



Collateral Consequences of Disciplinary Findings and OMIG

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The Fine Print

- These slides and this presentation are not intended to provide legal advice. Any opinions expressed in these slides or during the presentation are the opinions of the presenter, and not the opinion of the New York State Office of the Medicaid Inspector General (OMIG) or New York State.



About OMIG

- Pursuant to Public Health Law §31, et seq., OMIG was established in 2006 as an independent office within the Department of Health. OMIG (among other things), conducts audits, investigations, and reviews of Medicaid providers.



OMIG Mission Statement

The mission of OMIG is to enhance the integrity of the New York State Medicaid program by preventing and detecting fraudulent, abusive, and wasteful practices within the Medicaid program and recovering improperly expended Medicaid funds while promoting high-quality patient care.



Overview

- Why is OMIG a consideration in the disciplinary process?
- When OMIG takes action on disciplinary findings, what can you do?
- The Pre-Consent process
- Other considerations
- Appeals



Why is OMIG a consideration in the disciplinary process

- 1) 18 NYCRR 515.7 (e) “Immediate Sanctions”
 - Upon receiving notice that a person has been found to have violated a state or federal statute or regulation pursuant to a final decision or determination of an agency having the power to conduct the proceeding, and after an adjudicatory proceeding has been conducted in which no appeal is pending, or after resolution of the proceeding by stipulation



Why is OMIG a consideration in the disciplinary process (Continued)

1) 18 NYCRR 515.7 (e) “Immediate Sanctions” (Continued)

or agreement, and where the violation resulting in the final decision or determination would constitute an act described as **professional misconduct or unprofessional conduct** by the rules or regulations of the State Commissioner of Education or the State Board of Regents, or an unacceptable practice under this Part, or a violation of Article 33 of the Public Health Law, the department may immediately sanction the person and any affiliate. (Sanctions can be an exclusion or censure)



Why is OMIG a consideration in the disciplinary process (Continued)

2) OMIG Reviews

Pursuant to 515.7(e) above, OMIG’s Division of Medicaid Investigations (DMI) Administrative Remedies Unit (ARU) reviews consent orders, determinations, and any final action in which there are no appeals issued by professional licensing boards. In New York, that would be the Office of Professional Discipline (OPD) and the Office of Professional Medical Conduct (OPMC).



OMIG takes action on disciplinary findings. What can you do?

- Be aware. Be conscious of the fact when negotiating or defending these findings that a collateral consequence of a final determination resulting in, or that constitutes an act of, professional misconduct or unprofessional conduct can be subject to the imposition of a sanction by OMIG.



OMIG takes action on disciplinary findings. What can you do? (Continued)

- Be pro-active. OMIG has what it terms a “pre-consent process.” You can submit a proposed consent order to OMIG for review of the order prior to final signature and we will give you a pre-determination of what action OMIG would take, if any, regarding your client’s participation in the program.



The Pre-Consent Process

1) Send OMIG the proposed consent order before your client signs it. You can include any mitigating information you would like us to consider (continuing education, letters of recommendation, rehab, etc.)

You can email it to: pre-consentreview@omig.ny.gov; and/or

You can mail it to the office: 800 N. Pearl Street, Albany, NY 12204

2) OMIG will review the proposed consent and any other materials submitted.



The Pre-Consent Process (Continued)

3) After OMIG has determined what action it would take, OMIG will then mail you a letter, typically within two weeks, to tell you what OMIG would do when that final consent order comes across its desk.

4) OMIG's determination only applies to the consent order submitted. If the consent order changes after it has been submitted, send OMIG the new version. If it changes after OMIG's determination, send the new version and ask if it changes OMIG's determination.



What can OMIG's determination be

1) **Exclusion-** 18 NYCRR 515.5(c) sanctions; effect

- A person who is excluded from the program cannot be involved in any activity relating to furnishing medical care, services or supplies to recipients of medical assistance for which claims are submitted to the program, or relating to claiming or receiving payment for medical care, services or supplies during the period.

What can OMIG's determination be (Continued)

2) **Censure-** 18 NYCRR 515.1(b)(2)

- Censure means a warning that continued conduct of the type or nature cited may result in a more severe sanction. A censure may serve as a basis for imposition of a more severe sanction against the same person or an affiliate on a subsequent matter, whether or not the subsequent matter is related to the matter for which a censure was issued.

What can OMIG's determination be (Continued)

3) No Action-

- OMIG will send you a letter telling you that a sanction is not being imposed against the provider.



