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New York State Bar Association

Representing Licensed Healthcare Professionals In the Disciplinary Process: The OPMC Interview

Douglas M. Nadjari, Esq.
Ruskin Moscou Faltischek, P.C
June 1, 2017

Smart Counsel. Straight Talk.

1 **New York State Bar Association**

Representing Licensed Healthcare Professionals
In the Disciplinary Process: The OPMC Interview

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2 **The Interview**

Key Question: Will it lead to administrative closure or mitigation of penalty sought?

- Best opportunity to show training, experience and thoughtful clinical plan *vs.*
- Disclosure of hearing defense and "locks" the doctor into a story.
-

3 **Nature of the Allegation & Measuring OPMC Priority**

See Annual Report

- Impairment
- Negligence
- Sexual Boundary Violations
- Fraud
- Inappropriate Prescribing

4 **Consider: Source of Complaint**

- Other Providers
- Patients and family members
- Other state Medical Boards
- Malpractice carriers & health insurers
- I-STOP; pharmacy sweeps
- NPDB sweep
- BNE, DEA, FDA,MFCU?OIG/FBI
- U.S. Attorney, NYAG or D.A.

5 **Consider Body of Available Evidence What do they have already?**

- Clinical Records
- I-Stop & pharmacy records
- Court filings and transcripts
- Interviews of patients and staff
- Inspection of Premises
- Comprehensive Medical Review
- Demand Surrender of DEA Certificate
- Action of other states
-

6 **KYC Know Your Client?**

- Training and Experience
- OPMC & Malpractice History
- Records

- Presentation
- Competent?
- Honest?
- Your gut counts!
- Ultimate decision is client's and document that decision.

7 **Adequate Notice?**
Challenge the letter. Get more detail

- Description of the conduct that is the subject of the investigation;
- Disclosure of issues relating to that conduct
- Provide time frame of the conduct under investigation;
- Identity of each patient whose contact with or care is relevant;
- Right to counsel at interview and stenographic recording;

8 **The Interview**

Risks, Benefits & Alternatives:

1. Submit to Voluntary Interview
2. Waive interview. Provide no information
3. Written submission in lieu of Interview
4. Disclosure to law enforcement

9 **Interview Preparation & Conduct**

- Know the players
- Upstate vs. downstate
- Predict questions and prepare
- Know the records cold
- Be prepared to focus questions and clear up confusion
- If necessary, stay within 4 corners of Invitation Letter
- With a capable clinician –stay out of the way.
-

10 **OPMC Interview: Confidential?**

- May be shared with law enforcement and other agencies
  - Statements are voluntary & admissible in other proceedings
  - No immunity;
  - No real assurance of accuracy

11 **Conclusions**

- Know OPMC priorities and evidence
- Conduct your own investigation
- Know your client
- Consider danger of referral
- Ultimate Question: Will it lead to closure or mitigation of charges and/or penalty.
- Document the client's decision because:

"Even a paranoid can have enemies."
(Henry Kissinger December 1972)

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April 19, 2017

BY FEDERAL EXPRESS

Please be advised that our firm was today engaged to represent . Please accept this letter as a reply to yours dated February 20, 2017 concerning allegations of misconduct referable to unidentified patients. The letter advises Dr. of his right to an interview pursuant to P.H.L. § 230(10)(a)(iii). However, the statute requires that the letter provide: (a) a description of the conduct that is the subject of the investigation, (b) disclosure of (i) the issues relating to the conduct that have been identified at the time of the notice; (ii) the time frame of the conduct under investigation; (iii) the identity of each patient whose contact with or care by the licensee is believed to be relevant to the investigation; and (iv) the fact that the licensee may be represented by counsel and may be accompanied by a stenographer to transcribe the proceeding.

The letter of February 20, 2017 provides legally insufficient notice of the scope of the interview and, therefore, constitutes a legal nullity. With respect to Pt. "A", the letter articulates an allegation of misconduct but does not describe, with specificity, any of the facts underlying the clinical issues or conduct issues. With respect to Patient "B", it appears that the inquiry encompasses a three-year span but it too contains no factual disclosure with respect to the clinical or conduct issues raised. Moreover, it does not set forth the date of the alleged conduct that is the focus of your investigation. Finally, it does not provide a realistic time frame, as the statute otherwise requires.

Finally, with respect to Patient "C", the letter states that Dr. 123 "failed to timely inform the patient that sonogram results are abnormal". However, it does identify the sonographic study at issue, the date of that study. Noe does it describe the nature of the alleged abnormality upon which the complaint is premised upon.

Based upon the foregoing, we respectfully submit, once again, that the letter provides insufficient statutory notice and must be considered a legal nullity. Nonetheless, please be advised that when the Department provides notice that comports with the statute, [redacted] intends to avail herself of a right to attend the interview.

As always, our firm looks forward to working with you and bring this matter to a speedy and amicable resolution. If you have any questions or if I may of any further service, please do not hesitate to call.

Very truly yours,

Douglas M. Nadjari
For the Firm

DMN:llt

cc: [redacted]

The Board for Professional Medical Conduct

The New York State Board for Professional Medical Conduct consists of physicians and non-physicians and is responsible for investigating and adjudicating complaints against physicians, physician assistants, medical residents and specialist assistants.
For more information about the Board or the Office of Professional Medical Conduct, please contact us at:

New York State Department of Health
Office of Professional Medical Conduct
Riverview Center
150 Broadway, Suite 355
Albany, NY 12204-2719

Telephone: 1-800-663-6114
E-mail: opmc@health.state.ny.us
Or, visit the Website at:
www.health.ny.gov/nysdoh/opmc/main.htm

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New York's Medical Conduct Program

Pain Management

A Guide for Physicians

Introduction

The New York State Board for Professional Medical Conduct (Board) recognizes that principles of quality medical practice dictate that the people of the State of New York have access to appropriate and effective pain relief. Inadequate pain control may result from physician[1] lack of knowledge about pain management, inadequate understanding of addiction, or fear of investigation or action by the Board or other federal, state or local regulatory agencies. This publication therefore has been developed to clarify the Board's position on pain control, to encourage better pain management and to dispel physician fears of unwarranted legal consequences.

The appropriate application of up-to-date knowledge and treatment modalities can serve to improve the quality of life for those patients who suffer from pain, as well as reduce the morbidity and costs associated with untreated or inappropriately treated pain. The complexity of pain management often requires intradisciplinary consultation.

The Board encourages and expects physicians to view effective pain management as a part of quality medical practice for all patients with pain, acute or chronic, including pain as a result of terminal illness.

All physicians should become knowledgeable about effective methods of pain evaluation and treatment, as well as statutory requirements for prescribing controlled substances.

[1] For the purposes of this document, the term physicians shall refer to physicians, medical residents, physician assistants and specialist assistants.

Controlled Substances

The Board recognizes that controlled substances, including opioid analgesics, are often essential in the treatment of acute and chronic pain (both malignant and non-malignant). If the treatments are based on accepted medical practices and sound clinical grounds, the Board considers prescribing, administering or dispensing controlled substances for pain to be legitimate. The Board also recognizes that tolerance and physical dependency may be pharmacological effects of sustained use of opioid analgesics and are not synonymous with addiction.

Pursuant to the laws of the State of New York, the Board is bound to protect the public health and safety. Inappropriate prescribing of controlled substances may lead to drug diversion and abuse by individuals who seek drugs for other than legitimate medical use. Therefore, physicians should be aware that the Board will not tolerate the diversion of drugs for illegitimate purposes.

Points of Information

- An adequate assessment of the patient and the pain should be performed and documented.
- Pain should be considered a fifth vital sign that is viewed as a fundamental assessment of well-being, and which is regularly monitored.
- Communication is essential. Many patients, for various reasons, are unable to describe adequately their pain. Physicians should initiate conversations to identify pain and qualify/quantify it and its impact on the patient's life.
- Treatment should be based on the diagnosis, type of pain, intensity and duration of pain, prior therapies, and the impact on quality of life.
- Ongoing evaluation of pain, patient compliance, and treatment efficacy should be performed and documented.
- The definition of **addict** under the Controlled Substance Law excludes patients using controlled substances for legitimate medical purposes. The term **addiction** refers to compulsive use of controlled substances for non-legitimate purposes and is associated with loss of control and use despite harm. Many patients are reluctant to seek pain relief because of the fear of addiction. Clarification from their physicians is essential.
- Certain patients with pain, such as those with history of substance abuse or comorbid psychiatric disorder, may require extra attention, monitoring, documentation and consultation.
- The Board evaluates **inappropriate** versus **appropriate** prescribing, not the quantity of drugs prescribed. The Bureau of Narcotic Enforcement has reviewed and concurs with these guidelines.

New York State Department of Health

Board for Professional Medical Conduct

2015 Report

Office of Professional Medical Conduct
New York State Department of Health

Riverview Center, 150 Broadway, Suite 355
Albany, NY 12204-2719

Main Number: 518-402-0836
Complaints/Inquiries: 1-800-663-6114
E-mail Inquiries: opmc@health.ny.gov
Physician Information: www.nydoctorprofile.com *or* www.health.ny.gov

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Board for Professional Medical Conduct
2015 Report

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Board for Professional Medical Conduct
2015 REPORT

Executive Summary

The State Board for Professional Medical Conduct (Board) was created by the New York State Legislature in 1976 and, with the Department of Health's (DOH/Department) Office of Professional Medical Conduct (Office/OPMC), administers the State's physician discipline program. Its mission is patient safety -- to protect the public from medical negligence, incompetence and other kinds of professional misconduct.

The Board, through the OPMC, investigates complaints made against the nearly 110,000 physicians, physician assistants and specialist assistants and prosecutes those charged with misconduct. It also monitors licensees who have been impaired or who have been placed on probation by the Board.

The Program achieved the following during 2015:

- The Board imposed 319 final actions. Of those, 72 percent (231) were serious sanctions, including the loss, suspension, or restriction of a physician's medical license.
- The Office received 8,762 complaints and closed 8,880 complaints. These closures include various administrative reviews, as well as full field investigations assigned to the Regional Offices and Investigative Units.
- 2,204 full field investigations were closed.
- The average time to complete a full field investigation is 317 days.
- The OPMC monitored 1,312 physicians.

Protecting Patient Safety by Addressing Medical Conduct

Board for Professional Medical Conduct

The State Board for Professional Medical Conduct, with the Department of Health's Office of Professional Medical Conduct, administers the State's physician discipline program. Its mission is to protect the public from medical negligence, incompetence and other kinds of professional misconduct by the nearly 110,000 physicians.[1] The Board is a vital patient safety protection for those who access New York's health care system.

Public Health Law (PHL) §230(14) requires an annual report to the Legislature, the Governor and other executive offices, the medical profession, medical professional societies, consumer agencies and other interested persons. This report discusses the Board's 2015 experience.

As of December 31, 2015, the Board consists of 79 physician and 29 non-physician lay members. Lay members include members of the general public, to ensure that the patient perspective is represented on the Board. Physician members are appointed by the Commissioner of Health with recommendations for membership received largely from medical and professional societies. The Commissioner, with the approval of the Governor, appoints lay members of the Board. By law, the Board of Regents appoints 20 percent of the Board's membership.

Through its activity, the Board ensures the participation of both the medical community and the public in this important patient safety endeavor.

Office of Professional Medical Conduct

The OPMC's mission is to carry out its statutory mandate and the objectives of the Board to deter medical misconduct and promote and preserve appropriate standards of medical practice. Through its central office in Albany, New York and six field offices (Buffalo, Rochester, Syracuse, New York City, New Rochelle and Central Islip), the OPMC:

- Investigates all complaints and, with assistance of counsel, prosecutes physicians formally charged with misconduct;
- Monitors physicians whose licenses have been restored following a temporary surrender due to incapacity by drugs, alcohol or mental impairment;
- Monitors physicians placed on probation by the Board;

[1] In this report, "physician" and "licensee" refer to licensed medical doctors [MDs], doctors of osteopathy [DOs], physicians practicing under a limited permit, medical residents, physician assistants and specialist assistants.

- Oversees the contract with the Medical Society of the State of New York's Committee for Physician Health (CPH) – a non-disciplinary program to identify, refer to treatment and monitor impaired physicians, to assist physicians return to safe practice;

- Collects and maintains reports of medical malpractice claims filed in New York State and their dispositions. The OPMC reviews medical malpractice reports to identify potential misconduct that warrants further review and, as appropriate, investigation;

- Oversees the administration of the New York State Physician Profile, a single point of information for the education, training, practice, legal actions and professional activities of every physician licensed and registered to practice in New York State;

- Supports all Board activities, including appointments, training, recruitment of medical experts and coordination of the procedures for the approximately 59 committees of the Board that were convened in 2015; and

- Educates the physician community and others on misconduct definitions, trends in investigative findings, and best practices to avoid misconduct. In 2015, the OPMC continued to provide educational programs to medical students and physician assistant students, so that students are aware of what misconduct is and how they can avoid misconduct once they begin practice.

New York's Medical Conduct Process

PHL (PHL) and Education Law (EL) govern the State's physician discipline program. The process is defined in PHL §230, while the definitions of misconduct are found in sections 6530 and 6531 of the EL. The process is described in Figure 1.

Figure 1 - The Professional Medical Conduct Process

PROFESSIONAL MEDICAL CONDUCT PROCESS

Investigation
A **complaint** is reviewed to determine if there are issues which warrant an investigation. The investigation may consist of interviews, reviewing documents (such as medical records) and other evidence, and consultation with medical experts.

↓

The complete **investigation** is reviewed by supervisors and medical staff.

↓

If there is **no evidence of misconduct**, the case is closed.

↓

A **Committee of the Board** (Board Investigation Committee) reviews all possible misconduct cases and recommends whether a hearing is warranted.

↓

Hearing
A DOH attorney prepares a Notice of Hearing and **Statement of Charges** which describes the substance of the alleged misconduct.

↓

The **Hearing** provides the physician, with his/her attorney, an opportunity to present witnesses and evidence on his/her own behalf. The hearing is before a **Board Committee** of two physician members and a lay member. An Administrative Law Judge presides over the hearing process.

↓

Decision
The **Hearing Committee** determines **Findings of Fact**, conclusions and imposes a penalty, if appropriate.

↓

Review Board
Either the Department or the physician may **appeal** the hearing committee decision to the review board, consisting of five members of the board, three of whom are physicians. The Review Board issues a **Final Order**.

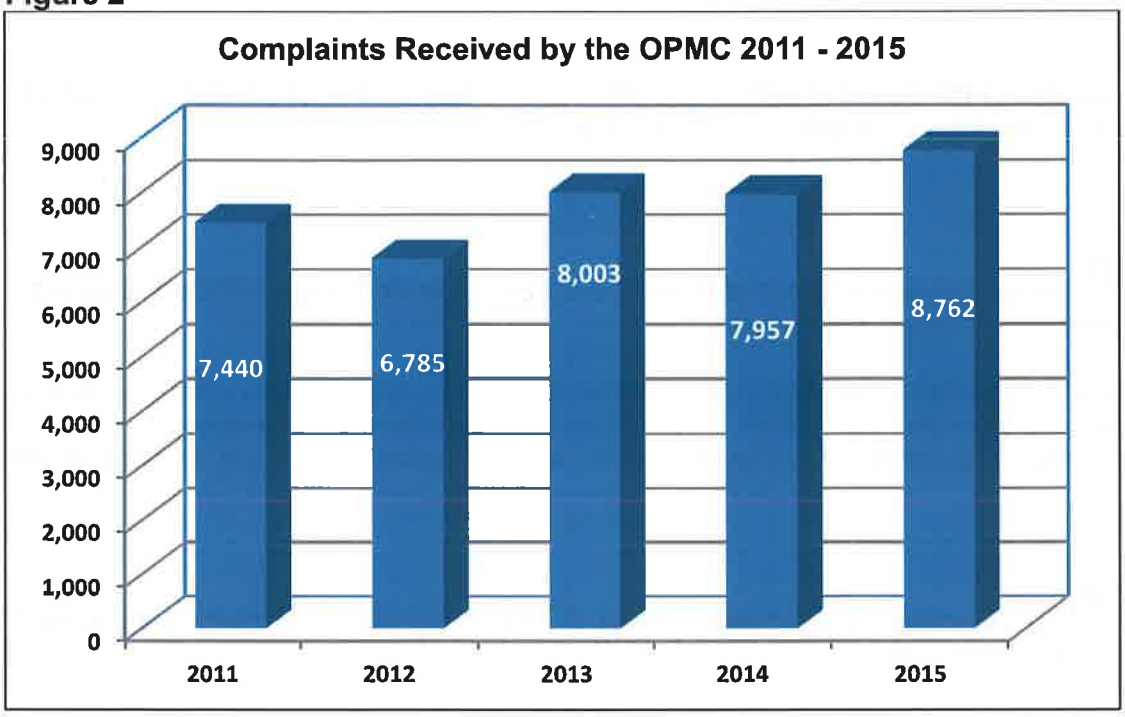
Complaints

The OPMC is required by PHL §230(10) to review every complaint it receives. Complaints come from many sources including the public, the health care community and others. Complaints may also be opened as a result of a report in the media a referral from another government agency, or OPMC's own review of information, such as medical malpractice data and compliance with statutory requirements related to the New York State Physician Profile.

In 2015, the OPMC received 8,762 complaints, the highest number in the last five years (see figure 2).

Every complaint is reviewed to determine whether the subject of the complaint is a physician (thereby falling under the OPMC's jurisdiction), and whether the allegation, if found true, would be considered medical misconduct. In 2015, 50 percent of all complaints moved forward after this initial review for further investigation. The OPMC makes referrals to other agencies as appropriate.

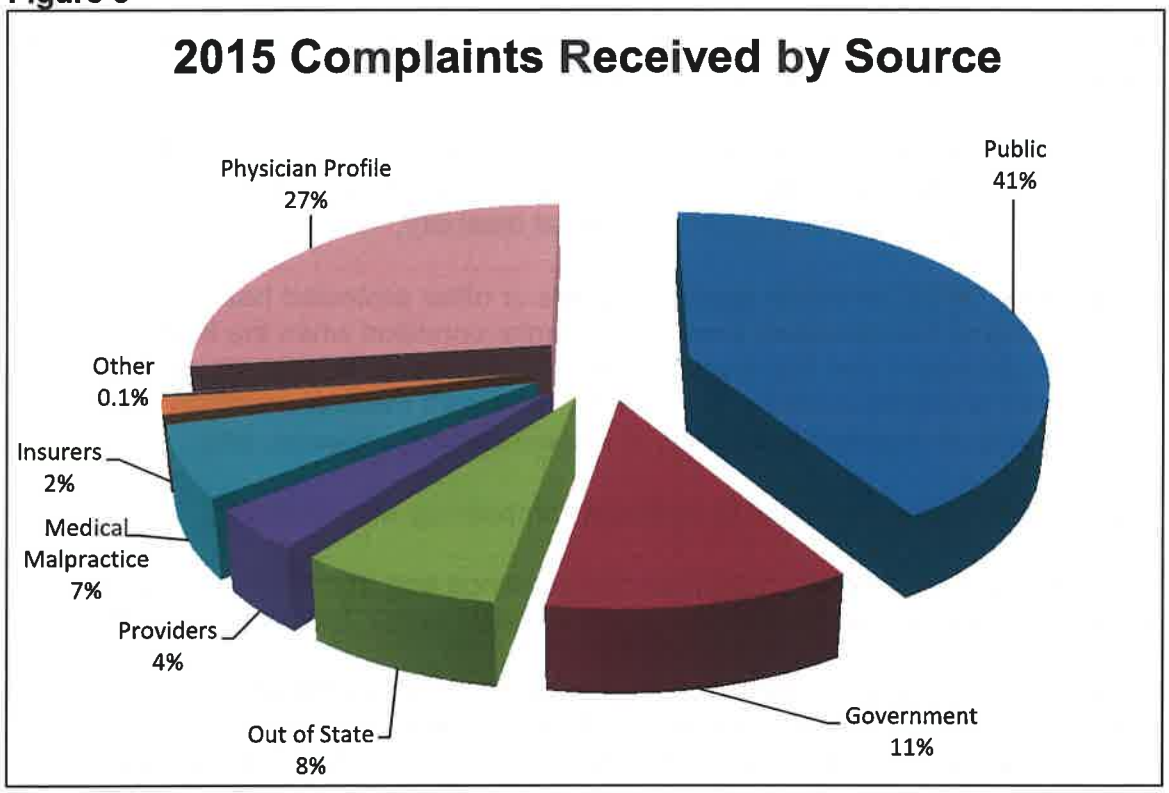
Figure 2



Source: The Office of Professional Medical Conduct

About 41 percent of the complaints received in 2015 came from the public (see Figure 3). About 4 percent of complaints come from providers.

