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The Physician as "Enemy Combatant": The New York's One-Sided System of Physician Discipline

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The Office of Professional Medical Conduct ("OPMC") is the arm of the New York State Department of Health ("DOH") that is responsible for policing the medical profession and meting out professional discipline. Its jurisdiction mandate requires it to investigate nearly every complaint, including those alleging sexual boundary violations, negligence, incompetence, physical or mental impairment, drug or alcohol abuse and fraud. An OPMC investigation is fraught with danger and the imposition of any discipline may, without exaggeration, be the death-knell of a physician's career. The process is fraught with danger and physicians should be aware of how the system works and the simple measures they may take to protect themselves.

Since 2001, legal experts have debated the lack of due process afforded to those labeled as "enemy combatants" in the war against terrorism. However, few have noted the shocking parallels between the scant rights afforded to the enemy and those afforded to physicians facing investigation or prosecution by OPMC. Moreover, formal rules of evidence familiar to all lawyers simply do not apply and judges may arbitrarily determine what evidence a "jury" may hear and do so without regard to traditional principles of reliability.

Moreover, in a proceeding before the Board for Professional Medical Conduct, the investigators, judges, and prosecutor are all handpicked and paid by the Commissioner of Health. Indeed, even when charged with misconduct, the physician is not permitted to participate in the selection of the Hearing Committee (or jury) that will determine his or her fate. Instead, the Commissioner of Health handpicks the Hearing Committee. Similar to the military tribunals afforded the enemy combatants, disciplinary hearings for physicians are conducted in secret and subject to very limited judicial review.

Making matters worse, the legislation governing physician discipline in New York underwent a sea change last year and the rights afforded to the physician have been further curtailed.

For example, a physician's personal medical and psychiatric records are now "fair game." While access to medical and psychiatric records is extremely limited in all other arenas (and subject to strict judicial scrutiny), a physician's medical and psychiatric records are now readily available to OPMC. A subpoena need not be obtained and, with few exceptions, the information must be provided whenever OPMC simply states that it has reason to believe that a physician is impaired.

OPMC investigations are no longer strictly confidential. The new legislation permits the Commissioner of Health to make disclosure of information obtained during an investigation if he or she believes disclosure is necessary in order to avert or minimize a public health threat. While the goal appears laudable, this aspect of the new statute was enacted in part as a political response to a highly publicized failure of DOH to respond to allegations that one physician had re-used syringes. While the new law provides easy "cover" for DOH, such publicity may be devastating to a physician's practice when disclosure is made before the facts are known.

While the danger is clear, there are some common-sense measures physicians can take to protect themselves:

1. Obtain Capable Healthcare Counsel: No OPMC investigation is routine and your license may be at risk. The worst mistakes are normally made early on by a physician who tries to navigate these dangerous channels alone. Counsel should be consulted as soon as the first communication is received from

OPMC – which usually comes in the form of a written request for records. Under no circumstances should the physician agree to be interviewed, provide charts, other information or permit an office inspection without first consulting with counsel.

2. Documentation: Investigations are often initiated well after the fact and your defense will often rise or fall on the adequacy of your records. While physicians need to see an increasing number of patients to make ends meet, your best defense is good documentation. Efforts should be made to implement electronics record keeping formats that forces the physician to document an appropriate examination, assessment and plan.

2. Chaperones: Based upon the nature of the relationship, physicians remain vulnerable to claims that they have violated sexual boundaries. Accordingly, chaperones should be employed and identified in the chart. The patient that declines a chaperone and later complains about a physician's actions is naturally suspect.

3. Communication: Maintain open lines of communication with your staff and train them to understand that they are your first line of defense. You must be advised of all patient complaints and efforts to resolve them should be documented. If Medicare or any managed care agency request for charts or undertakes an audit, the physician needs to know experienced health care counsel should be sought.

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