

WHAT TO DO WHEN THE OFFICE OF PROFESSIONAL DISCIPLINE GIVES YOU A FRIENDLY CALL

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It's 2 PM. You have almost finished enjoying your lunch at your desk, in between updating your charts, answering phone calls and reviewing various bills. Your assistant buzzes you and tells you that Ms. Jones is on the phone from the Office of Professional Discipline ("OPD"). After immediately consuming several antacids, you pick up the phone. Ms. Jones tells you she is an OPD investigator and just has a few quick questions about a matter that has come to the OPD's attention. You are too stunned to say anything. Ms. Jones says that they needed some information concerning a patient of yours, Ms. Green. You ask her what kind of information; you are happy to cooperate; after all, you have nothing to hide! I can explain whatever you need to know." These are famous last words.

The intent of this article is to guide you through the OPD process. The first step is to obtain experienced counsel that has represented numerous clients like you before the OPD. The next step is to inform Ms. Jones that you will be happy to cooperate, but **you are represented by counsel and your attorney will be calling her.**

Unfortunately, many clients, in the spirit of cooperation, attempt to "wing it" with the OPD investigator, hoping against hope, for a quick closure. That virtually never occurs! In the actual scenario, the patient, Ms. Green had accused the client of "inappropriate physical contact". Hoping to nip it in the bud, the client "thought quickly" and stated that his podiatric assistant, Joanie, was in the room on the date in question. He later found out that Joanie usually was in the room, but was out sick that particular day, almost one year ago! Now the client has a credibility issue to overcome with OPD. If he had prepared for the call, he would have had time to go back and check Ms. Green's chart, check his appointment book and then check his employee's timesheets. It would have prevented the client from having to explain his "mis-statement". Remember, OPD probably has spoken with several "witnesses" before they ever contact you. In this case, they had already spoken with Joanie and Joanie remembered this patient and also gave the OPD her schedule, which did not include the date in question. You can create your own scenarios consisting of care and treatment issues, infectious disease issues, changing a document, fraudulently billing and unnecessary surgery. The advice concerning the initial contact with OPD is the same; do not speak to OPD without experienced counsel. Do not think that if you hire a lawyer they will think you are guilty of something. The OPD actually advises you to obtain counsel; unfortunately, it is after they call you!

Usually, the OPD investigator will follow up by sending you a letter. Your attorney, once retained, will send a letter of representation to the investigator. That means that *all* future contact will be between OPD and your attorney, not you. That will give you and your attorney the time to strategize and perform your own investigation of the situation.

Does your attorney need to speak with a third party, such as your podiatric assistant; your biller; your front desk person? Your attorney must determine the strengths and weaknesses of the situation. Remember, an investigation may start out about inappropriate touching and wind up with a billing fraud allegation on the same patient. It is very important that you are completely candid and open with your attorney. Do *not* leave out any details. Attorney-client privilege attaches to your conversations between you and your attorney as long as there is no third party in the room.

Within a few months, the OPD may write your attorney offering you an interview conducted by the OPD investigator. You and your attorney will determine if an interview is advisable. It does give you the chance to tell your side of the story. It also gives the OPD a chance to question you without a predetermined script. You are not obligated to attend the interview and in some cases the interview can further damage your case.

Proper preparation by your attorney is essential. The preparation is not the same as if you are going for a malpractice deposition. Your attorney should have at least one or more preparation sessions which will consist, at least in part, with a mock interview.

If you decide to go to the interview, your attorney will accompany you to the interview. After the interview, your attorney will probably want to prepare a written submission for the OPD to emphasize and explicate your position in the matter. Additional information to explain questions where you answer were less than satisfactory can be an important part of your submission. Exactly what is included will depend on what you need to prove. Several weeks to several months or more afterwards, you might get a letter from OPD stating that the investigation has ended with no action being taken. If that occurs, you are a winner. You might get a letter stating you are being issued an Administrative Warning. This is non-disciplinary and kept private. You will appear with your attorney at an OPD office and receive “the warning” as to what to be careful with in the future. The only time the Administrative Warning can factor in against you is if you have a similar problem with OPD in the future.

If the investigation is not closed, your attorney will get a phone call from a prosecuting attorney at OPD. The OPD prosecutor will inform your attorney of pending allegations and the charges and disciplinary action the OPD is willing to agree to. This can run the gamut from surrender of license, suspension, probation, partially stayed suspension, fines, educational courses, fines to “just” a Censure and Reprimand. Any discipline agreed to, is published on the OPD website and placed in the National Practitioner Data Bank. It can negatively impact your managed care contracts and hospital affiliations. Your attorney will attempt to negotiate a lesser punishment. If both sides cannot agree, you can request an Informal Settlement Conference (“ISC”). Both sides “informally” lay out their cases to a hearing officer from OPD who is an attorney that works for them and a client that is a member of “the board”. There are no witnesses and no sworn testimony. The hearing officer and client on the board, confer at the conclusion the ISC. They provide to you their conclusions. You can agree with their recommendations or not. If you cannot agree, OPD’s prosecutor will draw up charges against you and it is time to prepare for a full-blown hearing. This is the equivalent of an administrative “trial”. There

are witnesses and experts that testify under oath. A hearing officer, paid by the state, is the presiding judge. The hearing officer has no vote over the outcome, but does control how the hearing is run and therefore can influence the outcome. A lot of evidence that might not be allowed in a civil court may be allowed by the hearing officer. Two medical specialists from the “board” and one lay person will act as the “jury”. They each get to ask every witness questions. Often, the panelists’ questions are more penetrating than the prosecutor’s questions, as the prosecutor is not a healthcare provider. For now, this is where we are going to end our story as over 90% of the OPD investigations never get to a hearing level. In fact, the vast majority of investigations are closed at the interview level. Why? With an experienced OPD attorney, you will be properly prepared to submit your case in the most effective way.