Figure 3



Source: The Office of Professional Medical Conduct

Investigations

OPMC investigators and clinicians, including Board Certified physicians, gather and analyze all relevant information from documents such as medical records and interviews to determine whether the evidence suggests that misconduct occurred. The investigative process ensures a thorough review and supports an informed determination by the Office and the Board as to whether the allegation is substantiated and, if so, constitutes misconduct.

OPMC investigations include strong confidentiality protections. For example, PHL requires the OPMC to keep the name of the complainant confidential. The very existence of an investigation is also confidential until completed. These provisions exist for the protection of both the complainant and the physician under review.

The physician is ensured due process throughout. The physician has a right to submit relevant information to the OPMC at any time during the investigation. Under the law, the OPMC must offer the physician an opportunity to be interviewed to comment on the issues under investigation if the OPMC intends to refer the matter to the Board. The physician may have an attorney present and may bring a stenographer to transcribe

the interview, at his/her expense. Cases are not referred to the Board when there is insufficient evidence to proceed or the issues are determined at that point to be outside its jurisdiction.

The Board can collect valuable information through its PHL §230(7) authority. Through a committee on professional conduct, the Board may:

- direct a physician to submit to a medical or psychiatric examination when a Board committee has reason to believe the licensee may be impaired by alcohol, drugs, physical disability or mental disability;

- direct the OPMC to obtain medical records or other protected health information pertaining to the licensee's physical or mental condition when the Board has reason to believe that the licensee may be impaired by alcohol, drugs, physical disability or mental disability or when the licensee's medical condition may be relevant to an inquiry into a report of a communicable disease; and

- direct a physician to submit to a clinical competency examination.

With these tools, the Board can determine the presence and magnitude of any issues facing the physician, and evaluate if these issues might present a risk to patients.

In investigations related to clinical care, information gathered by the OPMC is reviewed by medical experts who are board certified in their specialty, currently in practice and who are not employed by the OPMC. The expert identifies whether the physician under review met minimum standards of practice or did not. The peer review aspect of the process is key to making fair and appropriate determinations.

When the evidence indicates that misconduct has occurred, it is presented to an investigation committee of the Board for review. If a majority of the committee, comprised of two physician members and one public member, concurs with the Director of the OPMC (Director) that sufficient evidence exists to support misconduct, then, and after consultation with the Executive Secretary to the Board, the Director would direct counsel to prepare charges. In 2015, the OPMC referred 327 physicians for charges, a 47 percent increase from 2014.

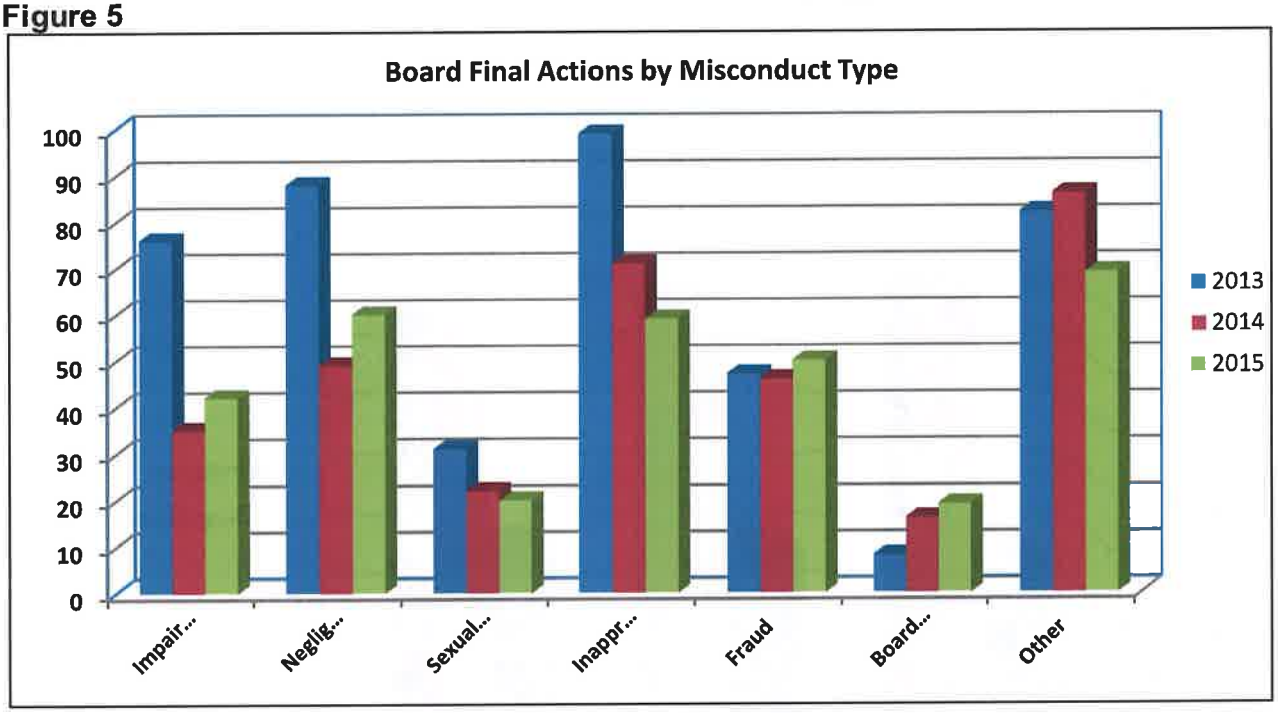
The Board is required to make charges public no earlier than five business days after charges are served upon a physician, and after an investigation committee has unanimously concurred with the Director's determination that a hearing is warranted. A statement advising that the charges or determinations are subject to challenge by the physician accompanies the charges.

The committee may take actions other than concurring that a disciplinary hearing is warranted. These range from a recommendation to the Commissioner of Health that a physician's practice be summarily suspended because he or she poses an imminent danger to the public health, to a confidential administrative warning if there is substantial evidence of professional misconduct of a minor or technical nature or of substandard medical practice which does not constitute professional misconduct.

until the period for requesting an appeal has passed, and if there is an appeal, disciplinary action is stayed until there is a resolution.

Most of the final Board actions (72 percent) are related to five areas of misconduct: negligence/incompetence, sexual misconduct, inappropriate prescribing, impairment, and fraud (see Figure 5).

Figure 5

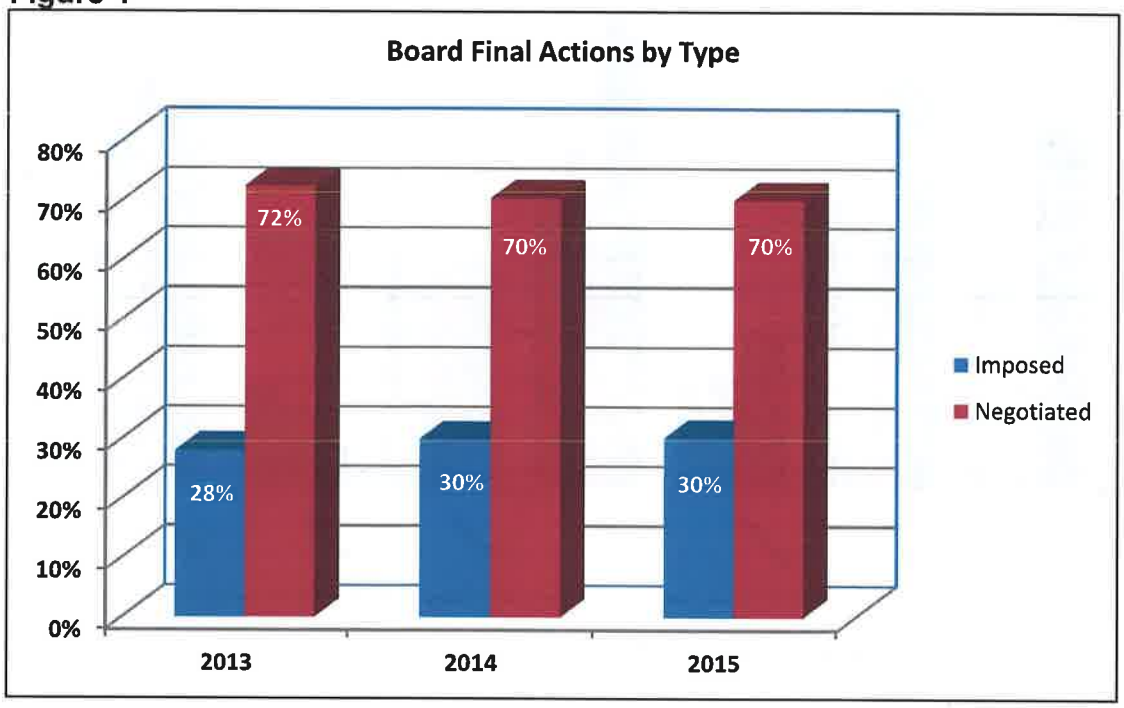


Source: The Office of Professional Medical Conduct

Disciplinary Hearings

For some investigations that result in a referral for charges, a disciplinary hearing is avoided through a signed consent agreement between the physician and the Board. These agreements include terms that adequately protect the public and address the physician's misconduct, without incurring the time and costs of a hearing. In 2015, approximately 70 percent of Board actions resulted from negotiated agreements (see Figure 4).

Figure 4



Source: The Office of Professional Medical Conduct

If the investigation proceeds to a hearing, or the Commissioner of Health orders a summary suspension, another three-member Board panel (two physicians and one lay member), known as a Hearing Committee, hears the case. An administrative law judge assists the committee on legal issues, and evidence and testimony may be presented by attorneys for the Department and the physician.

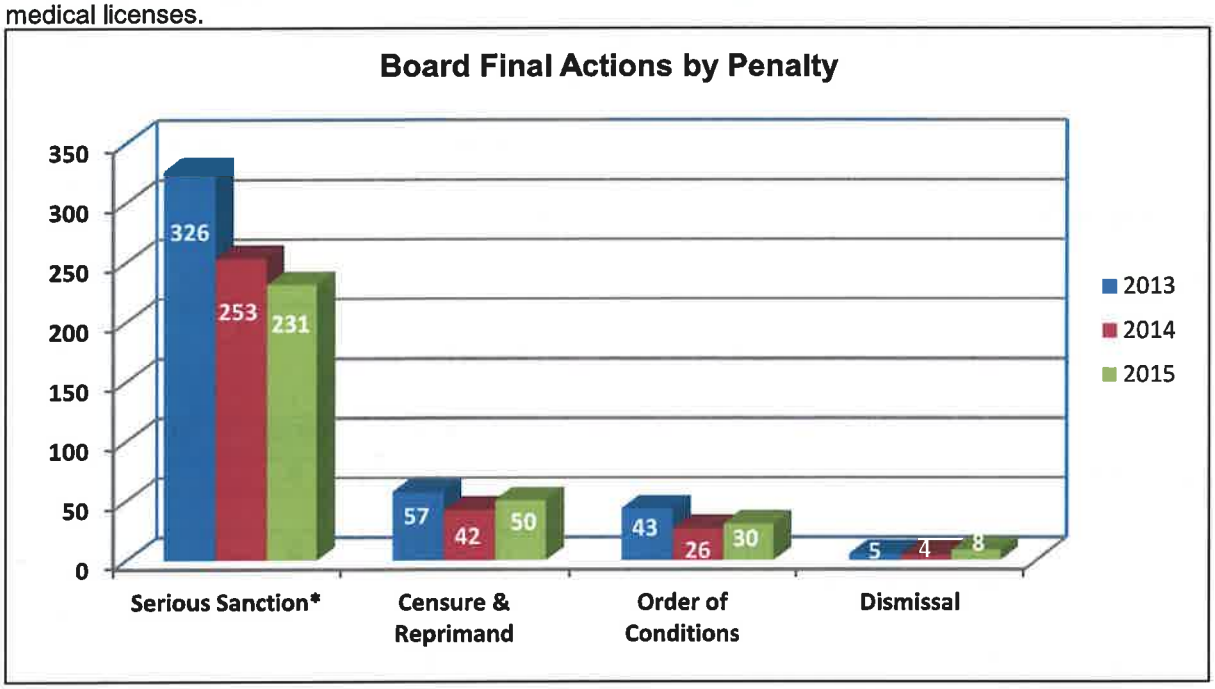
The Board Hearing Committee rules on whether misconduct exists or not by sustaining or not sustaining specific charges. If the committee sustains charges, it decides on an appropriate penalty. Penalties can range from a censure and reprimand to license revocation, including but not limited to, suspension of a physician's license, limitation of his or her practice, requiring supervision or monitoring of a practice, or a fine. Hearing committee determinations are immediately made public.

Revocations, actual suspensions and license annulments go into effect at once and are not stayed (postponed) if there is an administrative appeal. Other penalties are stayed

In 2015, the Board issued 319 final actions; 231 of these final actions (72 percent) were serious sanctions including the revocation, surrender, or suspension of a physician's medical license, or a limitation or restriction placed on the doctor's license (see Figure 6). This demonstrates the Board's stern response to misconduct that presents serious risk to patient safety

Figure 6

* Serious sanctions include revocations, surrenders, suspensions and restrictions or limitations of medical licenses.



Source: The Office of Professional Medical Conduct

The Board has jurisdiction over all physicians licensed to practice in New York. Many physicians who are trained in New York move to live and practice in other states but retain their New York license. When a medical board in the state in which they practice takes an action against the physician, New York and any other state in which the physician is licensed are notified through the Federation of State Medical Boards (FSMB).

The Board may impose a penalty against the physician to ensure that patients in New York State are protected. For example, if the nature of the misconduct is such that the physician presents a serious safety risk, the Board may revoke the doctor's license to practice in New York. The Board might otherwise impose a penalty that includes appropriate monitoring provisions to ensure that, if the physician does commence practice in New York, the risk to the health and safety of patients is minimized. This patient safety goal is the foundation for all Board actions, whether imposed against physicians practicing in New York or elsewhere.

Appeals

Either side may appeal the decision of a hearing committee to the Administrative Review Board (ARB), comprised of three physician members and two lay members of the Board. The ARB hears all administrative appeals.

There are no appearances or testimony in the appeals process. The ARB reviews whether the determination and penalty of the hearing committee are consistent with the hearing committee's findings and whether the penalty is appropriate. The ARB must issue a written determination within 45 days after the submission of briefs.

From 2013-15, the ARB issued 34 decisions (see Figure 7). The ARB upheld the hearing committee determination 97 percent of the time. The ARB reduced the penalty imposed in five (15 percent) of the decisions it reviewed.

Figure 7

Administrative Review Board Statistics 2013 - 2015

	2013	2014	2015
Administrative Review Board Decisions	12	9	13
Hearing Committee Determination Upheld	11	9	13
Hearing Committee Determination Not Upheld	1	0	0
Hearing Committee Penalty Upheld	5	6	6
Hearing Committee Penalty Increased	4	1	7
Hearing Committee Penalty Decreased	3	2	0

Source: The Office of Professional Medical Conduct

Physician Monitoring Program

Impaired Physicians

Ensuring that physicians who may be impaired by an illness can safely practice medicine is a priority patient safety goal of the Board. PHL§230(13) allows a physician who is temporarily incapacitated, is not able to practice medicine, and whose incapacity has not resulted in harm to a patient, to voluntarily surrender his or her license to the Board. The OPMC uses this tool to identify these impaired physicians, rapidly remove them from practice, refer them to rehabilitation and place them under monitoring upon their return to active practice to ensure that they practice safely.

When a surrender is accepted, the Board promptly notifies entities, including the State Education Department (SED) and each hospital at which the physician has privileges. The physician whose license is surrendered notifies all patients of temporary withdrawal from the practice of medicine. The physician is not authorized to practice

medicine, although the temporary surrender is not deemed to be an admission of permanent disability or misconduct. At the end of 2015, the OPMC was holding 51 temporarily surrendered licenses.

A surrendered license may be restored when the physician can demonstrate to the Board that he/she is no longer incapacitated for the active practice of medicine. A Board committee (two physicians and one lay member) determines whether the physician has made an adequate showing as to his or her rehabilitation. In 2015, two physicians petitioned the Board for and were granted a license restoration.

If the Board restores the license, the physician is placed under a minimum monitoring period of five years. Monitoring terms generally require abstinence from drugs and/or alcohol with random and unannounced drug screens, a medical practice supervisor, a treatment monitor and self-help group attendance such as Alcoholics Anonymous. As of December 31, 2015, the OPMC was monitoring 459 licensees who were in recovery from alcohol, drugs, mental illness or physical disability.

Probation

The OPMC also monitors physicians placed on probation, pursuant to a determination of professional misconduct, under PHL §230(18). The Board places a physician on probation when it determines that he/she can be rehabilitated or retrained in acceptable medical practice. It is the same underlying concept used in placing physicians impaired by drugs/alcohol under monitoring.

The OPMC monitors physicians using tools such as reviewing a random sample of the licensee's office and patient records, conducting onsite visits, assigning another physician to monitor the licensee's practice, auditing billing records, and testing for the presence of alcohol or drugs.

Probation ensures compliance with the Board order, and supports the physician's education and remediation. Working with professional societies, hospitals and individual practitioners, the program allows for close scrutiny of the physician's practice, early identification of necessary adjustments to and support for the physician's rehabilitation and training. During 2015, the OPMC monitored 1,312 licensees.

Sometimes, a physician does not comply with the terms of his/her Board order. Violation of the terms of a Board order is a serious matter; it may reflect a disregard for, or a lack of understanding of, the purpose and importance of the requirement. The Office and the Board must respond to these violations, to ensure the physician's compliance with these important patient safety protections.

In 2015, the Board imposed disciplinary actions against 19 physicians resulting from failure to comply with previous Board orders; 16 of the actions resulted in the loss of the physician's license to practice medicine. Additionally, 8 physicians were referred to disciplinary hearings for failure to comply with probation terms. Some of these referrals may have been among the 19 Board actions cited above.

Committee for Physician Health and the Board for Professional Medical Conduct

The OPMC oversees the contract with the Medical Society of the State of New York, Committee for Physician Health (CPH) – a non-disciplinary program to identify, refer to treatment and monitor impaired physicians. The goal of the program is to facilitate and monitor treatment and support, so that physicians who are dealing with stress, burnout, illness, or other issues can return to health, ensuring the safe practice of medicine. The CPH and the Board, through a Joint Committee, monitor the program's activities and discuss ways to enhance the program's patient protection and physician support effectiveness.

The OPMC and the CPH conduct presentations and provide education to hospitals, medical societies, specialty societies, and other groups, sometimes jointly. Both organizations emphasize the risk that impairment presents to patients, the benefits of the program to the physician, and the importance of referring physicians with actual or possible impairment issues to the program.

At the end of 2015, a total of 390 physicians were enrolled in the CPH. During the year, 73 physicians enrolled in the program; 11 of the 73 had previously been enrolled in CPH. Nineteen (26 percent) were self-referrals, and 41 (56 percent) were referred by their provider organizations (hospitals, nursing homes, clinics, etc.) or a colleague. This demonstrates that the OPMC and CPH message has been heard. Providers, physicians, and other health care practitioners recognize the magnitude of the problem and the value of the CPH program in terms of enhanced patient safety, as well as increased physician well-being.

