INFORMAL SETTLEMENT CONFERENCES

By

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Professions currently within the jurisdiction of the NYS Board of Regents are:

Acupuncture
Applied Behavior Analysis
. Licensed Behavior Analysts
. Certified Behavior Analyst Assistants
Architecture
Athletic Training
Audiology
Certified Shorthand Reporting
Chiropractic
Clinical Laboratory Technology
. Clinical Laboratory Technologists
. Cytotechnologists
. Clinical Laboratory Technicians
. Certified Histological Technicians
Dentistry
. Dentists
. Dental Anesthesia/Sedation
. Dental Hygienists
. Certified Dental Assistants
Dietetics-Nutrition
Engineering
Geology
Interior Design
Land Surveying
Landscape Architecture
Massage Therapy
Medical Physics
Medicine
. Physicians
. Physician Assistants
. Specialist Assistants
Mental Health Practitioners
. Creative Arts Therapists
. Marriage and Family Therapists
. Mental Health Counselors
. Psychoanalysts
Midwifery
Nursing
. Registered Professional Nurses
. Nurse Practitioners
. Clinical Nurse Specialists
. Licensed Practical Nurses
Occupational Therapy
. Occupational Therapists
. Occupational Therapy Assistants
Ophthalmic Dispensing
Optometry
Pathologists' Assistant
Perfusion
Pharmacy
. Pharmacists
. Pharmacy Establishments
Physical Therapy
. Physical Therapists
. Physical Therapist Assistants
Podiatry
Polysomnographic Technology
Psychology
Public Accountancy
. Certified Public Accountants
. Public Accountants
Respiratory Therapy
. Respiratory Therapists
. Respiratory Therapy Technicians
Social Work
. Licensed Master Social Worker (LMSW)
. Licensed Clinical Social Worker (LCSW)
Speech-Language Pathology
Veterinary Medicine
. Veterinarian
. Veterinary Technician

OFFICE OF PROFESSIONAL DISCIPLINE

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COMPLAINT RESOLUTION PROCESS

Background

'In an effort to process and resolve complaints expeditiously, fairly, and efficiently, OPD employs a Complaint Resolution Process (CRP) that is based on early and cooperative review and evaluation by investigators, prosecutors, and Board Members.

1. Key Straegies for the Complaint Resolution Process.

   (a) Screen complaints and expeditiously resolve cases through alternatives to formal disciplinary proceedings, as appropriate.

   (b) Make every effort to appropriately resolve complaints through an Early Involvement process (EI), an Informal Settlement Conference (ISC), or a negotiated consent without resorting to a disciplinary hearing.

INFORMAL SETTLEMENT CONFERENCE

After a complaint has been investigated and a determination has been made that professional licensee has engaged in professional misconduct or unprofessional conduct, the prosecutor will attempt to negotiate a settlement of the matter. Ifthe licensee and her counsel do not agree to the settlement proposal, the licensee will be offered an opportunity to attend an Informal Settlement Conference (ISC). The purpose of the ISC is to provide an environment for the proposed resolution of the matter prior to a disciplinary hearing. Convening all relevant parties at one time affords an opportunity to resolve allegations of professional misconduct by discussing the pertinent factors in an informal setting. Participation at the ISC is voluntary on the part of the licensee and counsel; prior settlement offers by the prosecutor are "off the table"; disposition of the matter requires approval of the Professional Conduct Officer and, in most cases, the Committee on the Professions, a Regent, the PPC and the full Board of Regents. The ISC is not a forum for prosecutor or the licensee's attorney to showcase their trial advocacy skills. It is a forum inwhich the licensee has an opportunity to present her version of events or position on the matter, to a fellow professional: If the matter is not resolved following the ISC and the Prosecution Division of OPD decides to go forward with a prosecution of the licensee, the matter will be scheduled for a formal hearing before three members of the applicable State board.

1. **General Strategies.**

   (a) ISCs are attended by the assigned prosecutor, the respondent and his/her attorney, the Board Member(s) and the professional conduct officer or his or her designee, who serves as the facilitator.

   (b) The informal settlement conference provides an opportunity for:

   - The prosecutor to present a synopsis of the allegations, the facts relating to the charges, and the recommended penalty;
   - The licensee and/or attorney to reply to the prosecutor's presentation by presenting any relevant facts/information;
   - The prosecutor and the licensee to present evidence, which may include records, x-rays, photographs, diagrams, charts and any other illustrative or explanatory materials that in the discretion of the facilitator are relevant to the proceeding; and
   - The Board Member to assess the information provided and to discuss an informal recommendation of settlement, if appropriate, with the PCO.

   (c) The informal settlement conference shall **not** include:

   - Testimony from witnesses.
   - Electronic or other transcript of the proceedings.
   - Presence of the investigator in the normal course; however, the prosecutor should be sufficiently informed by the investigator to respond to all appropriate questions raised and, when deemed helpful by the PCO, the investigator may participate.

2. Roles and Responsibilities of Participants at the ISC.

Board Member1

   (a) Assesses critical issues.

