**PLANNING YOUR DEFENSE**

**What are the Penalties if I Am Found Guilty or Agree to a Consent Order?**

The most onerous, of course, is revocation. Short of that penalty, the State has a variety of penalties including but limited to monetary fines, suspensions for a period of time, stayed suspensions, educational or rehabilitation requirements, censure and reprimand, restrictions or limitations on the scope or type of practice, supervision or chaperone requirements, practice monitors, and community service. Probation and monitoring are frequent requirements and typically extend for a three to five-year period. If the Commissioner determines that the physician is engaged in conduct that creates an imminent risk to the public health and welfare of the residents of New York, Summary Suspension can be invoked. This emergency measure can also be used where there is concern that a physician has a condition or is involved in an activity which is likely to transmit a communicable disease. If a Summary Suspension issue, the physician’s license is suspended pending a hearing within 90 days. This harsh measure can also be used when a physician has been found guilty of a felony crime.

If you plead to, or are convicted of, a New York State crime, including a misdemeanor, you are automatically guilty of professional misconduct and Office of Professional Medical Conduct (OPMC) will issue a penalty either by Consent Order or after an expedited hearing. If the matter proceeds to Hearing, the only issue is the nature and extent of the penalty. Not all criminal attorneys understand or are aware of the license repercussions associated with a plea bargain. In the event you are arrested for DWI, shoplifting, abuse, fraud, etc., make sure your attorney knows that any “deal” needs to take into account licensure ramifications.

**WHAT IF MY PERCEIVED MISCONDUCT IS THE RESULT OF AN ILLNESS OR MEDICAL CONDITION?**

The fact that you carry a diagnosis that could impact your ability to practice medicine is not professional misconduct. However, practicing while your ability is impaired is considered misconduct and you will be prosecuted by OPMC. The trick is to recognize you have a potential issue before it impacts your practice. We know you would never report to the office or the hospital while intoxicated but, are you fuzzy in the morning after a “night out”? Have you been late for work or called in sick because of overwhelming depression? Are you still taking Oxycontin for your back, six months after the injury? By statute, hospitals and even colleagues (other than treating physicians) are required to report a physician to OPMC if they have a reasonable belief that the doctor is incapacitated for the practice of medicine. If OPMC believes you are incapacitated, it has the authority to seek an Order compelling you to submit to an extensive evaluation and has the ability to obtain your medical and psychiatric records. Before someone makes that call, before a patient reports you to OPMC for having alcohol on your breath, before the local pharmacist calls OPMC because you are writing opioid scripts in large quantities for “a family member,” call the Committee for Physician Health (CPH), a physician advocacy group sponsored by The Medical Society of the State of New York (MSSNY). The agency is doctor-centered and offers confidential assistance to physician, residents, medical students and physician assistants suffering from substance abuse, alcoholism and psychiatric disorders. Are you concerned about a colleague and wonder how you can help him/her? CPH accepts confidential referrals. The team at CPH has worked with hundreds of my clients and has assisted in saving careers and licenses. Check out their website (www.cphny.org), call them at (518) 436-4723, or ask your local medical society for a referral.

If a physician’s addiction or mental illness has not resulted in patient harm, does not involve script forgery, and the physician is in treatment for the disease with the help of CPH, OPMC will often agree to a non-disciplinary route to insure patients are not adversely impacted.

**Should I Go to a Hearing or Try to Settle?**

Once OPMC determines that charges should be issued, the physician and her/his attorney need to decide if settlement makes more sense than setting through the Hearing process. The hearing is conducted before an Administrative Law Judge and the “jury” is made up of two physicians and one non-physician. The state proves its case with witnesses and documents, the panel is allowed to participate and ask questions, and the physician is allowed to put in proof regarding the allegations. Unlike the defense of a medical malpractice case in a traditional court, the rules of evidence do not apply and hearing dates are infrequently contiguous. It can take months to complete the hearing process, depending on the number and range of charges. The charges are public and are posted on the Health Department website. Findings by the panel are also made public. Fewer than 20% of physicians charged with unprofessional conduct in 2010 (most recent year for which data is published) elected to contest the charges via the hearing process and, of those physicians, the panel sustained the charges in almost 99% of the cases. The decision on whether or not to settle or proceed to a hearing, of course, is based on the nature and extent of the penalty. On occasion, even when there is clearly misconduct, the settlement “deal” offered by OPMC may be too onerous that it makes sense to have a panel decide the penalty instead. On the other hand, a Consent Order may make more sense if the parties can come to an agreement on language and terms that will permit the physician to continue working. Negotiating the terms of a Consent Order, and an understanding of the practice ramifications of the order, is one of the most challenging aspects of the OPMC process.