The CPH program has been effective. Of the 478 physicians who were engaged with the program at some point during 2015, only four were reported by CPH to OPMC for noncompliance, as CPH is required to do by law. Of the 88 physicians who left the program during the year, 67 successfully completed their program, and 17 left for other reasons such as transferring to programs in other states. CPH and OPMC continue to work collaboratively to protect patient safety and ensure access to effective physician support services.

Hospital Reporting to the OPMC

Hospitals are statutorily required to report any information to the Board that reasonably appears to show that a licensee may be guilty of misconduct. In 2015, the OPMC received 101 reports from hospitals regarding physician misconduct. Of these, 14 percent pertained to concerns of physician impairment.

Medical Malpractice Information

One source of information that OPMC continuously uses to identify potential medical misconduct is medical malpractice experience. State Insurance Law mandates the reporting of any claim filed for medical malpractice against a physician, physician assistant or specialist assistant, and the disposition of that claim, to be reported to the Commissioner of Health and the Superintendent of Insurance.

PHL §230 directs the OPMC to continuously review medical malpractice information for the purpose of identifying potential misconduct. The OPMC currently uses the following criteria for determining whether an investigation should commence:

- six or more payouts over the past five years
- cancellation or non-renewal of the physician's malpractice policy by the insurer due to a concern about quality of care
- addition of a surcharge of 75 percent or more to a physician's policy
- a single payout amount higher than a specialty- and geography-specific 75th percentile dollar amount

Of the 161 investigations completed in 2015 that were based on medical malpractice criteria, about 18 percent resulted in a Board action or administrative warning.

The OPMC and the Department of Financial Services (DFS) continually work together with New York State medical malpractice insurers, hospitals and other mandated reporters to ensure complete and accurate reporting. The OPMC will continue to monitor malpractice experience to maximize its use as a predictor of possible misconduct.

Ensuring Safety in Office-based Surgery Settings

PHL §230-d requires licensees to report adverse events following OBS to the DOH's Patient Safety Center (PSC). Adverse events that must be reported include: 1) patient death within 30 days; 2) unplanned transfer to the hospital; 3) unscheduled hospital admission within 72 hours of the OBS for longer than 24 hours; or, 4) any other serious or life-threatening event. Failure to report an OBS adverse event within one business day of when the licensee became aware of the adverse event may constitute professional misconduct. Additional provisions of the law, effective July 14, 2009, require physicians to perform OBS only in accredited practice settings.

After reviewing an Adverse Event Report, if the PSC believes further review and investigation is warranted, it may refer the report to the OPMC for an investigation. At that point, the OPMC will commence an investigation which may include, but not be limited to, the following: medical record review by a board certified physician, interviews of various participants, and a site visit of the office setting. In 2015, OPMC opened 12 investigations based on referrals from the Patient Safety Center.

Internet Access to Physician Information

Information regarding the OPMC and the Board can be accessed through the DOH Web site, www.nyhealth.gov/professionals, by clicking on "Professional Misconduct and Physician Discipline." All disciplinary actions taken since 1990 are posted on the OPMC site, as well as information on how to file a complaint, brochures regarding medical misconduct, frequently asked questions and relevant statutes.

Expanding Outreach

The OPMC Director, Deputy Director and Chair of the Board frequently meet with county medical societies, state specialty societies, and hospitals to educate physicians about the medical conduct process, outcomes of the Board's work, and how to prevent misconduct. These meetings also provide an opportunity to invite physicians to get involved in the process through the medical expert program. In 2015 for the first time, the OPMC continued to present educational programs to Physician Assistant (PA) students on professional misconduct issues, to assist them in engaging in appropriate patient care and avoiding misconduct once they begin practice.

Prescribing of Controlled Substances

The Board and the OPMC have battled the public health crisis of opioid abuse for several years. Evidence demonstrates that inappropriate prescribing practices of opioid medications significantly contribute to abuse of and addiction to these drugs. Many physicians are not adequately trained in safe prescribing protocols that ensure appropriate treatment but minimize the risk of abuse.

Over the past few years, the Board and OPMC have provided dedicated educational programs for physicians on safe prescribing practices. In addition, all OPMC physician education presentations include a discussion of opioid prescribing. These efforts are intended to help physicians understand current standards and how to protect their patients from potential abuse while effectively treating their conditions. The Board and the OPMC also partner with the Department's Bureau of Narcotic Enforcement (BNE),to identify potential inappropriate prescribing, investigate and enforce appropriate prescribing standards, and educate prescribers and the public on ways to address this epidemic the OPMC and the BNE continually work together to monitor prescribing practices and make referrals to initiate investigations when appropriate.

In 2015, the OPMC initiated 114 investigations related to potential inappropriate controlled substance prescribing. The Board issued 59 orders against physicians found to have committed misconduct related to inappropriate/excessive prescribing. These actions primarily included sanctions such as license surrender or revocation (24), suspension (9), and/or a restriction or limitation against the physician's license (11). Since 2011, the Board has imposed sanctions against 367 physicians for misconduct related to inappropriate prescribing.

The Board and the OPMC will continue to use both provider education and strong enforcement to contribute to the battle against opioid abuse and addiction.

Future Initiatives

OPMC has implemented several initiatives to improve its effectiveness, including policy and data efforts. Some are designed to enhance its use of technology and data to improve decision-making and efficiencies. These initiatives include:

- OPMC continues to explore methods of increasing the use of data in order to proactively identify physicians who may warrant OPMC review before an adverse event occurs.

- The Executive Secretary of the Board participates on the DOH Telehealth workgroup to assist in developing best-practices with regard to telemedicine.

- Studies are suggesting the growing problem of physician burnout. Physician burnout is being linked to medical errors, physician impairment, abusive behavior, and misconduct. The OPMC will be working with the FSMB and state boards throughout the nation to discuss this issue and identify ways to address it.

- The OPMC investigative case management data system is still being redesigned to improve functionality and utility for analysis, investigation, processing, resolution, and monitoring of complaints. The redesigned Statewide Investigative Information Management System (SIIMS) is expected to be released in early 2017.

- The Medical Malpractice Data Collection System (MMDCS) continues to be updated to make it easier for mandated reporters to submit required data to the system and to retrieve information for their analyses, and to enhance the OPMC's ability to analyze the data for research and investigative purposes. The new MMDCS is expected to be released in 2016.

- The New York State Physician Profile is a public website providing information to consumers of healthcare and other stakeholders on currently licensed and registered physicians in NYS. The Physician Profile was established in 2000 by the New York Patient Health Information and Quality Improvement Act (PHL §2995 et seq.). Chapter 57 of the Laws of 2015 amended PHL §2995-a to require that the DOH study the feasibility of incorporating health plan reporting requirements regarding health plan network participation to the Profile, without imposing extra burden on physicians, to ensure that the information is available, accurate, up-to-date and accessible to consumers. OPMC staff participated in conducting the study. The study report is expected to be published in 2016.

- While efforts remain underway to enhance the Physician Profile, an article published March 29, 2016, by Consumer Reports, entitled "Seeking Doctor Information Online: A Survey and Ranking of State Medical and Osteopathic Board Websites in 2015" ranks the NYS Physician Profile as second in the nation among all 65 state medical and osteopathic boards' websites. The ranking was based on 61 different criteria, include how comprehensive and available information was on physicians. See the full report at http://consumersunion.org/wp-content/uploads/2016/03/Final-report-for-posting-3-28-16-6PM-ET.pdf.

Summary

The Board and the Office continue to effectively investigate allegations of medical misconduct and take appropriate action when evidence demonstrates that misconduct occurs. These efforts will continue to ensure that medical care is delivered consistent with today's standards.

Office of Professional Medical Conduct

Summary Statistics

Year	2013	2014	2015
Complaints Received	8003	7957	8762
Complaints Closed	6790	8283	8880
Licensees Referred for Charges	291	223	327
Administrative Warnings/Consultations	72	68	77

Final Actions

	2013	2014	2015
Revocation	52	35	34
Surrender	69	71	59
Summary Suspension	33	29	23
Suspension - Actual / Stayed	67	61	52
Restriction/Limitation	85	48	43
Censure and Reprimand/Probation	7	12	9
Censure and Reprimand/Other	47	27	37
Fine Only / No Penalty	3	3	4
Dismissal	5	4	8
Surrenders under 230(13)	20	9	20
Monitoring Agreements	43	26	30
TOTAL ACTIONS	**431**	**325**	**319**

Source: The Office of Professional Medical Conduct

* PHL§ 230(12) permits a summary suspension when:

- a licensee has pleaded or been found guilty or convicted of committing an act constituting a felony under New York State Law or federal law, or the law of another jurisdiction which, if committed within this State, would have constituted a felony under New York State Law, or when the duly authorized professional agency of another jurisdiction has made a finding substantially equivalent to a finding that the practice of medicine by the licensee in that jurisdiction constitutes an imminent danger to the health of its people, or

- there is information about the possible transmission of a communicable disease or evidence of a condition or activity constituting an imminent danger to the public.

State of New York

Department of Health
Howard A. Zucker, M.D., J.D., Commissioner

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Public Health Law (Refs & Annos)
Chapter 45. Of the Consolidated Laws (Refs & Annos)
Article 2. The Department of Health
Title II-a. Professional Medical Conduct

McKinney's Public Health Law § 230

§ 230. State board for professional medical conduct; proceedings

Effective: March 13, 2015

Currentness

1. A state board for professional medical conduct is hereby created in the department in matters of professional misconduct as defined in sections sixty-five hundred thirty and sixty-five hundred thirty-one of the education law. Its physician members shall be appointed by the commissioner at least eighty-five percent of whom shall be from among nominations submitted by the medical society of the state of New York, the New York state osteopathic society, the New York academy of medicine, county medical societies, statewide specialty societies recognized by the council of medical specialty societies, and the hospital association of New York state. Its lay members shall be appointed by the commissioner with the approval of the governor. The board of regents shall also appoint twenty percent of the members of the board. Not less than sixty-seven percent of the members appointed by the board of regents shall be physicians. Not less than eighty-five percent of the physician members appointed by the board of regents shall be from among nominations submitted by the medical society of the state of New York, the New York state osteopathic society, the New York academy of medicine, county medical societies, statewide medical societies recognized by the council of medical specialty societies, and the hospital association of New York state. Any failure to meet the percentage thresholds stated in this subdivision shall not be grounds for invalidating any action by or on authority of the board for professional medical conduct or a committee or a member thereof. The board for professional medical conduct shall consist of not fewer than eighteen physicians licensed in the state for at least five years, two of whom shall be doctors of osteopathy, not fewer than two of whom shall be physicians who dedicate a significant portion of their practice to the use of non-conventional medical treatments who may be nominated by New York state medical associations dedicated to the advancement of such treatments, at least one of whom shall have expertise in palliative care, and not fewer than seven lay members. An executive secretary shall be appointed by the chairperson and shall be a licensed physician. Such executive secretary shall not be a member of the board, shall hold office at the pleasure of, and shall have the powers and duties assigned and the annual salary fixed by, the chairperson. The chairperson shall also assign such secretaries or other persons to the board as are necessary.

2. Members of such board shall be appointed by the commissioner or the board of regents for three year terms except that the terms of those first appointed shall be arranged so that as nearly as possible an equal number shall terminate annually. A vacancy occurring during a term shall be filled by an appointment by the commissioner or the board of regents for the unexpired term.

3. Each member of the board shall receive a certificate of appointment, shall before beginning his term of office file a constitutional oath of office with the secretary of state, shall receive up to one hundred fifty dollars as prescribed by the

commissioner for each day devoted to board work not to exceed ten thousand dollars in any one year, and shall be reimbursed for his necessary expenses. Any member may be removed from the board at the pleasure of the commissioner.

4. The governor shall annually designate from the members of the board a chairperson who shall be a physician and vice-chairperson. The board shall meet upon call of the chairperson, and may adopt bylaws consistent with this section. A quorum for the transaction of business by the board shall be a majority of members.

5. From among the members of the board two or more committees on professional conduct shall be appointed by the board chairperson.

6. Any committee on professional conduct appointed pursuant to the provisions of this section shall consist of two physicians and one lay member.

7. (a) The board, by its committees on professional conduct, shall conduct disciplinary proceedings as prescribed in this section and shall assist in other professional conduct matters as prescribed by the chairperson. In this section the term "licensee" shall mean physician, including a physician practicing under a limited permit, a medical resident, physician's assistant and specialist's assistant. A committee on professional conduct, on notice to the licensee and after affording the licensee, the office of professional medical conduct, and their attorneys an opportunity to be heard, shall have the authority to direct a licensee to submit to a medical or psychiatric examination when the committee has reason to believe the licensee may be impaired by alcohol, drugs, physical disability or mental disability. The committee, with the advice of the licensee and the office of professional medical conduct, shall designate the physician who will conduct the examination. The results of the examination shall be provided by the examining physician to the committee, the licensee, and the office of professional medical conduct. The licensee may also obtain a physician to conduct an examination the results of which shall be provided to the committee and the office of professional medical conduct.

(b) A committee on professional conduct may sit as an administrative tribunal for the purpose of issuing an order authorizing the office of professional medical conduct to obtain medical records or other protected health information pertaining to the licensee's physical or mental condition when the committee has reason to believe that the licensee may be impaired by alcohol, drugs, physical disability or mental disability and that the records or information may be relevant to the alleged impairment or that information regarding the licensee's medical condition may be relevant to an inquiry into a report of a communicable disease, as defined by the state sanitary code or HIV/AIDS. No such order shall be issued except on notice to the licensee and after affording the licensee and the office of professional medical conduct an opportunity to be heard.

(c) A committee on professional conduct, on notice to the licensee and after affording the licensee and the office of professional medical conduct an opportunity to be heard, shall have the authority to direct a licensee to submit to a clinical competency examination when the committee has reason to believe that the licensee has practiced with incompetence, generally in his or her medical practice or in a specific area of his or her medical practice. The committee, with the advice of the licensee and the office of professional medical conduct, shall designate the facility or institution to conduct the clinical competency examination. The results of the clinical competency examination shall be provided by the facility or institution to the committee, the licensee and the office of professional medical conduct. The licensee may also obtain an accredited facility or institution to conduct a clinical competency examination, the results of which shall be provided to the committee and the office of professional medical conduct.

8. Notwithstanding any other provision of law, no member of a committee on professional conduct nor an employee of the board shall be liable in damages to any person for any action taken or recommendation made by him within the scope of his function as a member of such committee or employee provided that (a) such member or employee has taken action or made recommendations within the scope of his function and without malice, and (b) in the reasonable belief after reasonable investigation that the act or recommendation was warranted, based upon the facts disclosed.

9. Notwithstanding any other provisions of law, neither the proceedings nor the records of any such committee shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided. No person in attendance at a meeting of any such committee shall be required to testify as to what transpired thereat. The prohibition relating to discovery of testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting.

9-a. At any time, if the board for professional medical conduct or the office of professional medical conduct determines that there is a reasonable belief that an act or omission that constitutes a crime under the law of the state of New York, any other state, or the United States has been committed by the licensee, the board for professional medical conduct or office of professional medical conduct shall notify the appropriate law enforcement official or authority.

9-b. Neither the board for professional medical conduct nor the office of professional medical conduct shall charge a licensee with misconduct as defined in sections sixty-five hundred thirty and sixty-five hundred thirty-one of the education law, or cause a report made to the director of such office to be investigated beyond a preliminary review as set forth in clause (A) of subparagraph (i) of paragraph (a) of subdivision ten of this section, where such report is determined to be based solely upon the recommendation or provision of a treatment modality to a particular patient by such licensee that is not universally accepted by the medical profession, including but not limited to, varying modalities used in the treatment of Lyme disease and other tick-borne diseases. When a licensee, acting in accordance with paragraph e of subdivision four of section sixty-five hundred twenty-seven of the education law, recommends or provides a treatment modality that effectively treats human disease, pain, injury, deformity or physical condition for which the licensee is treating a patient, the recommendation or provision of that modality to a particular patient shall not, by itself, constitute professional misconduct. The licensee shall otherwise abide by all other applicable professional requirements.

10. Professional misconduct proceedings shall consist of:

(a) [Eff. until March 31, 2018, pursuant to L.1983, c. 426, § 5. See, also, par. (a), below.] (i)(A) The board for professional medical conduct, by the director of the office of professional medical conduct, may investigate on its own any suspected professional misconduct, and shall investigate each complaint received regardless of the source. By the conclusion of a preliminary review, including an internal clinical review, the director shall determine if a report is based solely upon the recommendation or provision of a treatment modality by a licensee that is not universally accepted by the medical profession, including but not limited to varying modalities used in the treatment of Lyme disease or other tick-borne diseases. Upon a determination by the director that a report is based solely upon the provision of a treatment modality that is not universally accepted, no further review shall be conducted and no charges shall be brought. Nothing in this section shall preclude the director from making such a determination earlier in, or subsequent to, a preliminary review. (B) The director of the office of professional medical conduct shall cause a preliminary review of every report made to the department pursuant to section

twenty-eight hundred three-e as added by chapter eight hundred sixty-six of the laws of nineteen hundred eighty, sections twenty-eight hundred five-l and forty-four hundred five-b of this chapter, and section three hundred fifteen of the insurance law, to determine if such report reasonably appears to reflect physician conduct warranting further investigation pursuant to this subparagraph.

(ii) If the investigation of cases referred to an investigation committee involves issues of clinical practice, medical experts, shall be consulted. Experts may be made available by the state medical society of the state of New York, by county medical societies and specialty societies, and by New York state medical associations dedicated to the advancement of non-conventional medical treatments. Any information obtained by medical experts in consultations, including the names of licensees or patients, shall be confidential and shall not be disclosed except as otherwise authorized or required by law.

(iii) In the investigation of cases referred to an investigation committee, the licensee being investigated shall have an opportunity to be interviewed by the office of professional medical conduct in order to provide an explanation of the issues under investigation. Providing an opportunity for such an interview shall be a condition precedent to the convening of an investigation committee on professional misconduct of the board for professional medical conduct.

(A) At least twenty days before the interview, except as otherwise set forth herein, the licensee under investigation shall be given written notice of: (1) a description of the conduct that is the subject of the investigation; (2) the issues relating to the conduct that have been identified at the time of the notice; (3) the time frame of the conduct under investigation; (4) the identity of each patient whose contact with or care by the licensee is believed to be relevant to the investigation; and (5) the fact that the licensee may be represented by counsel and may be accompanied by a stenographer to transcribe the proceeding. All costs of transcription shall be paid by the licensee and a copy shall be provided to the department by the licensee within thirty days of the interview. The notice required by this subparagraph may be given less than twenty days before an interview in any case where the office of professional medical conduct anticipates that the commissioner will take summary action under subdivision twelve of this section, provided that the notice is given within a reasonable amount of time prior to the interview and advises of the possible summary action.

(B) Within thirty days following the interview or, in a case where a stenographer was present at the interview, within fifteen days after the office of professional medical conduct receives the transcript of the interview, whichever is later, the licensee shall be provided with a copy of the report of the interviewer. In addition, the licensee shall promptly be given written notice of issues identified subsequent to the interview. The licensee may submit written comments or expert opinion or medical or scientific literature that is directly relevant to the issues that have been identified by the office of professional medical conduct to the office of professional medical conduct at any time.

(C) If the director determines that the matter shall be submitted to an investigation committee, an investigation committee shall be convened within ninety days of any interview of the licensee. The director shall present the investigation committee with relevant documentation including, but not limited to: (1) a copy of the original complaint; (2) the report of the interviewer and the stenographic record if one was taken; (3) the report of any medical or scientific expert; (4) copies of reports of any patient record reviews; and (5) the licensee's submissions.

(D) If the director determines to close an investigation following an interview without presentation to an investigation committee, the office of professional medical conduct shall notify the licensee in writing.