   (b) Works with the facilitator to explore an appropriate disposition of the case.

   (c) Recommends an appropriate disposition.

   (d) If the ISC does not resolve the case and a hearing is scheduled, the ISC Board Member(s) is not assigned to the disciplinary hearing panel.

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1 While it is preferable that the EI-participating Board Member contiilues with the ISC, the Board Secretary can designate another member, requiring that the new Board Member confer with the EI-participating Board Member in order to fully understand the rationale for the EI team's recommendation.

Prosecutor

(a) Presents facts and circumstances of the case, which provide an informed summary, i.e., nature of the charges, aggravating or mitigating circumstances, recommended penalties, and any other information requested by the PCO and/or the Board Member.

(b) Informs the ISC team of the resolution proposed at the EI meeting, which is consistent with statute and rules and both protects the public and conforms to the pattern of penalties for similar misconduct previously imposed by the Board of Regents.

Professional Conduct Officer

(a) Serves as or designates the facilitator for the ISC, who:

- Articulates the process.
- Ensures that th discussion remains professional, non-confrontational, and conducive to a resolution.
- Clarifies issues.
- Informs the respondent of the following assurances from the PCO:
  - Nothing said by respondent at the ISC may be used as the basis for additional investigation or charges or at hearings related to the relevant charge(s).
  - Any additional investigation or charges must be based on information obtained independent of the ISC proceeding.
- Advises the respondent that any settlement agreed to at the ISC is contingent upon the approval of the Board of Regents and the recommendation of the PCO, if the ISC is not facilitated by the PCO.

(b) Recommends outcome consistent with Regents policy.

(c) Reviews and/or approves recommended case dispositions.2

2 Closure of a case at which the PCO is not the facilitator, will require the approval of the PCO following the submission of a memorandum.

3. Acceptable Resolutions after an Informal Settlement Conference.

(a) Closure of case because the information presented at the ISC does not support taking disciplinary action.

(b) Issuance of a letter of corrective action required or administrative warning, when appropriate.

{c) Instruction for the prosecutor to obtain additional information.
{d) Violations Committee settlement

{e) Application for consent order for appropriate penalty, including surrender of license.

(f) Referral of case for formal hearing.

. (g) Other dispositions appropriate to the case.

PREPARATION OF THE PRACTITIONER FOR ISC

OPD has concluded the investigation and now wants to resolve the case, if possible, without a formal hearing. An interview of your client and witnesses has already occurred, and scope of allegations and factual claims can be assessed by you and your client to prepare defense.

Should defense counsel participate in the ISC?

The defense should obtain all relevant records including client's chart, billing records, subsequent treating records, or substance of the materials if they cannot be obtained.

Conduct search/inquiry for any further relevant documents/records based on what was learned from investigation and negotiations with OPD.

Obstacles to getting records:

Privilege {Quality Assurance Materials & Credential Files)

Materials often not available to practitioner

HIPAA (Other treating records)

Limits ability to obtain treatment records

Seek to negotiate with OPD to review its copies of medical records at the OPD office . with your client in advance ofISC.

Additional areas of investigation if not already undertaken:

Facts and records of underlying medical malpractice claim

Facts and records of underlying criminal investigation/indictment/trial

Relevant protocols/ rules, regulations/ statutes and clinical guidelines

Obtain and transcroe a copy of your client's recorded statement given during initial OPD interview to insure it is accurate when compared to your notes, and to insure your client is consistent with his testimony at ISC. Your client's initial interview is generally recorded and a copy will be provided if you provide a blank tape after the interview. This is especially important ifyour client was not represented by counsel during the initial interview.

Obtain further expert review(s) in area of specialty to obtain guidance and prepare defense on medical and practice issues, and also to assist in negotiations with OPD.

Prepare all potential qemonstrative evidence for ISC, including exhibits of chart entries, illustrations of anatomy, etc.

Preparation of practitioner to testify.

The practitioner must:

Understand the theory(s) of the defense

Demonstrate reasonableness of conduct, overall competency and honesty

Be aware of any weaknesses in case and be ready to respond

Be confident inthe defense by understanding all aspects of it

CASE PRESENTATION #1:

A nurse with over thirty years of experience and no prior claims history was reported to the OPD for administering by injection the wrong medication in excess of ten times before the same unique pattern of error was discovered and rectified.

The wrong medication administered to different patients over a several month period was an injectable steroid instead of an intended birth control medication. Both medications vials were manufactured by the same company and appeared very similar in size, shape, weight, color, and labeling. Both medications were identical in appearance in the vial, however, the labels on each medication were correct and the nurse did not realize he was using the wrong medication until a physician working at the clinic brought it to his attention.

Although no patients were directly harmed by the steroid injections, the OPD appropriately investigated the matter vigorously.

The defense strategy focused both on the nurse's strong credentials and the unique human and system factors associated with the repetition of the medication error, including that the clinic never purposely stocked or ordered the steroid, hence it was never part of the clinic's formulary. The defense also pointed out that the birth control medication used at that clinic had always been in injectable form. Hence, unlike in a hospital setting or office practice, the variety of injectable medications was limited to this one type.

