at the OPMC website. In many cases, OPMC brought multiple charges of professional misconduct against physicians, but our survey results only report charges to which the physician either pleaded guilty or was adjudicated as guilty by OPMC after the conclusion of formal proceedings (although OPMC also disciplines physician assistants and specialist assistants, only a relatively few cases involved them).

The results of the survey were interesting and enlightening. Here's the list of the top 10 causes of OPMC sanctions (the numbers in brackets represent the number of physicians disciplined during the period 1997-2003):

1. License revocation or suspension or similar disciplinary action from another state resulting in action against the physician's New York license (821)

2. Being found guilty of improper professional practice or professional misconduct by another state disciplinary action where the conduct would constitute professional misconduct in New York (553)

3. Practicing negligently on more than one occasion (441)

4. Conviction of a crime under any State or Federal law (404)

5. Failing to maintain medical records for each patient (326)

6. Practicing the profession fraudulently or beyond its authorized scope (237)

7. Conduct in the practice of medicine which evidences moral unfitness to practice medicine (186)

8. Practicing with gross negligence on a particular occasion (156)

9. Practicing with incompetence on more than one occasion (147)

10. Willfully making or filing a false report or failing to file a report required by law or by the Department of Health or Education Department (138)

Let's take a closer look at a few of these categories. By far the most common reason for OPMC action is when another state has already taken disciplinary action against the physician who happens to also be licensed in New York. The physician who loses his or her license in another state will suffer a similar fate in New York.

A conviction of any act constituting a crime under New York or federal law is also a basis for disciplinary action. Even a misdemeanor conviction, such as DWI or petit larceny, is a sufficient basis for OPMC action, although whether it leads to any disciplinary action, and the type of sanction that might be levied,

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will depend on the particular facts and circumstances in each case.

Failing to maintain medical records for each patient seems straightforward enough. Most of these cases involved inadequate records rather than the lack of any records. However, quite a few cases involved physicians who wrote prescriptions as a favor for friends or relatives (or for themselves) without a physical examination of the patient and therefore without a medical record to support the need for the prescription.

Many physicians have been snagged by willfully making or filing a false report or failing to file a report required by law or by the Department of Health or Education Department. It is not just a report that must be filed by law or a regulatory body that is covered by this section – any false report can lead to a violation of the misconduct statute. For example, many physicians have been disciplined for providing false or incomplete information on hospital employment and medical staff credentialing applications. Whether the physician is submitting a form to a hospital or an insurance carrier, the law requires that it be accurate and complete.

Other types of misconduct that resulted in relatively large numbers of disciplinary actions were: violating any term of probation or condition or limitation placed on the physician (72); habitual drug or alcohol abuse (71); willfully or negligently violating laws affecting the practice of medicine (69); and ordering excessive tests or treatment not warranted by the condition of the patient (68).

It is not always self-evident that certain conduct involves a violation of a law or regulation affecting the practice of medicine. Under this standard, many professional corporations have been dissolved by the State for failure to redeem the stock owned by a physician within six months after the physician's date of death or disqualification to practice medicine as required by statute. The lesson here is particularly important for single shareholder professional corporations: there should be a plan for the sale or perpetuation of the practice after death, otherwise there is a real risk that the State will close it down, resulting in a loss of value to the physician's estate. Physicians have also had their medical licenses suspended for failing to repay student loans.

Disciplinary sanctions for giving or receiving kickbacks (18) and fee-splitting (5) were fewer than anticipated given the amount of attention to those matters in the press and from government pronouncements; however, the types of specific conduct involved demonstrate the willingness of OPMC to interpret the misconduct statute as broadly as possible. For example, a physician who practiced nonconventional medicine was found guilty of improperly receiving payments from a third party for referrals where the physician prescribed nutritional supplements which were exclusively sold by a company in which he had an interest and from which he received consideration in the form of promotion of his medical practice. The case offers an important lesson for practitioners who may be branching out into alternative forms of treatment, especially those that are not limited to licensed physicians. OPMC found:

> "…that the conduct amounted to a conflict of interest which was contrary to accepted standards of practice. The prescribing of supplements sold exclusively by a company in which the practitioner has an interest is inherently forbidden. The claim by the [physician] that he never made any profit from this practice is irrelevant."

In many cases, a single act of misconduct can lead to multiple charges by OPMC. The physician who is convicted of failing to file income tax returns and does not disclose the conviction on a credentialing application may face OPMC charges due to the criminal conviction, willfully violating a law regulating the practice medicine, and filing a false report.

"Many physicians have been disciplined for providing false or incomplete information on hospital employment and medical staff credentialing applications"

THE SNDA: A WHAT?