(iv) If the director of the office of professional medical conduct, after obtaining the concurrence of a majority of an investigation committee, and after consultation with the executive secretary, determines that a hearing is warranted the director shall, within fifteen days thereafter, direct counsel to prepare the charges. If the investigation committee is unanimous in its concurrence that a hearing is warranted, the charges shall be made public under paragraph (d) of this subdivision. If the investigation committee is not unanimous in its concurrence that a hearing is warranted, the members of such committee shall vote on whether the charges should be made public, and if all of the committee members vote in favor of publication, the charges shall be made public under paragraph (d) of this subdivision. If the director determines after consultation with an investigation committee that: (A) evidence exists of a single incident of negligence or incompetence, a pattern of inappropriate prescribing or medical practice, or impairment by drugs, alcohol, physical or mental disability; (B) a recommendation was made by a county medical society or the medical society of the state of New York that warrants further review; or (C) the facts underlying a verdict in a medical malpractice action warrant further review, the director, in addition to the authority set forth in this section, shall be authorized to conduct a comprehensive review of patient records of the licensee and such office records of the licensee as are related to said determination. The licensee shall cooperate with the investigation and willful failure to cooperate in a substantial or material respect may result in an enforcement proceeding pursuant to subparagraph (ii) of paragraph (o) of this subdivision. If there is a question of alcoholism, alcohol abuse, drug abuse or mental illness, the director may refer the matter to a committee, as referred to in subparagraph (ii) of paragraph (c) of subdivision eleven of this section.

(v) The files of the office of professional medical conduct relating to the investigation of possible instances of professional misconduct shall be confidential and not subject to disclosure at the request of any person, except as provided by law in a pending disciplinary action or proceeding. The provisions of this paragraph shall not prevent the office from sharing information concerning investigations within the department and, pursuant to subpoena, with other duly authorized public agencies responsible for professional regulation or criminal prosecution. Nothing in this subparagraph shall affect the duties of notification set forth in subdivision nine-a of this section or prevent the publication of charges or of the findings, conclusions, determinations, or order of a hearing committee pursuant to paragraphs (d) or (g) of this subdivision. In addition, the commissioner may disclose the information when, in his or her professional judgment, disclosure of such information would avert or minimize a public health threat. Any such disclosure shall not affect the confidentiality of other information in the files of the office of professional medical conduct related to the investigation.

(vi) The office of professional medical conduct, acting under this section, may have access to the criminal history record of any licensee governed by the provisions of this section maintained by the division of criminal justice services pursuant to subdivision six of section eight hundred thirty-seven of the executive law.

(vii) The director of the office of professional medical conduct, in consultation with the patient safety center, shall cause a review on a continuous basis of medical malpractice claim and disposition information reported to the commissioner under section three hundred fifteen of the insurance law, for the purpose of identifying potential misconduct. The office shall commence a misconduct investigation if potential misconduct is identified as a result of such review, which shall be based on criteria such as disposition frequency, disposition type including judgment and settlement, disposition award amount, geographic region, specialty, or other factors as appropriate in identifying potential misconduct.

(a) [Eff. March 31, 2018, pursuant to L.1983, c. 426, § 5. See, also, par. (a) above.] Investigation. The board for professional medical conduct, by a committee on professional conduct, may investigate on its own any suspected professional misconduct, and shall investigate each complaint received regardless of the source. The results of the investigation shall be referred to the director of the office of professional medical conduct. If the director of the office of professional medical conduct, after consultation with a professional member of the board for professional medical conduct, determines that a hearing is

warranted he shall direct counsel to prepare the charges within fifteen days thereafter. If it is determined by the director that the complaint involves a question of professional expertise then such director may seek, and if so shall obtain, the concurrence of at least two members of a panel of three members of the state board for professional medical conduct.

(b) Charges. The charges shall state the substance of the alleged professional misconduct and shall state clearly and concisely the material facts but not the evidence by which the charges are to be proved.

(c) Notice of hearing. The board shall set the time and place of the hearing. The notice of hearing shall state (1) the date, time and place of the hearing, (2) that the licensee shall file a written answer to each of the charges and allegations in the statement of charges no later than ten days prior to the hearing, that any charge and allegation not so answered shall be deemed admitted and that the licensee may wish to seek the advice of counsel prior to filing such answer, (3) that the licensee shall appear personally at the hearing and may be represented by counsel who shall be an attorney admitted to practice in New York state, (4) that the licensee shall have the right to produce witnesses and evidence in his behalf, to cross-examine witnesses and examine evidence produced against him, and to have subpoenas issued in his behalf to require the production of witnesses and evidence in manner and form as prescribed by the civil practice law and rules or either party may issue such subpoenas in their own behalf, (5) that a stenographic record of the hearing will be made, and (6) such other information as may be considered appropriate by the committee.

(d) Service of charges and of notice of hearing. (i) A copy of the charges and the notice of the hearing shall be served on the licensee personally by the board at least thirty days before the hearing. If personal service cannot be made after due diligence and such fact is certified under oath, a copy of the charges and the notice of hearing shall be served by registered or certified mail to the licensee's last known address by the board at least fifteen days before the hearing.

(ii) The charges shall be made public, consistent with subparagraph (iv) of paragraph (a) of this subdivision, no earlier than five business days after they are served, and the charges shall be accompanied by a statement advising the licensee that such publication will occur; provided, however, that charges may be made public immediately upon issuance of the commissioner's order in the case of summary action taken pursuant to subdivision twelve of this section and no prior notification of such publication need be made to the licensee.

(iii) If a hearing on the charges has not yet been conducted or if a hearing has been conducted but the committee has not yet issued a determination, the publication of charges by the department shall include a statement advising that the charges are only allegations which may be contested by the licensee in an administrative hearing, except that no such statement need be included if the licensee fails or affirmatively declines to contest the charges. In the event any or all such charges are dismissed, such dismissal shall be made public within two business days.

(d-1) Disclosure of exculpatory evidence. After service of the charges upon the licensee, counsel for the office of professional medical conduct shall, as soon as practicable and on a continuing basis, provide the licensee with any information or documentation in the possession of the office of professional medical conduct which tends to prove the licensee's innocence.

(e) Committee hearing. The hearing shall be conducted by a committee on professional conduct. The members of the hearing committee shall be appointed by the chairperson of the board who shall designate the committee chairperson. In addition to

said committee members, the commissioner shall designate an administrative officer, admitted to practice as an attorney in the state of New York, who shall have the authority to rule on all motions, including motions to compel disclosure of information or material claimed to be protected because of privilege or confidentiality, procedures and other legal objections and shall draft the conclusions of the hearing committee pursuant to paragraph (g). The administrative officer shall have the authority to rule on objections to questions posed by either party or the committee members. The administrative officer shall not be entitled to vote.

(f) Conduct of hearing. All hearings must be commenced within sixty days of the service of charges except that an adjournment of the initial hearing date may be granted by the hearing committee upon request by either party upon good cause shown. No adjournment shall exceed thirty days. The evidence in support of the charges shall be presented by an attorney. The licensee shall have the rights required to be stated in the notice of hearing (subparagraph (c) of this subdivision) and in section four hundred one of the state administrative procedure act. The committee shall not be bound by the rules of evidence, but its conclusion shall be based on a preponderance of the evidence. A hearing which has been initiated shall not be discontinued because of the death or incapacity to serve of one member of the hearing committee. In the event of a member's death or incapacity to serve on the committee, a member shall be appointed immediately by the chairperson of the board. The member shall affirm in writing that he or she has read and considered evidence and transcripts of the prior proceedings. The last hearing day must be held within one hundred twenty days of the first hearing day. Either party, for good cause shown, may request that the committee extend the last hearing day beyond one hundred twenty days. An extension requested by the licensee and granted by the committee may not be used as the grounds for a proceeding brought under paragraph (j) of this subdivision.

(g) Results of hearing. The committee shall make (1) findings of fact, (2) conclusions concerning the charges sustained or dismissed, and (3) a determination regarding charges sustained or dismissed, and in the event any of the charges have been sustained, of the penalty to be imposed or appropriate action to be taken and the reasons for the determination. For the committee to make a conclusion sustaining a charge, or determining a penalty or the appropriate action to be taken, two members of the committee must vote for such a conclusion or determination. The committee shall issue an order based on its determination. The committee's findings, conclusions, determinations and order shall become public upon issuance. However, if the time to request a review of the committee's determination has not yet expired, or if the review has been requested but no determination as a result of the review has been issued, such publication shall include a statement advising that the licensee or the department may request a review of the committee's determination. No such statement is required if (a) the time to request such review has expired without the filing of such request by either of the parties, or (b) the licensee and the department both affirmatively decline to request review of the committee's determination or fail to perfect such review. In the event any or all such charges are dismissed, such dismissal shall be made public within two business days.

(h) Disposition of results. (i) The findings, conclusions, determination and the reasons for the determination of the committee shall be served upon the licensee, the department, and any hospitals, primary practice settings or health care plans required to be identified in publicly disseminated physician data pursuant to paragraph (j), (n), or (q) of subdivision one of section twenty-nine hundred ninety-five-a of this chapter, within sixty days of the last day of hearing. Service shall be either by certified mail upon the licensee at the licensee's last known address and such service shall be effective upon receipt or seven days after mailing by certified mail whichever is earlier or by personal service and such service shall be effective upon receipt. The licensee shall deliver to the board the license which has been revoked, annulled, suspended or surrendered, together with the registration certificate, within five days after receipt of the order. If the license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, the licensee shall submit an affidavit to that effect and shall deliver such license or certificate to the board when located. The director of the office shall promptly transmit a copy of the order to the division of professional licensing services of the state education department and to each hospital at which the licensee has privileges.

(ii) When a license has been: (A) revoked or annulled without stay pursuant to subdivision four or five of section two hundred thirty-a of this title; (B) surrendered by a licensee; (C) suspended without stay for more than one hundred eighty days; or (D) restricted to prohibit the practice of medicine or to preclude the delivery of patient care, the licensee whose license has been so revoked, surrendered, annulled without stay, suspended without stay for more than one hundred eighty days, or restricted shall, within fifteen days of the effective date of the order:

(1) notify his or her patients, of the cessation or limitation of the licensee's medical practice; the names of other physicians or health care practitioners who have agreed to assume responsibility for the patient's care; that the patient should contact one of those named physicians or health care practitioners, or another physician or health care practitioner of the patient's choice, to determine the health care plans, as defined in sections four thousand nine hundred of the insurance law and forty-nine hundred of this chapter, in which the physician or health care practitioner participates and the polices' and procedures of such physician or other health care practitioner; that the patient should notify the licensee of the name of the physician or other health care practitioner to whom the patient's medical records should be transferred; and that the licensee will retain, and remain responsible for the maintenance of the patient's medical records until the patient provides notice that the records shall be transferred directly to the patient, consistent with the provisions of sections seventeen and eighteen of this chapter, or to another practitioner of the patient's choice. The licensee shall also notify each health care plan with which the licensee contracts or is employed, and each hospital where he or she has privileges in writing of the cessation or limitation of the licensee's medical practice. Within forty-five days of the effective date of the order, the licensee shall provide the office of professional medical conduct with proof, in a form acceptable to the director of the office of professional medical conduct, that all patients and hospitals have been notified of the cessation or limitation of the licensee's medical practice.

(2) make arrangements for the transfer and maintenance of the medical records of his or her former patients. Records shall be either transferred to the licensee's former patients consistent with the provisions of sections seventeen and eighteen of this chapter or to another physician or health care practitioner as provided in clause (1) of this subparagraph who shall expressly assume responsibility for their care and maintenance and for providing access to such records, as provided in subdivisions twenty-two and thirty-two of section sixty-five hundred thirty of the education law, the rules of the board of regents or the regulations of the commissioner of education and sections seventeen and eighteen of this chapter. When records are not transferred to the licensee's former patients or to another physician or health care practitioner, the licensee whose license has been revoked, annulled, surrendered, suspended or restricted shall remain responsible for the care and maintenance of the medical records of his or her former patients and shall be subject to additional proceedings pursuant to subdivisions twenty-two, thirty-two and forty of section sixty-five hundred thirty of the education law in the event that the licensee fails to maintain those medical records or fails to make them available to a former patient.

(3) notify the office of professional medical conduct of the name, address, and telephone number of any physician or other health care practitioner who has agreed to accept responsibility for storing and maintaining these medical records.

(4) in the event that the licensee whose license has been revoked, annulled, surrendered or restricted to prohibit the practice of medicine or to preclude the delivery of patient care holds a federal Drug Enforcement Agency (DEA) certificate, advise the DEA in writing of the licensure action, surrender his or her DEA controlled substance privileges to the DEA, and surrender any unused DEA #222 U.S. Official Order Forms, Schedules 1 and 2 to the DEA.

(5) for licensees whose license has been revoked, annulled, surrendered or restricted to prohibit the practice of medicine or to preclude the delivery of patient care, return any unused New York state official prescription forms to the bureau of narcotics enforcement of the department. The licensee shall cause all other prescription pads bearing the licensee's name to be destroyed. If no other licensee is providing services at the licensee's practice location, all medications shall be properly

disposed.

(6) for licensees whose license to practice has been revoked, annulled, surrendered or restricted to prohibit the practice of medicine or to preclude the delivery of patient care, refrain from new advertising and make reasonable efforts to cease current advertising by which his or her eligibility to practice medicine is represented.

In addition to any other penalty provided for in law, failure to comply with the requirements of this subparagraph shall constitute misconduct that may be prosecuted pursuant to this section and which may subject the licensee to the imposition of additional penalties pursuant to section two hundred thirty-a of this title.

(i) The determinations of a committee on professional conduct of the state board for professional medical conduct may be reviewed by the administrative review board for professional medical conduct.

(j) Time limitations. Failure to comply with a provision of this subdivision requiring that a specified action shall be taken within a specified period of time shall be grounds for a proceeding pursuant to article seventy-eight of the civil practice law and rules for an order staying the hearing or dismissing the charges or any part thereof or any other appropriate relief. Such proceeding shall be returnable before the supreme court of Albany county or New York county. The respondent in such proceeding shall have the initial burden to explain the reasons for the failure to comply with a provision of this subdivision requiring that a specified action to be taken within a specified period of time. The court shall not stay the hearing or dismiss the charges or grant any other relief unless it determines that failure to comply was not caused by the article seventy-eight petitioner and has caused substantial prejudice to the article seventy-eight petitioner.

(k) The executive secretary of the board with the specific approval of a committee on professional conduct of the board shall have the power to issue subpoenas requiring persons to appear before the board and be examined with reference to a matter within the scope of the inquiry or the investigation being conducted by the board and produce books, papers, records or documents pertaining thereto.

(l) The board or its representatives may examine and obtain records of patients in any investigation or proceeding by the board acting within the scope of its authorization. Unless expressly waived by the patient, any information so obtained shall be confidential and shall not be disclosed except to the extent necessary for the proper function of the board and the name of the patient may not be disclosed by the board or its employees at any stage of the proceedings unless the patient has expressly consented. Any other use or dissemination by any person by any means, unless pursuant to a valid court order or otherwise provided by law, is prohibited.

(m) Expedited procedures. (i) Violations. Violations involving professional misconduct of a minor or technical nature may be resolved by expedited procedures as provided in subparagraph (ii) or (iii) of this paragraph. For purposes of this paragraph violations of a minor or technical nature shall include, but shall not be limited to, isolated instances of violations concerning professional advertising or record keeping, and other isolated violations which do not directly affect or impair the public health, welfare or safety.

(ii) Administrative warning and consultation. If the director of the office of professional medical conduct, after obtaining the concurrence of a majority of a committee on professional conduct, and after consultation with the executive secretary, determines that there is substantial evidence of professional misconduct of a minor or technical nature or of substandard medical practice which does not constitute professional misconduct, the director may issue an administrative warning and/or provide for consultation with a panel of one or more experts, chosen by the director. Panels of one or more experts may include, but shall not be limited to, a peer review committee of a county medical society or a specialty board. Administrative warnings and consultations shall be confidential and shall not constitute an adjudication of guilt or be used as evidence that the licensee is guilty of the alleged misconduct. However, in the event of a further allegation of similar misconduct by the same licensee, the matter may be reopened and further proceedings instituted as provided in this section.

(iii) Violation committee proceeding. If the director determines, after obtaining the concurrence of a majority of a committee on professional conduct, and after consultation with the executive secretary, that there is substantial evidence of a violation and that the violation is of a nature justifying a penalty as specified in this subparagraph the department may prepare and serve charges, either by personal service or by certified mail, return receipt requested. A violation committee proceeding shall be commenced within three years of the alleged professional misconduct. Such charges shall include a statement that the matter shall be referred to a committee on professional conduct, which shall act as a violations committee for determination. The violations committee shall be appointed by the chairperson of the state board. Paragraph (c) of subdivision ten of this section shall apply to the proceeding. A stenographic record of the hearing shall be made. The evidence in support of the charges shall be presented by an attorney and the licensee shall be afforded an opportunity to be heard and to present evidence in his behalf. Such violations committee may issue a censure and reprimand, may require the licensee to perform up to twenty-five hours of public service in a facility licensed pursuant to article twenty-eight of this chapter in a manner and at a time and place directed by the board, and in addition, or in the alternative, may impose a fine not to exceed five hundred dollars for each specification of minor or technical misconduct. The violations committee may alternatively dismiss the charges in the interest of justice. The order shall be served either by certified mail to the licensee's last known address and such services shall be effective upon receipt or seven days after mailing by certified mail whichever is earlier or by personal service and such service shall be effective upon receipt. The order may be reviewed by the administrative appeals board for professional medical conduct.

(iv). Deleted by L.1991, c. 606, § 10.

(n) Engagement. A proceeding under this section shall be treated in the same manner as an action or proceeding in supreme court for the purpose of any claim by counsel of actual engagement.

(o) Orders for review of medical records. Where the director has issued an order for a comprehensive medical review of patient records and office records pursuant to subparagraph four of paragraph (a) of this subdivision and the licensee has refused to comply with the director's order, the director may apply to a justice of the supreme court, in writing, on notice to the licensee, for a court order to compel compliance with the director's order. The court shall not grant the application unless it finds that (i) there was a reasonable basis for issuance of the director's order and (ii) there is reasonable cause to believe that the records sought are relevant to the director's order. The court may deny the application or grant the application in whole or in part.

(p) Convictions of crimes or administrative violations. In cases of professional misconduct based solely upon a violation of subdivision nine of section sixty-five hundred thirty of the education law, the director may direct that charges be prepared and served and may refer the matter to a committee on professional conduct for its review and report of findings, conclusions as to guilt, and determination. In such cases, the notice of hearing shall state that the licensee shall file a written answer to

each of the charges and allegations in the statement of charges no later than ten days prior to the hearing, and that any charge or allegation not so answered shall be deemed admitted, that the licensee may wish to seek the advice of counsel prior to filing such answer that the licensee may file a brief and affidavits with the committee on professional conduct, that the licensee may appear personally before the committee on professional conduct, may be represented by counsel and may present evidence or sworn testimony in his or her behalf, and the notice may contain such other information as may be considered appropriate by the director. The department may also present evidence or sworn testimony and file a brief at the hearing. A stenographic record of the hearing shall be made. Such evidence or sworn testimony offered to the committee on professional conduct shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. Where the charges are based on the conviction of state law crimes in other jurisdictions, evidence may be offered to the committee which would show that the conviction would not be a crime in New York state. The committee on professional conduct may reasonably limit the number of witnesses whose testimony will be received and the length of time any witness will be permitted to testify. The determination of the committee shall be served upon the licensee and the department in accordance with the provisions of paragraph (h) of this subdivision. A determination pursuant to this subdivision may be reviewed by the administrative review board for professional medical conduct.

