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MEDICAL SOCIETY OF THE STATE OF NEW YORK NEWS OF NEW YORK

Providing Information to Assist Physicians in the State of New York

An Attorney's View On Professional Misconduct Investigations:

What To Do When The OPMC Calls on You

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You are sitting in your office, secure in the knowledge that you are practicing good medicine, when your receptionist announces that John Roe, an investigator from the New York State Department of Health, Office of Professional Medical Conduct (OPMC), is on the line. Your heart begins to race, your face becomes flushed, and, with trembling hand, you lift the telephone receiver and answer the call.

Mr. Roe states that he is an OPMC investigator and that he is investigating your treatment of patients Alice Abel, Betty Baker, and Clara Charles. Mr. Roe requests that you send him copies of each of these patient charts. Furthermore, he wants to meet with you at a later date to discuss your care and treatment of these patients.

What you say and do next can profoundly affect the outcome of this investigation. Do you:

- (a.) Tell Mr. Roe to "go to hell" and hang up the phone.
- (b.) Tell Mr. Roe that you have nothing to hide, that you will send the charts and speak with him freely at any time.
- (c.) Politely thank Mr. Roe for the call, and advise him that your legal representative will get back to him shortly.

If you picked (a), you should, immediately upon hanging up the receiver, call a medical school classmate, who is a board-certified psychiatrist.

If you picked (b), which is, unfortunately, what the overwhelming majority of physicians would do, you may be unwittingly participating in the demise of your practice and career.

If you picked (c), you have taken the first step in the successful resolution of this investigation. Your next step should be to call an attorney who handles medical misconduct investigations, or if you are not familiar with one, call the Medical Society of the State of New York's Office of General Counsel (516-488-6100 ext 320).

OPMC Must Investigate Every Complaint

The State Board for Professional Medical Conduct has the authority to investigate on its own any suspected professional misconduct, and must investigate each complaint received regardless of the source. So, if a complaint has been made, the State Board has no discretion but to investigate.

Typically, the investigation is assigned to one of the investigators at OPMC, the prosecutorial arm of the State Board. The

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investigator will interview the person or persons making the complaint and contact you to request copies of the medical charts for the patients involved. The investigator is authorized by law to obtain and examine records of specific patients in an investigation and you may not raise the issue of patient confidentiality to prevent disclosure of such records for the limited purpose of the investigation. If the investigation involves issues of clinical practice, OPMC

medical experts may also review the charts and address those issues.

Not Necessarily Entitled to Random Audits

At some point during the investigation, the investigator may request access to random samples of your patient charts as part of a "comprehensive review" of your office records. Unlike the earlier request for a specific patient chart, the OPMC is not entitled to conduct a random audit or comprehensive review of your patient charts unless a justice of the State Supreme Court finds that: there is a reasonable basis for such a review; and there is reasonable cause to believe that the records sought are relevant to an ongoing investigation. Therefore, if the investigator does request a comprehensive review of your office records, talk to your lawyer to determine if OPMC is entitled to one.

The obvious concern with a comprehensive review of your office records is that you may be handing OPMC the rope which it may use to hang you. You should consent to a comprehensive review only after your counsel has determined that the OPMC has the proper foundation for such a review.

In all investigative committee misconduct cases, the physician must be allowed an opportunity to explain his or her position on the issues being investigated. This is done in an "interview" with the OPMC investigator and, in some cases, an OPMC medical consultant. This interview is potentially the most dangerous aspect of the investigation, and should never occur without representation by legal counsel. You are under no obligation to be interviewed by OPMC investigators, and you may choose not to be interviewed. While the statute states that the purpose of the interview is to allow the physician an opportunity to provide an "explanation" of the issues under investiga-

tion, it has been my experience that these interviews are more likely to provide OPMC with damaging admissions and inconsistent explanations at a time when the nature and scope of the misconduct issues are poorly defined and not ripe for response. The damage done by physicians in these interviews can be insurmountable, and, often, counsel retained after such an interview must devote great efforts to damage control.

There are some types of investigations where I do recommend that a physician seize the opportunity to provide an explanation of the issues. But I do so only after I have learned as much about the issues as can be determined and am satisfied that the physician will make a reasonable, articulate and logical presentation to the investigator. Misconduct allegations for which I often encourage my physician clients to be interviewed include quality of care and clinical practice issues. In these cases, most physicians are well equipped to defend the quality of care rendered to a particular patient. Examples of investigations for which I rarely permit my physician clients to be interviewed involve allegations of patient abuse, sexual abuse, drug or alcohol impairment, psychiatric impairment and allegations of misconduct occurring outside the scope of the practice of medicine. In these cases, even an innocent physician will rarely say anything which will impact favorably on the outcome of the investigation. More often, because of nervousness, lack of preparation or an insufficient understanding of the nature of the allegations, the physician will say things that will come back to haunt him or her. The decision to be interviewed is never routine; it is made on a case by case basis.

I Don't Practice Medicine: You Don't Practice Law

The main reason why physicians get themselves into trouble during misconduct investigations is that they believe that they are capable of "handling" the situation by themselves, of "explaining" everything in a nice, neat and tidy package. They believe that after the investigator hears their explanation, OPMC will have no choice but to agree that they have been unjustly accused. Physicians who think they can talk their way out of one of these investigations usually are sadly mistaken, and, unfortunately, often find out too late. Some OPMC investigators encourage physicians to talk to them without the benefit of counsel, by suggesting that the physician has "nothing to worry about" and that the investigator only wants to hear the physician's side of the story, so that the physician can "help himself." While I have, by and large, found the OPMC investigative staff members to conduct themselves in a professional manner, they do encourage physicians to talk to them openly, and rarely advise physicians that they should seek counsel before doing so.

A potential sanction for a finding of professional medical misconduct is the revocation of your license to practice medicine, and the consequent destruction of your career. It is a penalty which can be every bit as serious, and in some instances more serious, than many criminal penalties. For this reason, you should be no more inclined to voluntarily talk to someone investigating you for professional misconduct than you should be to talk to a police detective who is investigating you for the commission of a crime. If you have nothing to hide, and you

are truly innocent of the charge, having a lawyer represent you will help assure that finding of innocence. If you do believe you have a problem, having a lawyer can make the difference between a proper resolution and an utter catastrophe.

Michael S. Kelton is a partner in the Manhattan law firm of Lippman Krasnow & Kelton. A substantial portion of his practice involves the defense of physicians in misconduct proceedings before the New York State Department of Health. He has lectured on the subject to bar groups and at medical seminars.

First Say Nothing

Attorney Michael S. Kelton recommends that you take these precautions from the moment you learn that you are the subject of a medical misconduct investigation:

- Seek out and retain an attorney who is well versed in representing physicians in such matters.
- If you have any questions, call MSSNY's Office of General Counsel at 516-488-6100 ext. 320.
- Never, under any circumstances, attempt to "represent yourself" in an OPMC investigation.
- Don't volunteer to talk to an investigator without your attorney present.