If you rent your office, it's probably happened to you. On a Thursday afternoon your landlord, who is the process of getting a mortgage, drops off a document that the lender *must have signed* before the loan can close. The landlord tells you that you're obligated to sign and assures you that it's a routine document that all of its tenants have signed. You read the document which is called a "Subordination, Non-Disturbance and Attornment Agreement" or SNDA, and, frankly, can't make heads or tails of it. You send it to your lawyer.

An SNDA is actually three agreements in one. The "subordination" portion assures that the lender's lien on the property is superior to the lien of your lease. Once the lender's lien is superior, in the event of a foreclosure the lender may eliminate all junior liens, including your lease. Most lenders insist that their loans be a "first lien" and most landlords appreciate that their property will be more valuable and more attractive to lenders if all of their leases are subordinate to subsequent mortgages.

"A non-disturbance agreement permits the lease to stay in force so long as the tenant is not in default. So even though the lender may have the right to terminate your lease on a foreclosure, it agrees not to do so if you are not in default under your lease."

However, lenders also need another agreement along with subordination, to assure that tenants can't walk away from their leases in the event of a foreclosure. This agreement is called an "attornment." The attornment agreement creates a contract between the tenant and the lender under which the tenant agrees it will recognize the mortgagee as landlord. In other words, if the lender forecloses, the lender – or a purchaser in a foreclosure – will step into the shoes of the landlord under the lease.

This all sounds rather one sided. What protects the tenant? The agreement that protects the tenant is called a "non-disturbance." A non-disturbance agreement permits the lease to stay in force so long as the tenant is not in default. So even though the lender may have the *right* to terminate your lease on a foreclosure, it agrees not to do so if you are not in default under your lease.

Are you obligated to sign an SNDA? Probably. It is likely that your lease requires you to subordinate to lenders of the landlord. However, your lease also should require the lender to provide a non-disturbance agreement as a condition to the subordination. Even if the lease does not, it is routine for a tenant to request, and receive, a non-disturbance agreement.

Do you need to negotiate the terms of the SNDA? It depends. If there are unique circumstances an SNDA may need to be crafted to fit them. For example, if signing a lease for a space that is under construction or requires substantial repairs or renovation, the SNDA should include a provision requiring the mortgagee to complete any unfinished construction begun by the landlord as a pre-condition to collecting rent. (Many subordination agreements excuse lenders from this obligation, and tenants should watch for this language in their lease forms.)

Although in the long run you are better off having a landlord who pays its bills, you can obtain some protection from an unpaid lender by insisting on a non-disturbance agreement.

CMS' Recovery Audit Initiative (RAC): New York Physicians on the Rack

The RAC is not a medieval torture device, but is just one more burden New York physicians, hospitals and other suppliers and providers will have to live with for the next three years. The Centers for Medicare and Medicaid Services ("CMS") has announced a three year Recovery Audit Contractor ("RAC") initiative that will impact physicians and other providers in California, Florida and New York.

The Medicare Prescription Drug, Improvement and Modernization Act of 2003 authorized the RAC initiative as a way of (1) identifying underpayments and overpayments and (2) recouping overpayments. The CMS bulletin announcing the RAC initiative noted that claims payment error rates of between 6% and 10% have been identified in annual studies of the Medicare program and that in the last two fiscal years "billions of dollars" have been inappropriately paid out by Medicare.

Recovery audit contractors are private companies that will contract with CMS to conduct analyses and audits of claims beyond those conducted by Medicare carriers. The RAC audits are intended to supplement, not replace the traditional carrier audits. The RACs will request claim history and medical records, if necessary, to determine if over or underpayments exist.

Connolly Consulting has been awarded the New York State audit contract. In a March 28 release CMS stated that the present RAC contracts will focus on Part A Medicare claims and exclude E&M services. However, other physician services are expected to be included within the scope of the audits.

"Somewhat ironically, RAC contractors will be paid based on a contingency fee basis: the more overpayments the RAC contractors can identify and collect, the more compensation they earn."

Somewhat ironically, the RAC contractors will be paid on a contingency fee basis: the more overpayments the RAC contracts can identify and collect, the more compensation they ear. Why is this ironic? Because in the 1990's CMS and the Office of Inspector General discouraged providers from paying their Medicare billing services and consultants on a contingency fee basis because they feared percentage payments tempted billers and consultants to recommend inflated charges. On the margins, might a RAC contractor be more likely to find an overpayment under a contingency fee arrangement than if it was paid on a flat fee basis?

Recovery of any overpayment through a RAC audit does not preclude further investigation or prosecution of fraud and abuse claims by Office of Inspector General or other enforcement authorities. On the positive side, providers may appeal negative determinations to their local carriers and, if underpayments are identified in connection with the audit, the RAC contractor will forward that information to the carrier for processing and payment.

The demonstration project will begin this month and continue for three years. Both the AMA and MSSNY have stated that they will monitor the project to assure that it is implemented fairly. The RAC initiative is just one more reason why physicians must make sure that they are billing and coding correctly.

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