(q) At any time subsequent to the final conclusion of a professional misconduct proceeding against a licensee, whether upon the determination and order of a hearing committee issued pursuant to paragraph (h) of this subdivision or upon the determination and order of the administrative review board issued pursuant to paragraph (d) of subdivision four of section two hundred thirty-c of this title, the licensee may file a petition with the director, requesting vacatur or modification of the determination and order. The director shall, after reviewing the matter and after consulting with department counsel, determine in the reasonable exercise of his or her discretion whether there is new and material evidence that was not previously available which, had it been available, would likely have led to a different result, or whether circumstances have occurred subsequent to the original determination that warrant a reconsideration of the measure of discipline. Upon determining that such evidence or circumstances exist, the director shall have the authority to join the licensee in an application to the chairperson of the state board for professional medical conduct to vacate or modify the determination and order, as the director may deem appropriate. Upon the joint application of the licensee and the director, the chairperson shall have the authority to grant or deny such application.

11. Reporting of professional misconduct:

(a) The medical society of the state of New York, the New York state osteopathic society or any district osteopathic society, any statewide medical specialty society or organization, and every county medical society, every person licensed pursuant to articles one hundred thirty-one, one hundred thirty-one-B, one hundred thirty-three, one hundred thirty-seven and one hundred thirty-nine of the education law, and the chief executive officer, the chief of the medical staff and the chairperson of each department of every institution which is established pursuant to article twenty-eight of this chapter and a comprehensive health services plan pursuant to article forty-four of this chapter or article forty-three of the insurance law, shall, and any other person may, report to the board any information which such person, medical society, organization[2] institution or plan has which reasonably appears to show that a licensee is guilty of professional misconduct as defined in sections sixty-five hundred thirty and sixty-five hundred thirty-one of the education law. Such reports shall remain confidential and shall not be admitted into evidence in any administrative or judicial proceeding except that the board, its staff, or the members of its committees may begin investigations on the basis of such reports and may use them to develop further information.

(b) Any person, organization, institution, insurance company, osteopathic or medical society who reports or provides information to the board in good faith, and without malice shall not be subject to an action for civil damages or other relief as the result of such report.

(c) Notwithstanding the foregoing, no physician shall be responsible for reporting pursuant to paragraph (a) of this subdivision with respect to any information discovered by such physician solely as a result of:

(i) Participation in a properly conducted mortality and/or morbidity conference, departmental meeting or a medical or tissue committee constituted pursuant to the by-laws of a hospital which is duly established pursuant to article twenty-eight of the public health law, unless the procedures of such conference, department or committee of such hospital shall have been declared to be unacceptable for the purpose hereof by the commissioner, and provided that the obligations of reporting such information when appropriate to do so shall be the responsibility of the chairperson of such conference, department or committee, or

(ii) [Expires March 31, 2018, pursuant to L.1983, c. 426, § 5.] Participation and membership during a three year demonstration period in a physician committee of the Medical Society of the State of New York or the New York State Osteopathic Society whose purpose is to confront and refer to treatment physicians who are thought to be suffering from alcoholism, drug abuse or mental illness. Such demonstration period shall commence on April first, nineteen hundred eighty and terminate on May thirty-first, nineteen hundred eighty-three. An additional demonstration period shall commence on June first, nineteen hundred eighty-three and terminate on March thirty-first, nineteen hundred eighty-six. An additional demonstration period shall commence on April first, nineteen hundred eighty-six and terminate on March thirty-first, nineteen hundred eighty-nine. An additional demonstration period shall commence April first, nineteen hundred eighty-nine and terminate March thirty-first, nineteen hundred ninety-two. An additional demonstration period shall commence April first, nineteen hundred ninety-two and terminate March thirty-first, nineteen hundred ninety-five. An additional demonstration period shall commence on April first, nineteen hundred ninety-five and terminate on March thirty-first, nineteen hundred ninety-eight. An additional demonstration period shall commence on April first, nineteen hundred ninety-eight and terminate on March thirty-first, two thousand three. An additional demonstration period shall commence on April first, two thousand three and terminate on March thirty-first, two thousand thirteen. An additional demonstration period shall commence April first, two thousand thirteen and terminate on March thirty-first, two thousand eighteen provided, however, that the commissioner may prescribe requirements for the continuation of such demonstration program, including periodic reviews of such programs and submission of any reports and data necessary to permit such reviews. During these additional periods, the provisions of this subparagraph shall also apply to a physician committee of a county medical society.

(d) In the event that a physician or administrator of a hospital established pursuant to article twenty-eight of this chapter shall reasonably be unable to determine if any information which he or she has is such that it does reasonably appear to show that a licensee is guilty of professional misconduct and therefore creates an obligation on such physician or such administrator to make a report pursuant to paragraph (a) hereof, he or she may either:

(i) in accordance with procedures established by the board, and without revealing the name of the licensee who he or she is considering making such a report about, request in writing the advice of the board as to whether or not a report should be made, and the physician or administrator so requesting such advice shall then be required to comply with the advice of the board. No such request for advice shall relieve the requesting physician or administrator of any obligation hereunder unless all other material facts are revealed, other than the name of the licensee in question, or

(ii) in the case where the licensee about whom another physician is considering making such report is affiliated with a hospital which is duly established pursuant to article twenty-eight of this chapter, a physician may elect to fulfill the obligations of paragraph (a) hereof by reporting such information to the appropriate executive committee or professional practices peer review committee which is duly constituted pursuant to by-laws of such hospital, unless the peer review procedures of such hospital shall have been declared to be unacceptable for the purposes hereof by the commissioner. The

physician members of such hospital executive committee or professional practices peer review committee shall thereupon have the responsibility of reporting such information to the board pursuant to paragraph (a) hereof, as required thereby, but in the event that such committee determines that a report shall be made to the board, the chairperson of such committee may fulfill the obligation of reporting on behalf of all the members of the committee, or

(iii) in a case where the physician, about whom he or she is considering making such report, is a member of a county medical society or district osteopathic society, and is not affiliated with a hospital, but practices his or her profession within such county or district, a physician may elect to fulfill the obligations of paragraph (a) hereof by reporting such information to the appropriate county medical society's or district osteopathic society's professional practices review committee duly constituted pursuant to the by-laws of such county medical society or district osteopathic society, unless the review procedures of such county medical society or district osteopathic society shall have been declared to be unacceptable for the purposes hereof by the commissioner. The physician members of such review committee shall thereupon have the responsibility of reporting such information to the board pursuant to paragraph (a) hereof, as required thereby, but in the event that such committee determines that a report shall be made to the board, the chairperson of such committee may fulfill the obligation of reporting on behalf of all the members of the committee.

(e) Nothing contained in this subdivision shall be so construed as to require any physician to violate a physician/patient privilege and therefore, no physician shall be required to report any information to the board which such physician has learned solely as a result of rendering treatment to another physician.

(f) A violation of this subdivision shall not be subject to the provisions of sections twelve and twelve-b of this chapter.

(g) [Expires March 31, 2018, pursuant to L.1983, c. 426, § 5] Any physician committee of the Medical Society of the State of New York, the New York State Osteopathic Society or a county medical society referred to in subparagraph (ii) of paragraph (c) of this subdivision shall develop procedures in consultation with, and approved by, the commissioner of the department of health, including but not limited to the following:

(i) The committee shall disclose at least once a month such information as the director of the office of professional medical conduct may deem appropriate regarding reports received, contacts or investigations made and the disposition of each report, provided however that the committee shall not disclose any personally identifiable information except as provided in subparagraph (ii) or subparagraph (iii) of this paragraph.

(ii) The committee shall immediately report to the director the name, all information obtained and the results of any contact or investigation regarding any physician who is believed to be an imminent danger to the public.

(iii) The committee shall report to the director in a timely fashion all information obtained regarding any physician who refuses to cooperate with the committee, refuses to submit to treatment, or whose impairment is not substantially alleviated through treatment.

(iv) The committee shall inform each physician who is participating in a program of the procedures followed in the program,

of the rights and responsibilities of the physician in the program and of the possible results of noncompliance with the program.

(v) [Deemed repealed March 31, 2018, pursuant to L.1984, c. 582, § 5.] No member of any such committee shall be liable for damages to any person for any action taken by such member provided that such action was taken without malice and within the scope of such member's function as a member of such committee.

(vi) [Deemed repealed March 31, 2018, pursuant to L.1984, c. 582, § 5.] The committee, in conjunction with the director of the office of professional medical conduct, shall develop appropriate consent forms and disclosure proceedings as may be necessary under any federal statute, rule or regulation in order to permit the disclosure of the information as may be required under subparagraphs (ii) and (iii) of this paragraph.

Except as herein provided and notwithstanding any other provision of law, neither the proceedings nor the records of any such physician committee shall be subject to disclosure under article thirty-one of the civil practice law and rules nor shall any member of any such committee nor any person in attendance at any such meeting be required to testify as to what transpired thereat.

12. Summary action. (a) Whenever the commissioner, (i) after being presented with information indicating that a licensee is causing, engaging in or maintaining a condition or activity which has resulted in the transmission or suspected transmission, or is likely to lead to the transmission, of communicable disease as defined in the state sanitary code or HIV/AIDS, by the state and/or a local health department and if in the commissioner's opinion it would be prejudicial to the interests of the people to delay action until an opportunity for a hearing can be provided in accordance with the prehearing and hearing provisions of this section; or (ii) after an investigation and a recommendation by a committee on professional conduct of the state board for professional medical conduct, based upon a determination that a licensee is causing, engaging in or maintaining a condition or activity which in the commissioner's opinion constitutes an imminent danger to the health of the people, and that it therefore appears to be prejudicial to the interests of the people to delay action until an opportunity for a hearing can be provided in accordance with the prehearing and hearing provisions of this section; the commissioner may order the licensee, by written notice, to discontinue such dangerous condition or activity or take certain action immediately and for a period of ninety days from the date of service of the order. Within ten days from the date of service of the said order, the state board for professional medical conduct shall commence and regularly schedule such hearing proceedings as required by this section, provided, however, that the hearing shall be completed within ninety days of the date of service of the order. To the extent that the issue of imminent danger can be proven without the attorney representing the office of professional medical conduct putting in its entire case, the committee of the board shall first determine whether by a preponderance of the evidence the licensee is causing, engaging in or maintaining a condition or activity which constitutes an imminent danger to the health of the people. The attorney representing the office of professional medical conduct shall have the burden of going forward and proving by a preponderance of the evidence that the licensee's condition, activity or practice constitutes an imminent danger to the health of the people. The licensee shall have an opportunity to be heard and to present proof. When both the office and the licensee have completed their cases with respect to the question of imminent danger, the committee shall promptly make a recommendation to the commissioner on the issue of imminent danger and determine whether the summary order should be left in effect, modified or vacated, and continue the hearing on all the remaining charges, if any, in accordance with paragraph (f) of subdivision ten of this section. Within ten days of the committee's recommendation, the commissioner shall determine whether or not to adopt the committee's recommendations, in whole or in part, and shall leave in effect, modify or vacate his summary order. The state board for professional medical conduct shall make every reasonable effort to avoid any delay in completing and determining such proceedings. If, at the conclusion of the hearing, (i) the hearing committee of the board finds the licensee guilty of one or more of the charges which are the basis for the summary order, (ii) the hearing committee determines that the summary order continue, and (iii) the ninety day term of the order has not expired, the summary order shall remain in full force and effect until a final decision has been rendered by

the committee or, if review is sought, by the administrative review board. A summary order shall be public upon issuance.

(b) When a licensee has pleaded or been found guilty or convicted of committing an act constituting a felony under New York state law or federal law, or the law of another jurisdiction which, if committed within this state, would have constituted a felony under New York state law, or when the duly authorized professional disciplinary agency of another jurisdiction has made a finding substantially equivalent to a finding that the practice of medicine by the licensee in that jurisdiction constitutes an imminent danger to the health of its people, or when a licensee has been disciplined by a duly authorized professional disciplinary agency of another jurisdiction for acts which if committed in this state would have constituted the basis for summary action by the commissioner pursuant to paragraph (a) of this subdivision, the commissioner, after a recommendation by a committee of professional conduct of the state board for professional medical conduct, may order the licensee, by written notice, to discontinue or refrain from practicing medicine in whole or in part or to take certain actions authorized pursuant to this title immediately. The order of the commissioner shall constitute summary action against the licensee and become public upon issuance. The summary suspension shall remain in effect until the final conclusion of a hearing which shall commence within ninety days of the date of service of the commissioner's order, end within ninety days thereafter and otherwise be held in accordance with paragraph (a) of this subdivision, provided, however, that when the commissioner's order is based upon a finding substantially equivalent to a finding that the practice of medicine by the licensee in another jurisdiction constitutes an imminent danger to the health of its people, the hearing shall commence within thirty days after the disciplinary proceedings in that jurisdiction are finally concluded.

13. (a) Temporary surrender. The license and registration of a licensee who may be temporarily incapacitated for the active practice of medicine and whose alleged incapacity has not resulted in harm to a patient may be voluntarily surrendered to the board for professional medical conduct, which may accept and hold such license during the period of such alleged incapacity or the board for professional medical conduct may accept the surrender of such license after agreement to conditions to be met prior to the restoration of the license. The board shall give prompt written notification of such surrender to the division of professional licensing services of the state education department, and to each hospital at which the licensee has privileges. The licensee whose license is so surrendered shall notify all patients and all persons who request medical services that the licensee has temporarily withdrawn from the practice of medicine. The licensure status of each such licensee shall be "inactive" and the licensee shall not be authorized to practice medicine. The temporary surrender shall not be deemed to be an admission of disability or of professional misconduct, and shall not be used as evidence of a violation of subdivision seven or eight of section sixty-five hundred thirty of the education law unless the licensee practices while the license is "inactive". Any such practice shall constitute a violation of subdivision twelve of section sixty-five hundred thirty of the education law. The surrender of a license under this subdivision shall not bar any disciplinary action except action based solely upon the provisions of subdivision seven or eight of section sixty-five hundred thirty of the education law and where no harm to a patient has resulted, and shall not bar any civil or criminal action or proceeding which might be brought without regard to such surrender. A surrendered license shall be restored upon a showing to the satisfaction of a committee of professional conduct of the state board for professional medical conduct that the licensee is not incapacitated for the active practice of medicine provided, however, that the committee may impose reasonable conditions on the licensee, if it determined that due to the nature and extent of the licensee's former incapacity such conditions are necessary to protect the health of the people. The chairperson of the committee shall issue a restoration order adopting the decision of the committee. Prompt written notification of such restoration shall be given to the division of professional licensing services of the state education department and to all hospitals which were notified of the surrender of the license.

(b) Permanent surrender. The license and registration of a licensee who may be permanently incapacitated for the active practice of medicine, and whose alleged incapacity has not resulted in harm to a patient, may be voluntarily surrendered to the board for professional medical conduct. The board shall give prompt written notification of such surrender to the division of professional licensing services of the state education department, and to each hospital at which the licensee has privileges. The licensee whose license is so surrendered shall notify all patients and all persons who request medical services that the licensee has permanently withdrawn from the practice of medicine. The permanent surrender shall not be deemed to be an

admission of disability of or professional misconduct, and shall not be used as evidence of a violation of subdivision seven or eight of section sixty-five hundred thirty of the education law. The surrender shall not bar any civil or criminal action or proceeding which might be brought without regard to such surrender. There shall be no restoration of a license that has been surrendered pursuant to this subdivision.

14. Reports. The board shall prepare an annual report for the legislature, the governor and other executive offices, the medical profession, medical professional societies, consumer agencies and other interested persons. Such report shall include, but shall not be limited to, a description and analysis of the administrative procedures and operations based upon a statistical summary relating to (i) discipline, (ii) complaint, investigation, and hearing backlog and (iii) budget. Information provided for these sections shall be enumerated by regional office of the office of professional medical conduct.

15. [Deemed repealed March 31, 2013, pursuant to L.1984, c. 582, § 5.] The commissioner shall make grants to any physician committee as referred to in subparagraph (ii) of paragraph (c) of subdivision eleven of this section to fund the operations of such committee during the authorized demonstration period. Grants shall be awarded pursuant to an expenditure plan developed by the sponsoring organization in consultation with, and approved by the commissioner. No funds shall be made available unless the committee's procedures have been approved by the commissioner pursuant to paragraph (g) of subdivision eleven of this section.

16. Liability. Notwithstanding any other provision of law, persons who assist the department as consultants, expert witnesses, administrative officers or monitors in the investigation, prosecution or hearing of alleged professional misconduct, licensure matters, restoration proceedings, probation, or criminal prosecutions for unauthorized practice, shall not be liable for damages in any civil action or proceeding as a result of such assistance, except upon proof of actual malice. The attorney general shall defend such persons in any such action or proceeding, in accordance with section seventeen of the public officers law.

17. Monitoring. (a) A licensee may be ordered to have his or her practice monitored by another appropriate licensee after investigation and review pursuant to paragraph (a) of subdivision ten of this section, if there is reason to believe that the licensee is unable to practice medicine with reasonable skill and safety to patients.

(b) The director of the office of professional medical conduct, after consultation with the executive secretary, shall direct counsel to prepare a notice detailing the reasonable cause and a copy of the notice shall be served on the licensee. The matter shall be presented to a committee on professional conduct by an attorney for the department and the licensee shall have the opportunity to be heard by such committee and may be represented by counsel. A stenographic record of the proceeding shall be made. Service of the notice shall be in accordance with the methods of service authorized by paragraph (d) of subdivision ten of this section.

(c) If the committee determines that reasonable cause exists as specified in paragraph (a) of this subdivision and that there is insufficient evidence for the matter to constitute misconduct as defined in sections[3] sixty-five hundred thirty and section sixty-five hundred thirty-one of the education law, the committee may issue an order directing that the licensee's practice of medicine be monitored for a period specified in the order, which shall in no event exceed one year, by a licensee approved by the director, which may include members of county medical societies or district osteopathic societies designated by the commissioner. The licensee responsible for monitoring the licensee shall submit regular reports to the director. If the licensee refuses to cooperate with the licensee responsible for monitoring or if the monitoring licensee submits a report that the

licensee is not practicing medicine with reasonable skill and safety to his or her patients, the committee may refer the matter to the director for further proceedings pursuant to subdivision ten of this section. An order pursuant to this paragraph shall be kept confidential and shall not be subject to discovery or subpoena, unless the licensee refuses to comply with the order.

(d) A licensee may not seek the appointment of a monitor pursuant to this subdivision in lieu of an order issued pursuant to subdivision seven of this section or a disciplinary proceeding pursuant to subdivision ten or twelve of this section.

18. (a) The director shall have the authority to monitor physicians, physician's assistants and specialist's assistants who have been placed on probation pursuant to a determination of professional misconduct by the board. During such period of probation, the director, or his or her designee, as provided in the order of the board, and after consultation with the executive secretary, (i) may review the professional performance of the licensee by randomly selecting office records, patient records and hospital charts, (ii) may require periodic visits by the licensee to a member of the state board for professional medical conduct or an employee of the office of professional medical conduct, (iii) may require the licensee to obtain an appropriate monitor, approved by the director, to monitor the licensee's practice, (iv) may require an audit of the licensee's billings for services rendered during probation, (v) may require the licensee to submit on a random basis to tests for the presence of alcohol or drugs, (vi) may require the licensee to obtain additional training prior to completion of the probation, (vii) may require the licensee to work in a supervised setting, (viii) may require, as a condition of the licensee's continued practice, that the licensee undergo therapy and/or treatment approved and monitored by the director, (ix) may require that the licensee comply with the requirements of the penalty imposed, and (x) may impose upon the licensee such additional requirements as reasonably relate to the misconduct found or are necessary to protect the health of the people pursuant to regulation. The director is authorized to delegate some or all of the foregoing responsibilities to designated county medical societies and district osteopathic societies.

(b) Any health care provider licensed pursuant to this chapter or the education law, hospital licensed pursuant to article twenty-eight of this chapter or medical school that participates in a monitoring or remediation program pursuant to this subdivision and subdivision seventeen of this section shall not be liable for the negligence of the monitored licensee in providing medical care pursuant to a monitoring program. However, this paragraph does not diminish the participating provider's, hospital's or school's liability for failure to exercise reasonable care in properly carrying out its responsibilities under the program. The monitored licensee shall be required to maintain medical malpractice insurance coverage with limits no less than two million dollars per occurrence and six million dollars per policy year.

