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Suing the "Bad Faith" Complainant in an OPMC Investigation

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New York State Office of Professional Medical Conduct (OPMC) investigations present many difficult challenges to physicians and their defense counsel. It often seems that the respondent physician has no leverage in the investigation, is powerless to act in a proactive way to assert his or her innocence and must simply "play defense" without ever having the opportunity to go on the attack.

Two cases handled by partners at Abrams Fensterman have demonstrated that this dynamic can be changed, and that the respondent physician can, indeed, take the offensive. This article will discuss this often overlooked opportunity.

New York State Law Grants Qualified Immunity to Encourage "Good Faith" Complaints

OPMC investigations are governed by New York Public Health Law § 230, et. seq. Based upon the strong public policy in New York of encouraging individuals and entities to make legitimate "good faith" complaints about errant physicians, § 230(11)(b) provides as follows:

> Any person, organization, institution, insurance company, osteopathic or medical society who reports or provides information to the board *in good faith, and without malice*, shall not be subject to an action for civil damages or other relief as the result of such report. (emphasis added)

The immunity from legal action provided under this section is not absolute. It is merely a "qualified" immunity. This means that one may not be sued for filing an OPMC complaint about a physician *as long as the complaint was made in good faith and without malice*. While many complaints clearly fall within this statutory protection, it is equally clear that some do not. Disgruntled former patients, audit-happy insurance carriers, malpractice litigants, business competitors and even ex-spouses have been known to file OPMC complaints against physicians which are not filed in "good faith" for a variety of self-serving reasons. Such complaints are filed out of spite, for economic gain or legal advantage, and with no legitimate medical or

legal basis. When this occurs, physicians and their attorneys now have the ability go on the offensive.

Case 1: An HMO Files a False Complaint about a Physician

In 1997, Dr. Foong was audited by Empire Blue Cross Blue Shield. Empire performed a "post-payment" review of some of Dr. Foong's claims for endoscopic procedures and concluded that he had "over utilized" such procedures. When Dr. Foong resisted Empire's demand for repayment, and complained to the New York State Insurance Department, Empire retaliated by terminating Dr. Foong's provider contract and reporting Dr. Foong to OPMC in bad faith, claiming that Dr Foong had committed fraud and had falsified medical records, both of which were factually untrue. Dr Foong subsequently filed a civil lawsuit against Empire.

Upon investigating Empire's complaint, OPMC determined that Dr. Foong had done nothing wrong and closed the investigation without taking any action. Dr. Foong attempted to be reinstated to Empire's panel, and after exhaustive efforts failed to resolve the issue of the economic impact of Empire's wrongful conduct on his practice, Dr. Foong sued Empire for breach of contract, denial of due process, wrongful termination and bad faith reporting to OPMC, demanding $2 million in compensatory damages and $5 million in punitive damages, as well as reinstatement as a network provider. In *Foong v. Empire Blue Cross and Blue Shield*, 305 A.D.2d 330, 762 N.Y.S.2d 348 (App. Div. 2003), the court wrote that the physician had "an implied right of action under Public Health Law § 230(11)(b), which immunizes from suit insurers and others who make good faith reports to the State Board for Professional Medical Conduct. Here, an issue of fact as to defendant's good faith [was] raised…" *Id.* at 330. Thus, a new private right of action for physicians was created in New York. The appellate court upheld Dr Foong's novel lawsuit, a case of first impression at the time, and Empire entered into a confidential settlement with Dr. Foong, who was also reinstated in its network.[1]

Dr. Foong's case laid the groundwork in New York for suing individuals or entities who make false complaints to OPMC which are not made in good faith. It has been cited in additional case law for the establishment of this right. *See Weisenthal v. United Health Care Ins. Co. of New York*, No. 07 Civ. 1175 (LAP), 2007 BL 249951 (S.D.N.Y. Nov. 29, 2007).

Case 2: A Disgruntled Patient Files a False Complaint about a Physician

In 2007, a young female patient presented to Dr. N, an ophthalmologist, with a complaint of bilateral eye pain. The patient alleged that Dr. N sexually abused her during the examination, and filed a complaint with OPMC. The patient also commenced a civil lawsuit against Dr. N seeking substantial money damages. Dr. N adamantly denied any wrongdoing and insisted on defending the OPMC case and the civil suit. OPMC charged Dr. N with patient abuse and moral unfitness for the practice of medicine, and sought revocation of his license to practice medicine.

During an investigation by Dr. N's attorneys, it was learned that the patient was an abuser of prescription pain medications. Counsel argued that her motivation for presenting to Dr. N was to obtain additional pain medications after her primary care physician refused to prescribe her any more. At the OPMC hearing counsel presented

a chart demonstrating how the patient had "ping-ponged" among three different unsuspecting providers, obtaining thirty day prescriptions for pain medications every three days. Counsel argued to the OPMC hearing committee that the patient had made her complaint against Dr. N in bad faith as retribution for his refusal to give her a pain medication prescription as well. It was also argued that the patient had a financial motive for filing her OPMC complaint, as a victory at OPMC would have assured her a victory in her civil lawsuit.

After three days of hearing at which nine witnesses testified, the OPMC hearing committee unanimously found Dr. N not guilty of the charges. In finding Dr. N not guilty, the hearing committee made the specific finding that the complaint made by the patient was false and was in retaliation for Dr. N's refusal to prescribe her pain medications. This finding provided Dr. N with the legal basis for counterclaiming against the patient, in her civil lawsuit, for filing the OPMC complaint against him not in good faith and with malice.

With the OPMC case dismissed, the patient then moved ahead with her civil lawsuit and Dr. N pursued his counterclaim for money damages for the filing of a false complaint against him. Dr. N then moved to dismiss the plaintiff's lawsuit, which was granted by the court. Now that plaintiff's civil suit was dismissed, Dr. N was free to pursue his counterclaim against the patient. The patient finally relented, and agreed not to appeal the dismissal of her case, in exchange for Dr. N discontinuing his counterclaim. The end result was that Dr N was able, through aggressive litigation tactics, to obtain both a dismissal of the OPMC case and a dismissal of the patient's unmeritorious civil suit.

Opportunities for Proactive, Aggressive Defense of OPMC Complaints

These cases demonstrate that an aggressive approach to defending physicians in OPMC investigations can yield positive results, and that opportunities in certain cases do exist for physicians and their counsel to be proactive in defending OPMC cases. The assertion of a legal claim against a complainant in an OPMC matter, while not available in all cases, may be utilized in an appropriate case to go on offense on behalf of the physician.

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[1] *See* Berkeley Rice, *How I beat an HMO*, Medical Economics, Jan. 9, 2004 *available at* http://medicaleconomics.modernmedicine.com/memag/Young+Doctors'+Resource+Center:+Practice+Management:+Managed+care/How-I-beat-an-HMO/ArticleStandard/Article/detail/108748 (last visited Mar. 19, 2010).