The defense also was able to point out that the nurse was able to track each injection because he had recorded the lot and expiration number on each vial in the patient record as part of the routine medical documentation during each patient encounter. This careful tracking allowed for each patient to be contacted and advised of the error.

The OPD focused on how nurses are trained not to fall prey to medications that look alike, sound alike, feel alike, etc., in order to avoid the very type of error that occurred here on multiple occasions. The OPD also stressed how nurses are trained to ensure that 1. the patient is the correct patient, 2. that the timing of the dose is correct, 3. that the dose is correct, 4. that the route is appropriate, i.e. oral versus IV, and 5. that the medication is the correct medication.

The defense maintained that in this specialized clinic with a closed population and specific birth control program, the dosage, route, timing, and patient population were essentially constant factors and that but for the unknown disruption of what medications were delivered and stocked at the facility, leading to the unanticipated use of the wrong medication, the practitioner would not have accessed the wrong medication, which he erroneously and repeatedly assumed was the correct medication.

How would you bring your client to an ISC? How you prepare him to discuss the case?

CASE PRESENTATION # 2

Dr. Tooth, the subject of an OPD investigation, treated 16 year old Tina Brush for one year beginning in April 1995 for routine exams, fillings and x-rays.

Before seeing Dr. Tooth, the patient was treated by Dr. Prior, who in June 1993 treated a cavity in tooth #3 with a white composite filling on the lingual side, (inside where the tongue touches). Tooth #3 was one of Tina's four molar teeth that generally break through at six years of age. The material used for white fillings in and around 1993 was radiolucent, and, on an x-ray, can appear similar to a cavity.

In April, 1995, Dr. Tooth examined Tina for the first time and gave her a cleaning and fluoride treatment. According to his notes, Tina was asymptomatic of pain and sensitivity, and had no complaints about tooth #3. Films taken at that time were read by Dr. Tooth as showing no decay, and demonstrated an intact white filling. Dr. Tooth saw Tina approximately every six months for the next year and a half, until November, 1996. The patient reported no problems during these routine exams, films were taken each visit and read by Dr. Tooth as showing no decay in any teeth, including #3. At the last visit Dr. Tooth performed a filling on tooth #10. Tina never returned to Dr. Tooth again.

Thirteen months later, in March 1998, Tina presented to a subsequent treating physician, Dr. Floss. On the first visit to Dr. Floss, Tina was noted to have multiple cavities, including tooth # 3. On initial exam, Dr. Floss noted no filling of any kind in tooth #3, as this filling had fallen out. He saw an enlarged open pit of approximately two millimeters on the occlusal surface, (biting surface). Dr. Floss performed a temporary root canal, and in April 1998, he performed a root canal on #3.

OPD investigated Dr. Tooth's treatment of Tina, most likely in response to a confidential complaint made by the patient's parents. The OPD obtained the entire patient's records from each dentist, including all films, interviewed the patient, her father, Dr. Prior and Dr. Floss. Once the OPD finished gathering facts, it contacted Dr. Tooth, who agreed to speak to an OPD investigator without a lawyer.

OPD's position was that Dr. Tooth failed to diagnose and treat decay in tooth #3 during the one year time period that he treated the patient resulting in a subsequent root canal. The OPD's expert interpreted the x-rays taken by Dr. Tooth as showing ongoing decay throughout his treatment period, and up to when Dr. Floss had to perform a root canal. In his opinion, Dr. Tooth's alleged failure to "fill the tooth" during the last office visit was a departure from the standard of care, and that by the time Dr. Floss encountered the problems, the cavity was larger, and required a root canal.

Our client, Dr. Tooth, decided he should hire a lawyer after the OPD contacted him and told him they would be pursuing charges against him.

Our dental expert felt Dr. Tooth's care was defensible because his documentation on each visit specifically noted that each tooth was fine, including tooth #3. Our expert agreed with Dr. Tooth that if a patient is asymptomatic, and the doctor feels the tooth with an explorer instrument and does not find any sort of "pull," indicating decay, the appropriate treatment is to watch and wait.

The x-rays however were questionable. On first glance, like the OPD, our expert felt that there was decay and a cavity on the last set of films taken by Dr. Tooth. However, on closer inspection, our expert explained that a dark area on the film could have been the non radiopaque white composite filling originally used by Dr. Prior. Our expert advised that in 1996, dentists typically used these older materials for white fillings. At approximately that time, new materials for white fillings with a radiopaque lining to distinguish a white filling from decay came in to use. Therefore, our expert was able to support Dr. Tooth's care in light of his clinical exam indicating no cavity on tooth #3, his notation that he was watching all six years molars, and the absence of any symptoms from the patient.

OPD felt that Dr. Tooth committed negligence on more than one occasion by failing to properly interpret the x-rays taken in his office, and by failing to properly evaluate the patient clinically over the one year period of treatment. Dr. Tooth was offered a settlement proposal of a three year stayed suspension of his license,

You represent Dr. Tooth. Should you proceed directly to a hearing, or request an ISC?