19. Upon receipt of information that indicates a licensee may be in violation of the terms or conditions of probation, the director of the office of professional medical conduct shall conduct an investigation. If the director determines that a licensee may have violated probation, the director shall give notice by letter to the licensee of the facts forming the basis of the alleged violation of probation by the licensee, that the licensee has a right to a hearing and may be represented by counsel. If the licensee does not dispute the facts forming the basis of the alleged violation of probation within twenty days of the date of the letter, the director shall submit the matter to a committee on professional conduct for its review and determination. If within twenty days of the date of the letter, the licensee disputes any of the facts forming the basis of the alleged violation of probation, the licensee shall be afforded a hearing before a committee on professional conduct to hear and make findings of fact, conclusions of law and a determination. A stenographic record of the hearing shall be made. The committee, after providing a licensee with an opportunity to be heard, shall determine whether the licensee has violated probation and shall impose an appropriate penalty as defined in section two hundred thirty-a of this title. In determining the appropriate penalty, the committee shall consider both the violation of probation and the prior adjudication of misconduct. The chairperson of the committee shall issue an order adopting the decision of the committee on professional conduct. The order may be reviewed by the administrative review board for professional medical conduct.

Credits

(Added L.1975, c. 109, § 28. Amended L.1977, c. 773, §§ 2 to 5; L.1978, c. 210, § 1; L.1978, c. 401, § 1; L.1980, c. 343, §§ 2, 3; L.1980, c. 866, §§ 10 to 14; L.1983, c. 27, § 1; L.1983, c. 426, §§ 1 to 3; L.1984, c. 545, § 1; L.1984, c. 582, §§ 2, 3; L.1984, c. 1005, §§ 1 to 9; L.1984, c. 1018, §§ 1, 2; L.1986, c. 45, § 1; L.1986, c. 266, §§ 23 to 29; L.1989, c. 55, § 1; L.1991, c. 606, §§ 1 to 15; L.1992, c. 37, §§ 1 to 6; L.1992, c. 735, §§ 1 to 5; L.1994, c. 558, §§ 2, 3; L.1995, c. 24, § 3; L.1996, c. 599, §§ 1 to 4; L.1996, c. 627, §§ 1 to 7; L.1998, c. 35, § 3, eff. April 1, 1998; L.1998, c. 537, § 1, eff. Nov. 1, 1998; L.1999, c. 610, § 1, eff. Nov. 9, 1999; L.2000, c. 542, §§ 5, 6, eff. Oct. 6, 2000; L.2003, c. 35, § 3, eff. April 8, 2003; L.2003, c. 542, §§ 1, 2, eff. Sept. 17, 2003; L.2008, c. 36, § 3, eff. March 31, 2008; L.2008, c. 477, §§ 1 to 12, eff. Nov. 3, 2008; L.2013, c. 56, pt. B, § 24, eff. March 28, 2013, deemed eff. April 1, 2013; L.2014, c. 532, § 1, eff. Dec. 17, 2014; L.2015, c. 11, §§ 1, 2, eff. March 13, 2015.)

Notes of Decisions (328)

Footnotes

1 So in original ("polices" should be "policies").

2 So in original. Comma inadvertently omitted.

3 So in original.

McKinney's Public Health Law § 230, NY PUB HEALTH § 230
Current through L.2017, chapters 1 to 23.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Public Health Law (Refs & Annos)
Chapter 45. Of the Consolidated Laws (Refs & Annos)
Article 2. The Department of Health
Title II-a. Professional Medical Conduct

McKinney's Public Health Law § 230

§ 230. State board for professional medical conduct; proceedings

Effective: March 13, 2015

Currentness

1. A state board for professional medical conduct is hereby created in the department in matters of professional misconduct as defined in sections sixty-five hundred thirty and sixty-five hundred thirty-one of the education law. Its physician members shall be appointed by the commissioner at least eighty-five percent of whom shall be from among nominations submitted by the medical society of the state of New York, the New York state osteopathic society, the New York academy of medicine, county medical societies, statewide specialty societies recognized by the council of medical specialty societies, and the hospital association of New York state. Its lay members shall be appointed by the commissioner with the approval of the governor. The board of regents shall also appoint twenty percent of the members of the board. Not less than sixty-seven percent of the members appointed by the board of regents shall be physicians. Not less than eighty-five percent of the physician members appointed by the board of regents shall be from among nominations submitted by the medical society of the state of New York, the New York state osteopathic society, the New York academy of medicine, county medical societies, statewide medical societies recognized by the council of medical specialty societies, and the hospital association of New York state. Any failure to meet the percentage thresholds stated in this subdivision shall not be grounds for invalidating any action by or on authority of the board for professional medical conduct or a committee or a member thereof. The board for professional medical conduct shall consist of not fewer than eighteen physicians licensed in the state for at least five years, two of whom shall be doctors of osteopathy, not fewer than two of whom shall be physicians who dedicate a significant portion of their practice to the use of non-conventional medical treatments who may be nominated by New York state medical associations dedicated to the advancement of such treatments, at least one of whom shall have expertise in palliative care, and not fewer than seven lay members. An executive secretary shall be appointed by the chairperson and shall be a licensed physician. Such executive secretary shall not be a member of the board, shall hold office at the pleasure of, and shall have the powers and duties assigned and the annual salary fixed by, the chairperson. The chairperson shall also assign such secretaries or other persons to the board as are necessary.

2. Members of such board shall be appointed by the commissioner or the board of regents for three year terms except that the terms of those first appointed shall be arranged so that as nearly as possible an equal number shall terminate annually. A vacancy occurring during a term shall be filled by an appointment by the commissioner or the board of regents for the unexpired term.

3. Each member of the board shall receive a certificate of appointment, shall before beginning his term of office file a constitutional oath of office with the secretary of state, shall receive up to one hundred fifty dollars as prescribed by the

commissioner for each day devoted to board work not to exceed ten thousand dollars in any one year, and shall be reimbursed for his necessary expenses. Any member may be removed from the board at the pleasure of the commissioner.

4. The governor shall annually designate from the members of the board a chairperson who shall be a physician and vice-chairperson. The board shall meet upon call of the chairperson, and may adopt bylaws consistent with this section. A quorum for the transaction of business by the board shall be a majority of members.

5. From among the members of the board two or more committees on professional conduct shall be appointed by the board chairperson.

6. Any committee on professional conduct appointed pursuant to the provisions of this section shall consist of two physicians and one lay member.

7. (a) The board, by its committees on professional conduct, shall conduct disciplinary proceedings as prescribed in this section and shall assist in other professional conduct matters as prescribed by the chairperson. In this section the term "licensee" shall mean physician, including a physician practicing under a limited permit, a medical resident, physician's assistant and specialist's assistant. A committee on professional conduct, on notice to the licensee and after affording the licensee, the office of professional medical conduct, and their attorneys an opportunity to be heard, shall have the authority to direct a licensee to submit to a medical or psychiatric examination when the committee has reason to believe the licensee may be impaired by alcohol, drugs, physical disability or mental disability. The committee, with the advice of the licensee and the office of professional medical conduct, shall designate the physician who will conduct the examination. The results of the examination shall be provided by the examining physician to the committee, the licensee, and the office of professional medical conduct. The licensee may also obtain a physician to conduct an examination the results of which shall be provided to the committee and the office of professional medical conduct.

(b) A committee on professional conduct may sit as an administrative tribunal for the purpose of issuing an order authorizing the office of professional medical conduct to obtain medical records or other protected health information pertaining to the licensee's physical or mental condition when the committee has reason to believe that the licensee may be impaired by alcohol, drugs, physical disability or mental disability and that the records or information may be relevant to the alleged impairment or that information regarding the licensee's medical condition may be relevant to an inquiry into a report of a communicable disease, as defined by the state sanitary code or HIV/AIDS. No such order shall be issued except on notice to the licensee and after affording the licensee and the office of professional medical conduct an opportunity to be heard.

(c) A committee on professional conduct, on notice to the licensee and after affording the licensee and the office of professional medical conduct an opportunity to be heard, shall have the authority to direct a licensee to submit to a clinical competency examination when the committee has reason to believe that the licensee has practiced with incompetence, generally in his or her medical practice or in a specific area of his or her medical practice. The committee, with the advice of the licensee and the office of professional medical conduct, shall designate the facility or institution to conduct the clinical competency examination. The results of the clinical competency examination shall be provided by the facility or institution to the committee, the licensee and the office of professional medical conduct. The licensee may also obtain an accredited facility or institution to conduct a clinical competency examination, the results of which shall be provided to the committee and the office of professional medical conduct.

8. Notwithstanding any other provision of law, no member of a committee on professional conduct nor an employee of the board shall be liable in damages to any person for any action taken or recommendation made by him within the scope of his function as a member of such committee or employee provided that (a) such member or employee has taken action or made recommendations within the scope of his function and without malice, and (b) in the reasonable belief after reasonable investigation that the act or recommendation was warranted, based upon the facts disclosed.

9. Notwithstanding any other provisions of law, neither the proceedings nor the records of any such committee shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided. No person in attendance at a meeting of any such committee shall be required to testify as to what transpired thereat. The prohibition relating to discovery of testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting.

9-a. At any time, if the board for professional medical conduct or the office of professional medical conduct determines that there is a reasonable belief that an act or omission that constitutes a crime under the law of the state of New York, any other state, or the United States has been committed by the licensee, the board for professional medical conduct or office of professional medical conduct shall notify the appropriate law enforcement official or authority.

9-b. Neither the board for professional medical conduct nor the office of professional medical conduct shall charge a licensee with misconduct as defined in sections sixty-five hundred thirty and sixty-five hundred thirty-one of the education law, or cause a report made to the director of such office to be investigated beyond a preliminary review as set forth in clause (A) of subparagraph (i) of paragraph (a) of subdivision ten of this section, where such report is determined to be based solely upon the recommendation or provision of a treatment modality to a particular patient by such licensee that is not universally accepted by the medical profession, including but not limited to, varying modalities used in the treatment of Lyme disease and other tick-borne diseases. When a licensee, acting in accordance with paragraph e of subdivision four of section sixty-five hundred twenty-seven of the education law, recommends or provides a treatment modality that effectively treats human disease, pain, injury, deformity or physical condition for which the licensee is treating a patient, the recommendation or provision of that modality to a particular patient shall not, by itself, constitute professional misconduct. The licensee shall otherwise abide by all other applicable professional requirements.

10. Professional misconduct proceedings shall consist of:

(a) [Eff. until March 31, 2018, pursuant to L.1983, c. 426, § 5. See, also, par. (a), below.] (i)(A) The board for professional medical conduct, by the director of the office of professional medical conduct, may investigate on its own any suspected professional misconduct, and shall investigate each complaint received regardless of the source. By the conclusion of a preliminary review, including an internal clinical review, the director shall determine if a report is based solely upon the recommendation or provision of a treatment modality by a licensee that is not universally accepted by the medical profession, including but not limited to varying modalities used in the treatment of Lyme disease or other tick-borne diseases. Upon a determination by the director that a report is based solely upon the provision of a treatment modality that is not universally accepted, no further review shall be conducted and no charges shall be brought. Nothing in this section shall preclude the director from making such a determination earlier in, or subsequent to, a preliminary review. (B) The director of the office of professional medical conduct shall cause a preliminary review of every report made to the department pursuant to section

twenty-eight hundred three-e as added by chapter eight hundred sixty-six of the laws of nineteen hundred eighty, sections twenty-eight hundred five-l and forty-four hundred five-b of this chapter, and section three hundred fifteen of the insurance law, to determine if such report reasonably appears to reflect physician conduct warranting further investigation pursuant to this subparagraph.

(ii) If the investigation of cases referred to an investigation committee involves issues of clinical practice, medical experts, shall be consulted. Experts may be made available by the state medical society of the state of New York, by county medical societies and specialty societies, and by New York state medical associations dedicated to the advancement of non-conventional medical treatments. Any information obtained by medical experts in consultations, including the names of licensees or patients, shall be confidential and shall not be disclosed except as otherwise authorized or required by law.

(iii) In the investigation of cases referred to an investigation committee, the licensee being investigated shall have an opportunity to be interviewed by the office of professional medical conduct in order to provide an explanation of the issues under investigation. Providing an opportunity for such an interview shall be a condition precedent to the convening of an investigation committee on professional misconduct of the board for professional medical conduct.

(A) At least twenty days before the interview, except as otherwise set forth herein, the licensee under investigation shall be given written notice of: (1) a description of the conduct that is the subject of the investigation; (2) the issues relating to the conduct that have been identified at the time of the notice; (3) the time frame of the conduct under investigation; (4) the identity of each patient whose contact with or care by the licensee is believed to be relevant to the investigation; and (5) the fact that the licensee may be represented by counsel and may be accompanied by a stenographer to transcribe the proceeding. All costs of transcription shall be paid by the licensee and a copy shall be provided to the department by the licensee within thirty days of the interview. The notice required by this subparagraph may be given less than twenty days before an interview in any case where the office of professional medical conduct anticipates that the commissioner will take summary action under subdivision twelve of this section, provided that the notice is given within a reasonable amount of time prior to the interview and advises of the possible summary action.

(B) Within thirty days following the interview or, in a case where a stenographer was present at the interview, within fifteen days after the office of professional medical conduct receives the transcript of the interview, whichever is later, the licensee shall be provided with a copy of the report of the interviewer. In addition, the licensee shall promptly be given written notice of issues identified subsequent to the interview. The licensee may submit written comments or expert opinion or medical or scientific literature that is directly relevant to the issues that have been identified by the office of professional medical conduct to the office of professional medical conduct at any time.

(C) If the director determines that the matter shall be submitted to an investigation committee, an investigation committee shall be convened within ninety days of any interview of the licensee. The director shall present the investigation committee with relevant documentation including, but not limited to: (1) a copy of the original complaint; (2) the report of the interviewer and the stenographic record if one was taken; (3) the report of any medical or scientific expert; (4) copies of reports of any patient record reviews; and (5) the licensee's submissions.

(D) If the director determines to close an investigation following an interview without presentation to an investigation committee, the office of professional medical conduct shall notify the licensee in writing.

(iv) If the director of the office of professional medical conduct, after obtaining the concurrence of a majority of an investigation committee, and after consultation with the executive secretary, determines that a hearing is warranted the director shall, within fifteen days thereafter, direct counsel to prepare the charges. If the investigation committee is unanimous in its concurrence that a hearing is warranted, the charges shall be made public under paragraph (d) of this subdivision. If the investigation committee is not unanimous in its concurrence that a hearing is warranted, the members of such committee shall vote on whether the charges should be made public, and if all of the committee members vote in favor of publication, the charges shall be made public under paragraph (d) of this subdivision. If the director determines after consultation with an investigation committee that: (A) evidence exists of a single incident of negligence or incompetence, a pattern of inappropriate prescribing or medical practice, or impairment by drugs, alcohol, physical or mental disability; (B) a recommendation was made by a county medical society or the medical society of the state of New York that warrants further review; or (C) the facts underlying a verdict in a medical malpractice action warrant further review, the director, in addition to the authority set forth in this section, shall be authorized to conduct a comprehensive review of patient records of the licensee and such office records of the licensee as are related to said determination. The licensee shall cooperate with the investigation and willful failure to cooperate in a substantial or material respect may result in an enforcement proceeding pursuant to subparagraph (ii) of paragraph (o) of this subdivision. If there is a question of alcoholism, alcohol abuse, drug abuse or mental illness, the director may refer the matter to a committee, as referred to in subparagraph (ii) of paragraph (c) of subdivision eleven of this section.

(v) The files of the office of professional medical conduct relating to the investigation of possible instances of professional misconduct shall be confidential and not subject to disclosure at the request of any person, except as provided by law in a pending disciplinary action or proceeding. The provisions of this paragraph shall not prevent the office from sharing information concerning investigations within the department and, pursuant to subpoena, with other duly authorized public agencies responsible for professional regulation or criminal prosecution. Nothing in this subparagraph shall affect the duties of notification set forth in subdivision nine-a of this section or prevent the publication of charges or of the findings, conclusions, determinations, or order of a hearing committee pursuant to paragraphs (d) or (g) of this subdivision. In addition, the commissioner may disclose the information when, in his or her professional judgment, disclosure of such information would avert or minimize a public health threat. Any such disclosure shall not affect the confidentiality of other information in the files of the office of professional medical conduct related to the investigation.

(vi) The office of professional medical conduct, acting under this section, may have access to the criminal history record of any licensee governed by the provisions of this section maintained by the division of criminal justice services pursuant to subdivision six of section eight hundred thirty-seven of the executive law.

(vii) The director of the office of professional medical conduct, in consultation with the patient safety center, shall cause a review on a continuous basis of medical malpractice claim and disposition information reported to the commissioner under section three hundred fifteen of the insurance law, for the purpose of identifying potential misconduct. The office shall commence a misconduct investigation if potential misconduct is identified as a result of such review, which shall be based on criteria such as disposition frequency, disposition type including judgment and settlement, disposition award amount, geographic region, specialty, or other factors as appropriate in identifying potential misconduct.

(a) [Eff. March 31, 2018, pursuant to L.1983, c. 426, § 5. See, also, par. (a) above.] Investigation. The board for professional medical conduct, by a committee on professional conduct, may investigate on its own any suspected professional misconduct, and shall investigate each complaint received regardless of the source. The results of the investigation shall be referred to the director of the office of professional medical conduct. If the director of the office of professional medical conduct, after consultation with a professional member of the board for professional medical conduct, determines that a hearing is

warranted he shall direct counsel to prepare the charges within fifteen days thereafter. If it is determined by the director that the complaint involves a question of professional expertise then such director may seek, and if so shall obtain, the concurrence of at least two members of a panel of three members of the state board for professional medical conduct.

(b) Charges. The charges shall state the substance of the alleged professional misconduct and shall state clearly and concisely the material facts but not the evidence by which the charges are to be proved.

(c) Notice of hearing. The board shall set the time and place of the hearing. The notice of hearing shall state (1) the date, time and place of the hearing, (2) that the licensee shall file a written answer to each of the charges and allegations in the statement of charges no later than ten days prior to the hearing, that any charge and allegation not so answered shall be deemed admitted and that the licensee may wish to seek the advice of counsel prior to filing such answer, (3) that the licensee shall appear personally at the hearing and may be represented by counsel who shall be an attorney admitted to practice in New York state, (4) that the licensee shall have the right to produce witnesses and evidence in his behalf, to cross-examine witnesses and examine evidence produced against him, and to have subpoenas issued in his behalf to require the production of witnesses and evidence in manner and form as prescribed by the civil practice law and rules or either party may issue such subpoenas in their own behalf, (5) that a stenographic record of the hearing will be made, and (6) such other information as may be considered appropriate by the committee.

(d) Service of charges and of notice of hearing. (i) A copy of the charges and the notice of the hearing shall be served on the licensee personally by the board at least thirty days before the hearing. If personal service cannot be made after due diligence and such fact is certified under oath, a copy of the charges and the notice of hearing shall be served by registered or certified mail to the licensee's last known address by the board at least fifteen days before the hearing.

(ii) The charges shall be made public, consistent with subparagraph (iv) of paragraph (a) of this subdivision, no earlier than five business days after they are served, and the charges shall be accompanied by a statement advising the licensee that such publication will occur; provided, however, that charges may be made public immediately upon issuance of the commissioner's order in the case of summary action taken pursuant to subdivision twelve of this section and no prior notification of such publication need be made to the licensee.

(iii) If a hearing on the charges has not yet been conducted or if a hearing has been conducted but the committee has not yet issued a determination, the publication of charges by the department shall include a statement advising that the charges are only allegations which may be contested by the licensee in an administrative hearing, except that no such statement need be included if the licensee fails or affirmatively declines to contest the charges. In the event any or all such charges are dismissed, such dismissal shall be made public within two business days.