Other considerations

1) Termination- 18 NYCRR 504.7(d)

- If the provider agrees to a term of suspension or if there is a revocation of your client's license, the provider's enrollment (if actively enrolled) in Medicaid is automatically terminated pursuant to 18 NYCRR 504.7(d) and the provider will need to request reinstatement when the license has been reinstated if they want to participate in the Program.

A termination is NOT the same as an exclusion. It is not a sanction.



Other considerations (Continued)

2) HHS OIG- 18 NYCRR 515.8(a)(1)

- A provider who is excluded or terminated from participation in the federal Medicare program is immediately excluded from the Medicaid program.

What you will see in OMIG's pre-consent letters is the following:

“Should the U.S. Department of Health & Human Services determine to exclude your client from the Medicare program, their exclusion from the Medicaid program is mandatory.”



Other considerations (Continued)

HHS OIG- 18 NYCRR 515.8(a)(1)

Be aware that because the State takes this required action under its own independent authority, when HHS OIG ends its sanction the provider is still excluded from NY Medicaid until they request reinstatement or removal for the exclusion list in NY's program.



Other considerations (Continued)

3) **OMIG's Reporting Requirements** - When OMIG takes a "for cause" action to limit a provider's ability to participate, or if OMIG sanctions a provider, these actions are required to be reported to HHS OIG, the National Practitioner Data Bank (NPDB) and CMS.

Questions? Call Sean Parker in DMI ARU at 518-402-6698



Administrative Appeals of Immediate Sanctions

18 NYCRR 515.7(g)

a) A person sanctioned under 18 NYCRR Part 515 is not entitled to an administrative hearing, but may, within 30 days of the date of the notice, submit written arguments and documentation on the following issues:

- (i) whether the determination was based upon a mistake of fact;
- (ii) whether any crime charged in an indictment, or any conviction of a crime, resulted from furnishing or billing for medical care, services or supplies; and
- (iii) whether the sanction imposed was reasonable.



Administrative Appeals of Immediate Sanctions (Continued)

18 NYCRR 515.7(g) (Continued)

b) Within 45 days of receiving written arguments or documentation in response to an immediate sanction, the department will review the determination and notify the person sanctioned of the results of that review. After the review, the determination to immediately sanction the person may be affirmed, reversed or modified, in whole or in part.



Appeals

Judicial Review - Article 78

- OMIG's final determination is subject to an Article 78 proceeding.



Koch Court of Appeals Discussion

Matter of Koch v. Sheehan,
21 NY3d 697, 976 NYS 2d 4 (2013)

- OMIG excluded a physician from the Medicaid program on the basis of an OPMC consent order, in which the physician pled no contest to charges of professional misconduct and agreed to probation. The Supreme Court annulled the OMIG's determination.



Koch Court of Appeals Discussion (Continued)

- The Appellate Division affirmed the Supreme Court, concluding that the agency acted arbitrarily and capriciously in barring the physician from treating Medicaid patients when the OPMC permitted him to continue to practice and that the OMIG was required to conduct an independent investigation before excluding a physician from Medicaid on the basis of an OPMC consent order.



Koch Court of Appeals Discussion (Continued)

- The Court of Appeals disagreed with the Appellate Division's rationale but affirmed on other grounds, holding that **the OMIG is authorized to remove a physician from Medicaid in reliance solely on a consent order between the physician and the OPMC, regardless of whether OPMC chooses to suspend the physician's license or OMIG conducts an independent investigation.**



Koch Court of Appeals Discussion (Continued)

- However, because OMIG did not explain why the OPMC consent order caused it to exclude the physician from the Medicaid program, the agency's determination was arbitrary and capricious.



Koch Court of Appeals Discussion (Continued)

- The Court went on to say OMIG has a responsibility to insure that scarce Medicaid dollars are spent on quality medical care for Medicaid recipients and the agency may therefore properly decide that when the government is paying for the medical care of disadvantaged citizens, providers must possess more than the minimum level of competence necessary to avoid license suspension. Indeed, federal law requires, as a condition of receipt of federal funding, that states institute administrative procedures enabling them to exclude Medicaid providers for furnishing substandard services, regardless of whether those services were furnished to Medicaid recipients.



In Closing

- Keep OMIG in mind when negotiating disciplinary findings
- Be aware of the collateral consequences a determination or order can have with OMIG
- Be pro-active
- Avail yourself of the pre-consent process
- Call OMIG with any questions



Questions?

Thank you for your time



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