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The Consequences of an Office of Professional Discipline Penalty

Amy T. Kulb, Jacobson Goldberg & Kulb, LLP

In our litigious society, complaints by dental patients and other sources to the Office of Professional Discipline (OPD) are on the rise. The receipt of a letter from OPD requesting a patient's record will cause you to experience a wide range of emotions. You may be absolutely confident that your treatment of the patient was appropriate and that your record is beyond reproach. On the other hand, you may be understandably frustrated and disappointed that a patient on whom you worked so hard to achieve an excellent outcome has now reported you to OPD. Additionally, you may be greatly concerned about the time, effort and expense involved in navigating the OPD process. Anxiety about the eventual outcome of this process can weigh heavily upon you.

Hypothetically, the patient may allege that a crown did not fit properly and needed to be replaced, or that root canal treatment was unsatisfactory, requiring further treatment. This allegation triggers a report to OPD. A member of the State Board of Dentistry will then review your records and those of the patient's subsequent dentist. If this Board expert concludes that the crown had an open margin or that the root canal filling was short of the apex, he/she may recommend that you be suspended, but with the suspension stayed while you remain on probation. In addition, the expert reviewer may recommend that you promptly complete remedial coursework.

After this OPD investigation has concluded, the OPD attorney assigned to prosecute the case will send you a letter explaining the "findings" made by the State Board of Dentistry reviewer and propose that you enter into a settlement agreement to resolve the charges brought by the Board.

Although you are certain that the complaint and charges are unfounded, you may initially breathe a sigh of relief when the OPD attorney assures you that the proposed settlement of the investigation does not involve an "actual" suspension of your license, allowing you to practice dentistry without interruption. Because you believe you can now conclude this matter with no further repercussions and can avoid a negative impact on your finances and practice by contesting the charges at a hearing, you quickly opt to settle the matter.

The settlement agreement you are being asked to sign is embodied in a "Consent," which states in fine print that this Consent will be a "matter of public record." It does not elaborate further. After you sign the Consent, it is then signed by the State Board expert reviewer and the Board of Regents. An "Order" is issued and then sent to you, describing what you must do in accordance with the settlement. To your dismay, the Order is posted on OPD's website. Suddenly, during the ensuing days and weeks, you are barraged with letters from the New York State Office of the Medicaid Inspector General (OMIG), the U.S. Department of Health and Human Services (HHS), all of the insurance plans with which you participate, hospitals with which you are associated, and, sometimes, even the Drug Enforcement Agency and the Workers Compensation Board. All of these letters state that the agency or entity is either terminating, or proposing to terminate, your participation as a provider or your privileges.

How could this have happened? Unexpectedly, the Consent you signed with counsel, which was supposed to have concluded this matter, has now turned your professional life upside down. In reality, any penalty imposed by OPD can, and does, have far-reaching consequences affecting the many relationships you have with a variety of payors and others who are essential to your practice and livelihood.

Every dentist must be made aware of how essential it is to properly respond to an OPD investigation in order to deal appropriately with the very significant collateral consequences described below. Because your livelihood is at stake, we strongly recommend that you consult with, and retain, experienced counsel upon receiving the initial letter from OPD requesting the patient's record. Certainly, you should do so before accepting any settlement. From the very beginning of the investigation, your goal should be to demonstrate to the Board's reviewer that your evaluation of the patient was complete, your treatment plan was appropriate, and the dental work was completed properly and in a timely fashion. All of this must be documented in your dental record, including your conclusion that the patient had an acceptable outcome. Counsel can review your record with you and determine whether you should additionally prepare a narrative and/or obtain a consultant's report to submit to the reviewer, if he/she takes exception to any aspect of your care and treatment. By submitting a specific

response, you may be able to provide a satisfactory explanation for the Board member's "findings." You can also request an opportunity to discuss the case in person with the Board member at an informal settlement conference. If you do so, your counsel can both prepare this presentation with you and accompany you to the conference. The assistance of counsel at this stage of the OPD investigation can provide an opportunity for the recommended penalty to be mitigated or the charges dropped which would lessen or avoid collateral consequences.

If, however, the case is not resolved, either during the OPD investigation or at an informal settlement conference, it then proceeds forward. If you consent to settle with OPD, or you are found guilty of professional misconduct after a hearing or a penalty is imposed based upon a criminal conviction or disciplinary action by another state, an Order pursuant to any settlement agreement you make is then issued by the Board of Regents. This Order is both posted on the OPD website and reported to the National Practitioner Data Bank (NPDB). Your disclosure of this Order is also required when you apply or reapply for privileges, or when you provide credentialing information to hospitals and insurance networks. Experienced counsel can assist you to determine what entities will likely be affected by the Order, as well as help you navigate any collateral consequences that arise.

One of the most immediate, certain, and significant consequences to you is that all OPD Orders are now reviewed by the NYS Office of the Medicaid Inspector General (OMIG). This occurs regardless of whether the OPD matter is related to Medicaid or whether the dentist is a Medicaid provider. The OMIG has the authority to place the dentist on the Medicaid Disqualified Individuals (DQ) list. Being placed on the DQ list not only bars you from directly participating in Medicaid, but also from participating with privately administered Medicaid managed care entities. It further bars you from employment by, or affiliation with, any other individual or entity that participates in, or receives funds from, Medicaid. This includes group dental practices, hospitals, and any other Article 28 facility. This action may also impact other privileges that require "good standing" with Medicaid, such as hospital or academic appointments. Further, when your name is placed on the Medicaid DQ list, entities that administer insurance benefits for hundreds of prescription plans place an "edit" in their system. Regardless of whether the patient is a Medicaid beneficiary, at the time the patient presents your prescription to a pharmacy, payment for that prescription will be denied.