(d-1) Disclosure of exculpatory evidence. After service of the charges upon the licensee, counsel for the office of professional medical conduct shall, as soon as practicable and on a continuing basis, provide the licensee with any information or documentation in the possession of the office of professional medical conduct which tends to prove the licensee's innocence.

(e) Committee hearing. The hearing shall be conducted by a committee on professional conduct. The members of the hearing committee shall be appointed by the chairperson of the board who shall designate the committee chairperson. In addition to

said committee members, the commissioner shall designate an administrative officer, admitted to practice as an attorney in the state of New York, who shall have the authority to rule on all motions, including motions to compel disclosure of information or material claimed to be protected because of privilege or confidentiality, procedures and other legal objections and shall draft the conclusions of the hearing committee pursuant to paragraph (g). The administrative officer shall have the authority to rule on objections to questions posed by either party or the committee members. The administrative officer shall not be entitled to vote.

(f) Conduct of hearing. All hearings must be commenced within sixty days of the service of charges except that an adjournment of the initial hearing date may be granted by the hearing committee upon request by either party upon good cause shown. No adjournment shall exceed thirty days. The evidence in support of the charges shall be presented by an attorney. The licensee shall have the rights required to be stated in the notice of hearing (subparagraph (c) of this subdivision) and in section four hundred one of the state administrative procedure act. The committee shall not be bound by the rules of evidence, but its conclusion shall be based on a preponderance of the evidence. A hearing which has been initiated shall not be discontinued because of the death or incapacity to serve of one member of the hearing committee. In the event of a member's death or incapacity to serve on the committee, a member shall be appointed immediately by the chairperson of the board. The member shall affirm in writing that he or she has read and considered evidence and transcripts of the prior proceedings. The last hearing day must be held within one hundred twenty days of the first hearing day. Either party, for good cause shown, may request that the committee extend the last hearing day beyond one hundred twenty days. An extension requested by the licensee and granted by the committee may not be used as the grounds for a proceeding brought under paragraph (j) of this subdivision.

(g) Results of hearing. The committee shall make (1) findings of fact, (2) conclusions concerning the charges sustained or dismissed, and (3) a determination regarding charges sustained or dismissed, and in the event any of the charges have been sustained, of the penalty to be imposed or appropriate action to be taken and the reasons for the determination. For the committee to make a conclusion sustaining a charge, or determining a penalty or the appropriate action to be taken, two members of the committee must vote for such a conclusion or determination. The committee shall issue an order based on its determination. The committee's findings, conclusions, determinations and order shall become public upon issuance. However, if the time to request a review of the committee's determination has not yet expired, or if the review has been requested but no determination as a result of the review has been issued, such publication shall include a statement advising that the licensee or the department may request a review of the committee's determination. No such statement is required if (a) the time to request such review has expired without the filing of such request by either of the parties, or (b) the licensee and the department both affirmatively decline to request review of the committee's determination or fail to perfect such review. In the event any or all such charges are dismissed, such dismissal shall be made public within two business days.

(h) Disposition of results. (i) The findings, conclusions, determination and the reasons for the determination of the committee shall be served upon the licensee, the department, and any hospitals, primary practice settings or health care plans required to be identified in publicly disseminated physician data pursuant to paragraph (j), (n), or (q) of subdivision one of section twenty-nine hundred ninety-five-a of this chapter, within sixty days of the last day of hearing. Service shall be either by certified mail upon the licensee at the licensee's last known address and such service shall be effective upon receipt or seven days after mailing by certified mail whichever is earlier or by personal service and such service shall be effective upon receipt. The licensee shall deliver to the board the license which has been revoked, annulled, suspended or surrendered, together with the registration certificate, within five days after receipt of the order. If the license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, the licensee shall submit an affidavit to that effect and shall deliver such license or certificate to the board when located. The director of the office shall promptly transmit a copy of the order to the division of professional licensing services of the state education department and to each hospital at which the licensee has privileges.

(ii) When a license has been: (A) revoked or annulled without stay pursuant to subdivision four or five of section two hundred thirty-a of this title; (B) surrendered by a licensee; (C) suspended without stay for more than one hundred eighty days; or (D) restricted to prohibit the practice of medicine or to preclude the delivery of patient care, the licensee whose license has been so revoked, surrendered, annulled without stay, suspended without stay for more than one hundred eighty days, or restricted shall, within fifteen days of the effective date of the order:

(1) notify his or her patients, of the cessation or limitation of the licensee's medical practice; the names of other physicians or health care practitioners who have agreed to assume responsibility for the patient's care; that the patient should contact one of those named physicians or health care practitioners, or another physician or health care practitioner of the patient's choice, to determine the health care plans, as defined in sections four thousand nine hundred of the insurance law and forty-nine hundred of this chapter, in which the physician or health care practitioner participates and the polices' and procedures of such physician or other health care practitioner; that the patient should notify the licensee of the name of the physician or other health care practitioner to whom the patient's medical records should be transferred; and that the licensee will retain, and remain responsible for the maintenance of the patient's medical records until the patient provides notice that the records shall be transferred directly to the patient, consistent with the provisions of sections seventeen and eighteen of this chapter, or to another practitioner of the patient's choice. The licensee shall also notify each health care plan with which the licensee contracts or is employed, and each hospital where he or she has privileges in writing of the cessation or limitation of the licensee's medical practice. Within forty-five days of the effective date of the order, the licensee shall provide the office of professional medical conduct with proof, in a form acceptable to the director of the office of professional medical conduct, that all patients and hospitals have been notified of the cessation or limitation of the licensee's medical practice.

(2) make arrangements for the transfer and maintenance of the medical records of his or her former patients. Records shall be either transferred to the licensee's former patients consistent with the provisions of sections seventeen and eighteen of this chapter or to another physician or health care practitioner as provided in clause (1) of this subparagraph who shall expressly assume responsibility for their care and maintenance and for providing access to such records, as provided in subdivisions twenty-two and thirty-two of section sixty-five hundred thirty of the education law, the rules of the board of regents or the regulations of the commissioner of education and sections seventeen and eighteen of this chapter. When records are not transferred to the licensee's former patients or to another physician or health care practitioner, the licensee whose license has been revoked, annulled, surrendered, suspended or restricted shall remain responsible for the care and maintenance of the medical records of his or her former patients and shall be subject to additional proceedings pursuant to subdivisions twenty-two, thirty-two and forty of section sixty-five hundred thirty of the education law in the event that the licensee fails to maintain those medical records or fails to make them available to a former patient.

(3) notify the office of professional medical conduct of the name, address, and telephone number of any physician or other health care practitioner who has agreed to accept responsibility for storing and maintaining these medical records.

(4) in the event that the licensee whose license has been revoked, annulled, surrendered or restricted to prohibit the practice of medicine or to preclude the delivery of patient care holds a federal Drug Enforcement Agency (DEA) certificate, advise the DEA in writing of the licensure action, surrender his or her DEA controlled substance privileges to the DEA, and surrender any unused DEA #222 U.S. Official Order Forms, Schedules 1 and 2 to the DEA.

(5) for licensees whose license has been revoked, annulled, surrendered or restricted to prohibit the practice of medicine or to preclude the delivery of patient care, return any unused New York state official prescription forms to the bureau of narcotics enforcement of the department. The licensee shall cause all other prescription pads bearing the licensee's name to be destroyed. If no other licensee is providing services at the licensee's practice location, all medications shall be properly

disposed.

(6) for licensees whose license to practice has been revoked, annulled, surrendered or restricted to prohibit the practice of medicine or to preclude the delivery of patient care, refrain from new advertising and make reasonable efforts to cease current advertising by which his or her eligibility to practice medicine is represented.

In addition to any other penalty provided for in law, failure to comply with the requirements of this subparagraph shall constitute misconduct that may be prosecuted pursuant to this section and which may subject the licensee to the imposition of additional penalties pursuant to section two hundred thirty-a of this title.

(i) The determinations of a committee on professional conduct of the state board for professional medical conduct may be reviewed by the administrative review board for professional medical conduct.

(j) Time limitations. Failure to comply with a provision of this subdivision requiring that a specified action shall be taken within a specified period of time shall be grounds for a proceeding pursuant to article seventy-eight of the civil practice law and rules for an order staying the hearing or dismissing the charges or any part thereof or any other appropriate relief. Such proceeding shall be returnable before the supreme court of Albany county or New York county. The respondent in such proceeding shall have the initial burden to explain the reasons for the failure to comply with a provision of this subdivision requiring that a specified action to be taken within a specified period of time. The court shall not stay the hearing or dismiss the charges or grant any other relief unless it determines that failure to comply was not caused by the article seventy-eight petitioner and has caused substantial prejudice to the article seventy-eight petitioner.

(k) The executive secretary of the board with the specific approval of a committee on professional conduct of the board shall have the power to issue subpoenas requiring persons to appear before the board and be examined with reference to a matter within the scope of the inquiry or the investigation being conducted by the board and produce books, papers, records or documents pertaining thereto.

(l) The board or its representatives may examine and obtain records of patients in any investigation or proceeding by the board acting within the scope of its authorization. Unless expressly waived by the patient, any information so obtained shall be confidential and shall not be disclosed except to the extent necessary for the proper function of the board and the name of the patient may not be disclosed by the board or its employees at any stage of the proceedings unless the patient has expressly consented. Any other use or dissemination by any person by any means, unless pursuant to a valid court order or otherwise provided by law, is prohibited.

(m) Expedited procedures. (i) Violations. Violations involving professional misconduct of a minor or technical nature may be resolved by expedited procedures as provided in subparagraph (ii) or (iii) of this paragraph. For purposes of this paragraph violations of a minor or technical nature shall include, but shall not be limited to, isolated instances of violations concerning professional advertising or record keeping, and other isolated violations which do not directly affect or impair the public health, welfare or safety.

(ii) Administrative warning and consultation. If the director of the office of professional medical conduct, after obtaining the concurrence of a majority of a committee on professional conduct, and after consultation with the executive secretary, determines that there is substantial evidence of professional misconduct of a minor or technical nature or of substandard medical practice which does not constitute professional misconduct, the director may issue an administrative warning and/or provide for consultation with a panel of one or more experts, chosen by the director. Panels of one or more experts may include, but shall not be limited to, a peer review committee of a county medical society or a specialty board. Administrative warnings and consultations shall be confidential and shall not constitute an adjudication of guilt or be used as evidence that the licensee is guilty of the alleged misconduct. However, in the event of a further allegation of similar misconduct by the same licensee, the matter may be reopened and further proceedings instituted as provided in this section.

(iii) Violation committee proceeding. If the director determines, after obtaining the concurrence of a majority of a committee on professional conduct, and after consultation with the executive secretary, that there is substantial evidence of a violation and that the violation is of a nature justifying a penalty as specified in this subparagraph the department may prepare and serve charges, either by personal service or by certified mail, return receipt requested. A violation committee proceeding shall be commenced within three years of the alleged professional misconduct. Such charges shall include a statement that the matter shall be referred to a committee on professional conduct, which shall act as a violations committee for determination. The violations committee shall be appointed by the chairperson of the state board. Paragraph (c) of subdivision ten of this section shall apply to the proceeding. A stenographic record of the hearing shall be made. The evidence in support of the charges shall be presented by an attorney and the licensee shall be afforded an opportunity to be heard and to present evidence in his behalf. Such violations committee may issue a censure and reprimand, may require the licensee to perform up to twenty-five hours of public service in a facility licensed pursuant to article twenty-eight of this chapter in a manner and at a time and place directed by the board, and in addition, or in the alternative, may impose a fine not to exceed five hundred dollars for each specification of minor or technical misconduct. The violations committee may alternatively dismiss the charges in the interest of justice. The order shall be served either by certified mail to the licensee's last known address and such services shall be effective upon receipt or seven days after mailing by certified mail whichever is earlier or by personal service and such service shall be effective upon receipt. The order may be reviewed by the administrative appeals board for professional medical conduct.

(iv). Deleted by L.1991, c. 606, § 10.

(n) Engagement. A proceeding under this section shall be treated in the same manner as an action or proceeding in supreme court for the purpose of any claim by counsel of actual engagement.

(o) Orders for review of medical records. Where the director has issued an order for a comprehensive medical review of patient records and office records pursuant to subparagraph four of paragraph (a) of this subdivision and the licensee has refused to comply with the director's order, the director may apply to a justice of the supreme court, in writing, on notice to the licensee, for a court order to compel compliance with the director's order. The court shall not grant the application unless it finds that (i) there was a reasonable basis for issuance of the director's order and (ii) there is reasonable cause to believe that the records sought are relevant to the director's order. The court may deny the application or grant the application in whole or in part.

(p) Convictions of crimes or administrative violations. In cases of professional misconduct based solely upon a violation of subdivision nine of section sixty-five hundred thirty of the education law, the director may direct that charges be prepared and served and may refer the matter to a committee on professional conduct for its review and report of findings, conclusions as to guilt, and determination. In such cases, the notice of hearing shall state that the licensee shall file a written answer to

each of the charges and allegations in the statement of charges no later than ten days prior to the hearing, and that any charge or allegation not so answered shall be deemed admitted, that the licensee may wish to seek the advice of counsel prior to filing such answer that the licensee may file a brief and affidavits with the committee on professional conduct, that the licensee may appear personally before the committee on professional conduct, may be represented by counsel and may present evidence or sworn testimony in his or her behalf, and the notice may contain such other information as may be considered appropriate by the director. The department may also present evidence or sworn testimony and file a brief at the hearing. A stenographic record of the hearing shall be made. Such evidence or sworn testimony offered to the committee on professional conduct shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. Where the charges are based on the conviction of state law crimes in other jurisdictions, evidence may be offered to the committee which would show that the conviction would not be a crime in New York state. The committee on professional conduct may reasonably limit the number of witnesses whose testimony will be received and the length of time any witness will be permitted to testify. The determination of the committee shall be served upon the licensee and the department in accordance with the provisions of paragraph (h) of this subdivision. A determination pursuant to this subdivision may be reviewed by the administrative review board for professional medical conduct.

(q) At any time subsequent to the final conclusion of a professional misconduct proceeding against a licensee, whether upon the determination and order of a hearing committee issued pursuant to paragraph (h) of this subdivision or upon the determination and order of the administrative review board issued pursuant to paragraph (d) of subdivision four of section two hundred thirty-c of this title, the licensee may file a petition with the director, requesting vacatur or modification of the determination and order. The director shall, after reviewing the matter and after consulting with department counsel, determine in the reasonable exercise of his or her discretion whether there is new and material evidence that was not previously available which, had it been available, would likely have led to a different result, or whether circumstances have occurred subsequent to the original determination that warrant a reconsideration of the measure of discipline. Upon determining that such evidence or circumstances exist, the director shall have the authority to join the licensee in an application to the chairperson of the state board for professional medical conduct to vacate or modify the determination and order, as the director may deem appropriate. Upon the joint application of the licensee and the director, the chairperson shall have the authority to grant or deny such application.

11. Reporting of professional misconduct:

(a) The medical society of the state of New York, the New York state osteopathic society or any district osteopathic society, any statewide medical specialty society or organization, and every county medical society, every person licensed pursuant to articles one hundred thirty-one, one hundred thirty-one-B, one hundred thirty-three, one hundred thirty-seven and one hundred thirty-nine of the education law, and the chief executive officer, the chief of the medical staff and the chairperson of each department of every institution which is established pursuant to article twenty-eight of this chapter and a comprehensive health services plan pursuant to article forty-four of this chapter or article forty-three of the insurance law, shall, and any other person may, report to the board any information which such person, medical society, organization[2] institution or plan has which reasonably appears to show that a licensee is guilty of professional misconduct as defined in sections sixty-five hundred thirty and sixty-five hundred thirty-one of the education law. Such reports shall remain confidential and shall not be admitted into evidence in any administrative or judicial proceeding except that the board, its staff, or the members of its committees may begin investigations on the basis of such reports and may use them to develop further information.

(b) Any person, organization, institution, insurance company, osteopathic or medical society who reports or provides information to the board in good faith, and without malice shall not be subject to an action for civil damages or other relief as the result of such report.

(c) Notwithstanding the foregoing, no physician shall be responsible for reporting pursuant to paragraph (a) of this subdivision with respect to any information discovered by such physician solely as a result of:

(i) Participation in a properly conducted mortality and/or morbidity conference, departmental meeting or a medical or tissue committee constituted pursuant to the by-laws of a hospital which is duly established pursuant to article twenty-eight of the public health law, unless the procedures of such conference, department or committee of such hospital shall have been declared to be unacceptable for the purpose hereof by the commissioner, and provided that the obligations of reporting such information when appropriate to do so shall be the responsibility of the chairperson of such conference, department or committee, or

(ii) [Expires March 31, 2018, pursuant to L.1983, c. 426, § 5.] Participation and membership during a three year demonstration period in a physician committee of the Medical Society of the State of New York or the New York State Osteopathic Society whose purpose is to confront and refer to treatment physicians who are thought to be suffering from alcoholism, drug abuse or mental illness. Such demonstration period shall commence on April first, nineteen hundred eighty and terminate on May thirty-first, nineteen hundred eighty-three. An additional demonstration period shall commence on June first, nineteen hundred eighty-three and terminate on March thirty-first, nineteen hundred eighty-six. An additional demonstration period shall commence on April first, nineteen hundred eighty-six and terminate on March thirty-first, nineteen hundred eighty-nine. An additional demonstration period shall commence April first, nineteen hundred eighty-nine and terminate March thirty-first, nineteen hundred ninety-two. An additional demonstration period shall commence April first, nineteen hundred ninety-two and terminate March thirty-first, nineteen hundred ninety-five. An additional demonstration period shall commence on April first, nineteen hundred ninety-five and terminate on March thirty-first, nineteen hundred ninety-eight. An additional demonstration period shall commence on April first, nineteen hundred ninety-eight and terminate on March thirty-first, two thousand three. An additional demonstration period shall commence on April first, two thousand three and terminate on March thirty-first, two thousand thirteen. An additional demonstration period shall commence April first, two thousand thirteen and terminate on March thirty-first, two thousand eighteen provided, however, that the commissioner may prescribe requirements for the continuation of such demonstration program, including periodic reviews of such programs and submission of any reports and data necessary to permit such reviews. During these additional periods, the provisions of this subparagraph shall also apply to a physician committee of a county medical society.

(d) In the event that a physician or administrator of a hospital established pursuant to article twenty-eight of this chapter shall reasonably be unable to determine if any information which he or she has is such that it does reasonably appear to show that a licensee is guilty of professional misconduct and therefore creates an obligation on such physician or such administrator to make a report pursuant to paragraph (a) hereof, he or she may either:

(i) in accordance with procedures established by the board, and without revealing the name of the licensee who he or she is considering making such a report about, request in writing the advice of the board as to whether or not a report should be made, and the physician or administrator so requesting such advice shall then be required to comply with the advice of the board. No such request for advice shall relieve the requesting physician or administrator of any obligation hereunder unless all other material facts are revealed, other than the name of the licensee in question, or

(ii) in the case where the licensee about whom another physician is considering making such report is affiliated with a hospital which is duly established pursuant to article twenty-eight of this chapter, a physician may elect to fulfill the obligations of paragraph (a) hereof by reporting such information to the appropriate executive committee or professional practices peer review committee which is duly constituted pursuant to by-laws of such hospital, unless the peer review procedures of such hospital shall have been declared to be unacceptable for the purposes hereof by the commissioner. The

physician members of such hospital executive committee or professional practices peer review committee shall thereupon have the responsibility of reporting such information to the board pursuant to paragraph (a) hereof, as required thereby, but in the event that such committee determines that a report shall be made to the board, the chairperson of such committee may fulfill the obligation of reporting on behalf of all the members of the committee, or

(iii) in a case where the physician, about whom he or she is considering making such report, is a member of a county medical society or district osteopathic society, and is not affiliated with a hospital, but practices his or her profession within such county or district, a physician may elect to fulfill the obligations of paragraph (a) hereof by reporting such information to the appropriate county medical society's or district osteopathic society's professional practices review committee duly constituted pursuant to the by-laws of such county medical society or district osteopathic society, unless the review procedures of such county medical society or district osteopathic society shall have been declared to be unacceptable for the purposes hereof by the commissioner. The physician members of such review committee shall thereupon have the responsibility of reporting such information to the board pursuant to paragraph (a) hereof, as required thereby, but in the event that such committee determines that a report shall be made to the board, the chairperson of such committee may fulfill the obligation of reporting on behalf of all the members of the committee.

(e) Nothing contained in this subdivision shall be so construed as to require any physician to violate a physician/patient privilege and therefore, no physician shall be required to report any information to the board which such physician has learned solely as a result of rendering treatment to another physician.

(f) A violation of this subdivision shall not be subject to the provisions of sections twelve and twelve-b of this chapter.

(g) [Expires March 31, 2018, pursuant to L.1983, c. 426, § 5] Any physician committee of the Medical Society of the State of New York, the New York State Osteopathic Society or a county medical society referred to in subparagraph (ii) of paragraph (c) of this subdivision shall develop procedures in consultation with, and approved by, the commissioner of the department of health, including but not limited to the following:

(i) The committee shall disclose at least once a month such information as the director of the office of professional medical conduct may deem appropriate regarding reports received, contacts or investigations made and the disposition of each report, provided however that the committee shall not disclose any personally identifiable information except as provided in subparagraph (ii) or subparagraph (iii) of this paragraph.

(ii) The committee shall immediately report to the director the name, all information obtained and the results of any contact or investigation regarding any physician who is believed to be an imminent danger to the public.

(iii) The committee shall report to the director in a timely fashion all information obtained regarding any physician who refuses to cooperate with the committee, refuses to submit to treatment, or whose impairment is not substantially alleviated through treatment.

(iv) The committee shall inform each physician who is participating in a program of the procedures followed in the program,

of the rights and responsibilities of the physician in the program and of the possible results of noncompliance with the program.

(v) [Deemed repealed March 31, 2018, pursuant to L.1984, c. 582, § 5.] No member of any such committee shall be liable for damages to any person for any action taken by such member provided that such action was taken without malice and within the scope of such member's function as a member of such committee.

(vi) [Deemed repealed March 31, 2018, pursuant to L.1984, c. 582, § 5.] The committee, in conjunction with the director of the office of professional medical conduct, shall develop appropriate consent forms and disclosure proceedings as may be necessary under any federal statute, rule or regulation in order to permit the disclosure of the information as may be required under subparagraphs (ii) and (iii) of this paragraph.

Except as herein provided and notwithstanding any other provision of law, neither the proceedings nor the records of any such physician committee shall be subject to disclosure under article thirty-one of the civil practice law and rules nor shall any member of any such committee nor any person in attendance at any such meeting be required to testify as to what transpired thereat.

12. Summary action. (a) Whenever the commissioner, (i) after being presented with information indicating that a licensee is causing, engaging in or maintaining a condition or activity which has resulted in the transmission or suspected transmission, or is likely to lead to the transmission, of communicable disease as defined in the state sanitary code or HIV/AIDS, by the state and/or a local health department and if in the commissioner's opinion it would be prejudicial to the interests of the people to delay action until an opportunity for a hearing can be provided in accordance with the prehearing and hearing provisions of this section; or (ii) after an investigation and a recommendation by a committee on professional conduct of the state board for professional medical conduct, based upon a determination that a licensee is causing, engaging in or maintaining a condition or activity which in the commissioner's opinion constitutes an imminent danger to the health of the people, and that it therefore appears to be prejudicial to the interests of the people to delay action until an opportunity for a hearing can be provided in accordance with the prehearing and hearing provisions of this section; the commissioner may order the licensee, by written notice, to discontinue such dangerous condition or activity or take certain action immediately and for a period of ninety days from the date of service of the order. Within ten days from the date of service of the said order, the state board for professional medical conduct shall commence and regularly schedule such hearing proceedings as required by this section, provided, however, that the hearing shall be completed within ninety days of the date of service of the order. To the extent that the issue of imminent danger can be proven without the attorney representing the office of professional medical conduct putting in its entire case, the committee of the board shall first determine whether by a preponderance of the evidence the licensee is causing, engaging in or maintaining a condition or activity which constitutes an imminent danger to the health of the people. The attorney representing the office of professional medical conduct shall have the burden of going forward and proving by a preponderance of the evidence that the licensee's condition, activity or practice constitutes an imminent danger to the health of the people. The licensee shall have an opportunity to be heard and to present proof. When both the office and the licensee have completed their cases with respect to the question of imminent danger, the committee shall promptly make a recommendation to the commissioner on the issue of imminent danger and determine whether the summary order should be left in effect, modified or vacated, and continue the hearing on all the remaining charges, if any, in accordance with paragraph (f) of subdivision ten of this section. Within ten days of the committee's recommendation, the commissioner shall determine whether or not to adopt the committee's recommendations, in whole or in part, and shall leave in effect, modify or vacate his summary order. The state board for professional medical conduct shall make every reasonable effort to avoid any delay in completing and determining such proceedings. If, at the conclusion of the hearing, (i) the hearing committee of the board finds the licensee guilty of one or more of the charges which are the basis for the summary order, (ii) the hearing committee determines that the summary order continue, and (iii) the ninety day term of the order has not expired, the summary order shall remain in full force and effect until a final decision has been rendered by

the committee or, if review is sought, by the administrative review board. A summary order shall be public upon issuance.

(b) When a licensee has pleaded or been found guilty or convicted of committing an act constituting a felony under New York state law or federal law, or the law of another jurisdiction which, if committed within this state, would have constituted a felony under New York state law, or when the duly authorized professional disciplinary agency of another jurisdiction has made a finding substantially equivalent to a finding that the practice of medicine by the licensee in that jurisdiction constitutes an imminent danger to the health of its people, or when a licensee has been disciplined by a duly authorized professional disciplinary agency of another jurisdiction for acts which if committed in this state would have constituted the basis for summary action by the commissioner pursuant to paragraph (a) of this subdivision, the commissioner, after a recommendation by a committee of professional conduct of the state board for professional medical conduct, may order the licensee, by written notice, to discontinue or refrain from practicing medicine in whole or in part or to take certain actions authorized pursuant to this title immediately. The order of the commissioner shall constitute summary action against the licensee and become public upon issuance. The summary suspension shall remain in effect until the final conclusion of a hearing which shall commence within ninety days of the date of service of the commissioner's order, end within ninety days thereafter and otherwise be held in accordance with paragraph (a) of this subdivision, provided, however, that when the commissioner's order is based upon a finding substantially equivalent to a finding that the practice of medicine by the licensee in another jurisdiction constitutes an imminent danger to the health of its people, the hearing shall commence within thirty days after the disciplinary proceedings in that jurisdiction are finally concluded.

13. (a) Temporary surrender. The license and registration of a licensee who may be temporarily incapacitated for the active practice of medicine and whose alleged incapacity has not resulted in harm to a patient may be voluntarily surrendered to the board for professional medical conduct, which may accept and hold such license during the period of such alleged incapacity or the board for professional medical conduct may accept the surrender of such license after agreement to conditions to be met prior to the restoration of the license. The board shall give prompt written notification of such surrender to the division of professional licensing services of the state education department, and to each hospital at which the licensee has privileges. The licensee whose license is so surrendered shall notify all patients and all persons who request medical services that the licensee has temporarily withdrawn from the practice of medicine. The licensure status of each such licensee shall be "inactive" and the licensee shall not be authorized to practice medicine. The temporary surrender shall not be deemed to be an admission of disability or of professional misconduct, and shall not be used as evidence of a violation of subdivision seven or eight of section sixty-five hundred thirty of the education law unless the licensee practices while the license is "inactive". Any such practice shall constitute a violation of subdivision twelve of section sixty-five hundred thirty of the education law. The surrender of a license under this subdivision shall not bar any disciplinary action except action based solely upon the provisions of subdivision seven or eight of section sixty-five hundred thirty of the education law and where no harm to a patient has resulted, and shall not bar any civil or criminal action or proceeding which might be brought without regard to such surrender. A surrendered license shall be restored upon a showing to the satisfaction of a committee of professional conduct of the state board for professional medical conduct that the licensee is not incapacitated for the active practice of medicine provided, however, that the committee may impose reasonable conditions on the licensee, if it determined that due to the nature and extent of the licensee's former incapacity such conditions are necessary to protect the health of the people. The chairperson of the committee shall issue a restoration order adopting the decision of the committee. Prompt written notification of such restoration shall be given to the division of professional licensing services of the state education department and to all hospitals which were notified of the surrender of the license.

(b) Permanent surrender. The license and registration of a licensee who may be permanently incapacitated for the active practice of medicine, and whose alleged incapacity has not resulted in harm to a patient, may be voluntarily surrendered to the board for professional medical conduct. The board shall give prompt written notification of such surrender to the division of professional licensing services of the state education department, and to each hospital at which the licensee has privileges. The licensee whose license is so surrendered shall notify all patients and all persons who request medical services that the licensee has permanently withdrawn from the practice of medicine. The permanent surrender shall not be deemed to be an

admission of disability of or professional misconduct, and shall not be used as evidence of a violation of subdivision seven or eight of section sixty-five hundred thirty of the education law. The surrender shall not bar any civil or criminal action or proceeding which might be brought without regard to such surrender. There shall be no restoration of a license that has been surrendered pursuant to this subdivision.

14. Reports. The board shall prepare an annual report for the legislature, the governor and other executive offices, the medical profession, medical professional societies, consumer agencies and other interested persons. Such report shall include, but shall not be limited to, a description and analysis of the administrative procedures and operations based upon a statistical summary relating to (i) discipline, (ii) complaint, investigation, and hearing backlog and (iii) budget. Information provided for these sections shall be enumerated by regional office of the office of professional medical conduct.

15. [Deemed repealed March 31, 2013, pursuant to L.1984, c. 582, § 5.] The commissioner shall make grants to any physician committee as referred to in subparagraph (ii) of paragraph (c) of subdivision eleven of this section to fund the operations of such committee during the authorized demonstration period. Grants shall be awarded pursuant to an expenditure plan developed by the sponsoring organization in consultation with, and approved by the commissioner. No funds shall be made available unless the committee's procedures have been approved by the commissioner pursuant to paragraph (g) of subdivision eleven of this section.

16. Liability. Notwithstanding any other provision of law, persons who assist the department as consultants, expert witnesses, administrative officers or monitors in the investigation, prosecution or hearing of alleged professional misconduct, licensure matters, restoration proceedings, probation, or criminal prosecutions for unauthorized practice, shall not be liable for damages in any civil action or proceeding as a result of such assistance, except upon proof of actual malice. The attorney general shall defend such persons in any such action or proceeding, in accordance with section seventeen of the public officers law.

17. Monitoring. (a) A licensee may be ordered to have his or her practice monitored by another appropriate licensee after investigation and review pursuant to paragraph (a) of subdivision ten of this section, if there is reason to believe that the licensee is unable to practice medicine with reasonable skill and safety to patients.

(b) The director of the office of professional medical conduct, after consultation with the executive secretary, shall direct counsel to prepare a notice detailing the reasonable cause and a copy of the notice shall be served on the licensee. The matter shall be presented to a committee on professional conduct by an attorney for the department and the licensee shall have the opportunity to be heard by such committee and may be represented by counsel. A stenographic record of the proceeding shall be made. Service of the notice shall be in accordance with the methods of service authorized by paragraph (d) of subdivision ten of this section.

(c) If the committee determines that reasonable cause exists as specified in paragraph (a) of this subdivision and that there is insufficient evidence for the matter to constitute misconduct as defined in sections[1] sixty-five hundred thirty and section sixty-five hundred thirty-one of the education law, the committee may issue an order directing that the licensee's practice of medicine be monitored for a period specified in the order, which shall in no event exceed one year, by a licensee approved by the director, which may include members of county medical societies or district osteopathic societies designated by the commissioner. The licensee responsible for monitoring the licensee shall submit regular reports to the director. If the licensee refuses to cooperate with the licensee responsible for monitoring or if the monitoring licensee submits a report that the

licensee is not practicing medicine with reasonable skill and safety to his or her patients, the committee may refer the matter to the director for further proceedings pursuant to subdivision ten of this section. An order pursuant to this paragraph shall be kept confidential and shall not be subject to discovery or subpoena, unless the licensee refuses to comply with the order.

(d) A licensee may not seek the appointment of a monitor pursuant to this subdivision in lieu of an order issued pursuant to subdivision seven of this section or a disciplinary proceeding pursuant to subdivision ten or twelve of this section.

18. (a) The director shall have the authority to monitor physicians, physician's assistants and specialist's assistants who have been placed on probation pursuant to a determination of professional misconduct by the board. During such period of probation, the director, or his or her designee, as provided in the order of the board, and after consultation with the executive secretary, (i) may review the professional performance of the licensee by randomly selecting office records, patient records and hospital charts, (ii) may require periodic visits by the licensee to a member of the state board for professional medical conduct or an employee of the office of professional medical conduct, (iii) may require the licensee to obtain an appropriate monitor, approved by the director, to monitor the licensee's practice, (iv) may require an audit of the licensee's billings for services rendered during probation, (v) may require the licensee to submit on a random basis to tests for the presence of alcohol or drugs, (vi) may require the licensee to obtain additional training prior to completion of the probation, (vii) may require the licensee to work in a supervised setting, (viii) may require, as a condition of the licensee's continued practice, that the licensee undergo therapy and/or treatment approved and monitored by the director, (ix) may require that the licensee comply with the requirements of the penalty imposed, and (x) may impose upon the licensee such additional requirements as reasonably relate to the misconduct found or are necessary to protect the health of the people pursuant to regulation. The director is authorized to delegate some or all of the foregoing responsibilities to designated county medical societies and district osteopathic societies.

(b) Any health care provider licensed pursuant to this chapter or the education law, hospital licensed pursuant to article twenty-eight of this chapter or medical school that participates in a monitoring or remediation program pursuant to this subdivision and subdivision seventeen of this section shall not be liable for the negligence of the monitored licensee in providing medical care pursuant to a monitoring program. However, this paragraph does not diminish the participating provider's, hospital's or school's liability for failure to exercise reasonable care in properly carrying out its responsibilities under the program. The monitored licensee shall be required to maintain medical malpractice insurance coverage with limits no less than two million dollars per occurrence and six million dollars per policy year.

19. Upon receipt of information that indicates a licensee may be in violation of the terms or conditions of probation, the director of the office of professional medical conduct shall conduct an investigation. If the director determines that a licensee may have violated probation, the director shall give notice by letter to the licensee of the facts forming the basis of the alleged violation of probation by the licensee, that the licensee has a right to a hearing and may be represented by counsel. If the licensee does not dispute the facts forming the basis of the alleged violation of probation within twenty days of the date of the letter, the director shall submit the matter to a committee on professional conduct for its review and determination. If within twenty days of the date of the letter, the licensee disputes any of the facts forming the basis of the alleged violation of probation, the licensee shall be afforded a hearing before a committee on professional conduct to hear and make findings of fact, conclusions of law and a determination. A stenographic record of the hearing shall be made. The committee, after providing a licensee with an opportunity to be heard, shall determine whether the licensee has violated probation and shall impose an appropriate penalty as defined in section two hundred thirty-a of this title. In determining the appropriate penalty, the committee shall consider both the violation of probation and the prior adjudication of misconduct. The chairperson of the committee shall issue an order adopting the decision of the committee on professional conduct. The order may be reviewed by the administrative review board for professional medical conduct.

Credits

(Added L.1975, c. 109, § 28. Amended L.1977, c. 773, §§ 2 to 5; L.1978, c. 210, § 1; L.1978, c. 401, § 1; L.1980, c. 343, §§ 2, 3; L.1980, c. 866, §§ 10 to 14; L.1983, c. 27, § 1; L.1983, c. 426, §§ 1 to 3; L.1984, c. 545, § 1; L.1984, c. 582, §§ 2, 3; L.1984, c. 1005, §§ 1 to 9; L.1984, c. 1018, §§ 1, 2; L.1986, c. 45, § 1; L.1986, c. 266, §§ 23 to 29; L.1989, c. 55, § 1; L.1991, c. 606, §§ 1 to 15; L.1992, c. 37, §§ 1 to 6; L.1992, c. 735, §§ 1 to 5; L.1994, c. 558, §§ 2, 3; L.1995, c. 24, § 3; L.1996, c. 599, §§ 1 to 4; L.1996, c. 627, §§ 1 to 7; L.1998, c. 35, § 3, eff. April 1, 1998; L.1998, c. 537, § 1, eff. Nov. 1, 1998; L.1999, c. 610, § 1, eff. Nov. 9, 1999; L.2000, c. 542, §§ 5, 6, eff. Oct. 6, 2000; L.2003, c. 35, § 3, eff. April 8, 2003; L.2003, c. 542, §§ 1, 2, eff. Sept. 17, 2003; L.2008, c. 36, § 3, eff. March 31, 2008; L.2008, c. 477, §§ 1 to 12, eff. Nov. 3, 2008; L.2013, c. 56, pt. B, § 24, eff. March 28, 2013, deemed eff. April 1, 2013; L.2014, c. 532, § 1, eff. Dec. 17, 2014; L.2015, c. 11, §§ 1, 2, eff. March 13, 2015.)

Notes of Decisions (328)

Footnotes

1 So in original ("polices" should be "policies").

2 So in original. Comma inadvertently omitted.

3 So in original.

McKinney's Public Health Law § 230, NY PUB HEALTH § 230
Current through L.2017, chapters 1 to 23.

End of Document

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Prepared for internet access by
the University of Wisconsin Pain & Policy Studies Group

New York

The Board for Professional Medical Conduct
Policy Statement for the Use of Controlled Substances for the Treatment of Pain
Effective date: May, 2000

The New York State Board for Professional Medical Conduct (Board) recognizes that principles of quality medical practice dictate that the people of the State of New York have access to appropriate and effective pain relief. The appropriate application of up-to-date knowledge and treatment modalities can serve to improve the quality of life for those patients who suffer from pain as well as reduce the morbidity and costs associated with untreated or inappropriately treated pain. The Board encourages physicians[1] to view effective pain management as a part of quality medical practice for all patients with pain, acute or chronic, including pain as a result of terminal illness. All physicians should become knowledgeable about effective methods of pain treatment as well as statutory requirements for prescribing controlled substances. This policy statement has been developed to clarify the Board's position on pain control, specifically as related to the use of controlled substances, to alleviate physician uncertainty and to encourage better pain management.

The Board recognizes that controlled substances, including opioid analgesics, are often essential in the treatment of acute pain due to trauma or surgery and chronic pain, whether due to cancer or non-cancer origins. The medical management of pain should be guided by current knowledge and acceptable medical practice which includes the use of both pharmacologic and non-pharmacologic modalities. Pain should be assessed and treated promptly and appropriately with clear documentation. The Board also recognizes that tolerance and physical dependency are normal consequences of sustained use of opioid analgesics and are not synonymous with addiction.

The Board considers prescribing, administering, or dispensing controlled substances for pain to be for a legitimate medical purpose if based on accepted medical practice of the treatment of pain and sound clinical grounds. The physician's patient management will be evaluated by taking into account whether the diagnostic and therapeutic methodologies are appropriate for the patient's individual needs.

The Board is obligated under the laws of the State of New York to protect the public health and safety. The Board recognizes that inappropriate prescribing of controlled substances, including opioid analgesics, may lead to drug diversion and abuse by individuals who seek drugs for other than legitimate medical use. Physicians should be aware that the Board will not tolerate the use of such drugs for illegitimate purposes.

The Board's mission is to promote appropriate management of the patient's pain for its duration while addressing other aspects of the patient's functioning, including physical, psychological, social, and work-related factors.

1. For the purposes of this document, the term physicians shall refer to physicians, medical residents, physician assistants and specialist assistants.