Therefore, for all these reasons, before you agree to any settlement with OPD, your counsel should request approval from the OMIG that the proposed OPD penalty not result in your placement on the DQ list. If the OMIG does place you on the DQ list, you can challenge this action in court. Several recent court decisions have held that the OMIG's DQ list is "arbitrary," due to the fact that these consequences go far beyond the OPD penalty.¹

Additionally, all OPD Orders are reviewed by the U.S. Department of Health and Human Services (HHS), which oversees Medicare. If the matter involves any underlying conviction for healthcare fraud, a felony or a misdemeanor, HHS is required to exclude the dentist for a mandatory period of five (5) years. Further, HHS can extend the exclusion for fraud to ten (10), fifteen (15), or even twenty (20) years, depending upon the circumstances. If your license is suspended by OPD, that is considered to be a basis for exclusion by HHS. Although there are no Medicare benefits for dental

1. *Milhailescu v. Sheehan*, 25 Misc 3d 258 (Sup. Ct. New York Co. 2009);
Koch v Sheehan, 95 A.D.3d 82 (4th Dept. 2012);
Pearl v OMIG, (Supreme Court Albany County, Index No. 7162/2009).

services, exclusion by HHS bars you from participation in, or reinstatement by, any state's Medicaid Program and bars the submission of any eligible claims to any Medicare carrier for services you provide. The HHS exclusion extends to benefit programs for Federal employees and can entirely disqualify your participation with any insurance networks that administer such programs under their network umbrella. The New York State Workers Compensation Board (WCB) also reviews OPD Orders. The WCB will request that you provide an explanation of the OPD penalty and can then seek to suspend or terminate your participation to evaluate and/or provide services to Workers Compensation claimants as it sees fit.

Further, within a short time after the OPD Order is issued, you can expect to be contacted by most, if not all, of the insurance networks and plans with which you participate. They initially will request an explanation of what occurred. Your rights and responsibilities are governed by the provider agreement. Generally, the plan can

elect to terminate the contract, or submit the Order and your response to a peer or credentialing committee. If your participation with a specific plan or plans is crucial to your practice, you should evaluate this with counsel during the OPD process and, thereafter, in responding to the inquiry.

Many other significant privileges can be impacted by an OPD Order, such as: DEA registration; licensure in another state or in another profession; hospital and academic appointments; and, continuation of professional liability coverage, or the imposition of a premium surcharge. Therefore, these also require careful consideration and the assistance of counsel throughout the process. OPD Orders are also a basis for proceedings by the Council on Ethics of the New York State Dental Association (NYSDA). An OPD Order can result in censure, probation, suspension, or your expulsion as a member of NYSDA. If you are a defendant in a malpractice case or other litigation, opposing counsel may seek to introduce the OPD Order into evidence. Thus, you must always promptly advise your defense counsel of the pendency or existence of an OPD Order.

In the unlikely event that you also face criminal charges, it is essential that you understand that in New York State, all criminal convictions, regardless of the level of the offense or the relationship or lack thereof to professional practice, are considered by definition to be professional misconduct. Therefore, you can expect the OPD to commence proceedings and impose a penalty against you after a criminal conviction. Convictions are also reviewed by Medicaid and Medicare. If they are related to healthcare fraud or the use of controlled drugs, this likely mandates your exclusion by OMIG and HHS.

Further, when applying for privileges or in providing information for use in credentialing for employment, insurance participation, hospital privileges, and malpractice insurance, you must disclose them. Therefore, you must consider the potential impact of these collateral consequences on your career when you decide whether to agree to a criminal plea bargain offer.

Suspension or termination for cause by a hospital, educational program, or insurance network, can also result in your being reported to the NPDB, OPD, or, in certain instances, to law enforcement. The OMIG posts Medicaid Final Audit Reports, Sanctions and Decisions After Hearings on its website. An investigation by OPD or law enforcement could be generated from that posting as well.

In conclusion, when OPD imposes a disciplinary penalty on you, it often has far-reaching financial and/or other consequences, to your dental practice. Therefore, it is never too early to seek the guidance and assistance of experienced counsel when initially faced with an investigation by OPD, an insurance audit, or in the unlikely event of a criminal matter.

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Our heartfelt condolences to.....

- Drs. Mukesh and Dina Ajmera, for the loss of Dr. Mukesh Ajmera's sister, Mrs. Prathima V. Sheth, on March 17th, 2013 in Pune India.
- Dr. Haresh Shah's family, whose father Harshbhai Jayyogeshwar passed away in April, 2013.
- Dr. Nilesh Patel's family for the loss of his father-in-law.
- Dr. Divakar Chokshi's family whose father passed away in March 2013.
- The Mathew family for the loss of Dr. John Mathew, who was greatly respected and loved by many at IDA and the larger dental fraternity.



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