



The New York State Physician Profile: A practitioner's guide

After some highly publicized cases involving "bad outcomes" by physicians with prior disciplinary histories which were otherwise unknown to the public, in particular the Lisa Smart matter of 1997, the New York State Legislature passed and Governor George Pataki signed into law, the New York Patient Health Information and Quality Improvement Act of 2000 (the "Act"), creating what we now know as the New York State Physician Profile ("the Profile").¹

The Act can be found at New York Public Health Law § 2995 *et seq.* ("the Profile Statute") and its regulations can be found at Title 10 N.Y.C.R.R. 1000 *et seq.* (hereinafter, the "Profile Regulations"). In general the Profile is a publicly available online database which contains a wealth of information about every physician licensed in New York State, including background on a physician's medical education and training, board certification, medical staff privileging, and legal actions taken against the physician such as medical malpractice awards or settlements.² In February 2002, some two years after the Act was signed, the Profile went live.³ The stated purpose of the Profile is to provide patients with information about health care providers and thereby improve the quality of health care in New York State.⁴

Data Collected-Initial Data and Updating Requirements

The data collected in the Profile spans from "required data," such as education and board certification, to "optional data" such as publications and a statement by the physician. Significantly, New York Public Health Law § 2995-a (7) states that a physician who provides materially inaccurate information to the Profile is guilty of professional misconduct. One explanation for this particular provision is that the information maintained by the Profile is based on the information reported by the physicians in their initial profile submission upon licensure (10 N.Y.C.R.R. 1000.4) and pursuant to the physician's self-updating requirements (10 N.Y.C.R.R. 1000.5).

The initial Profile information is collected in accordance with 10 N.Y.C.R.R. 1000.4, which states that the Department of Health will send an initial profile survey to every newly licensed physician in the State of New York. This initial profile survey was also sent to all currently licensed physicians when the Act became law in 2000. For many physicians, this initial Profile survey is the only time that they provide information to the Profile, however, the Profile Regulations provide for more frequent updating. Pursuant to 10 N.Y.C.R.R. 1000.5, physicians licensed

in the State of New York are required to notify the Profile of any change in their "non-optional" information within 30-days. Any change in "optional information" must be reported to the profile within 365 days.⁵ Finally, as a condition of license renewal, physicians are required to update their Profile information within six months prior to the expiration date of their registration period.⁶

Physicians can update their Profile information by contacting the Profile customer service center and obtaining a Physician Survey Form. The Physician Survey Form is a ten-page form which lists all the information a physician will find in their Profile and allows for modifications which are then submitted to the Profile for updating.⁷ There is also an online updating option which requires that the physician obtain a username and password from New York State.⁸

How is the Profile Utilized?

The Profile is utilized by patients, insurance payors, hospitals and physician rating/review websites (such as healthygrades.com and vitals.com), amongst others. The Profile has vastly increased the amount of data available to the public regarding physicians licensed in the State of New York. While many utilize the Profile, the information on the Profile is primarily based on self-

reported data.⁹ Failure of physicians to timely self-report to the Profile has an obvious negative effect on the ability of patients to make informed decisions regarding their choice in practitioner and puts into question the accuracy of the information presented by physician ratings websites. It also puts physicians at risk for not following the Profile updating requirements. Attorneys representing physicians would be wise to remind their physician clients to confirm the accuracy of their profiles and to timely update their profiles. But that is easier said than done due to the lack of regulatory guidance about Profile updating.

Practical Guidance

There is confusion about what information needs to be updated to the Profile and when such updating responsibilities are triggered. One such area of confusion which we have encountered in our practice relates to New York Public Health Law § 2995-a(1)(d), the reporting of hospital privileges restrictions. Any restriction or loss of a physician's hospital privileges constitutes non-optional information which requires updating to the Profile within 30 days.¹⁰ Recognizing physicians' due process rights to challenge a disciplinary action taken against their privileges by a hospital, New York Public Health Law § 2995-

See PROFILE, Page 15



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PROFILE ...

Continued From Page 5

a(1)(d) states that a physician must submit to the Profile "a statement of any loss or involuntary restriction of hospital privileges or a failure to renew professional privileges at hospitals within the last ten years, for reasons related to the quality of patient care delivered or to be delivered by the physician where procedural due process has been afforded, exhausted, or waived, or the resignation from or removal of medical staff membership or restriction of privileges at a hospital taken in lieu of a pending disciplinary case related to the quality of patient care delivered or to be delivered by the physician ..." (emphasis).

In our practice we have faced this issue when representing physicians who have their hospital privileges summarily suspended, sought appeal of the suspension via the hospital due process hearing rights, and were successful in reversing the suspension through the intra-hospital hearing process. Upon review of the Profile Statute and Regulations, along with consultation with representatives at the Profile, we advised our clients that an update was not necessary even though they had been suspended from clinical practice at their respective hospitals for an extended period of time during the pendency of the internal due process hearing process. From a tactical standpoint, the ability to delay the updating or potentially avoid the updating of a hospital privileging adverse action can be very beneficial when representing a physician who is facing such a predicament. As a result of the paucity of regulatory guidance on the specifics of Profile updating in nuanced situations such as these, we have found it necessary to request two opinions from the Profile to determine whether a physician-client's Profile updating obligations had been triggered. Requesting an opinion from the Profile on reporting obligations for your physician clients is a worthwhile avenue for attorneys to evaluate a physician's updating obligations especially when an update would have the potential to damage a practitioner's reputation. We have also found it helpful at times to call the Profile and speak to one of their knowledgeable staff members on specific client related issues.

Finally, on multiple occasions we have assisted physicians who received notice from the Profile of a posting of a malpractice award, with an appeal pursuant to 10 N.Y.C.R.R. 1000.3, requesting reversal of the decision to publish the award.¹¹ This written appeals process permits the physician to submit factual clinical information to the



Department of Health, which reviews the submission under the standard of whether the settlement/award is "relevant to patient decisionmaking."¹² In our practice, we represented a physician who had a substantial money damages verdict against him. Though it was his first settlement/award the Profile sought to post the award pursuant to 10 N.Y.C.R.R. 1000.3(b)(2)(i) as the plaintiff had suffered a permanent injury. We successfully appealed the decision to post the award to the Profile. While the jury found our client liable, the Profile (through the panel set up to review Profile appeals pursuant to 10 N.Y.C.R.R. 1000.3(b)(2)(ii)(a)) agreed that, "...despite the awarding of payment to a complaining party, appropriate provision of patient care was provided."¹³ It is important to note the 30-day time limit by which the appeal must be submitted is based on the date of the Profile notice, not the date of receipt of the notice.¹⁴

Conclusion

If you are an attorney who represents physicians it is important for you to consider Profile related issues when representing your client in a wide array of matters. From the benign situation of a physician resigning privileges at one hospital in order to take a new position at another institution, to the more serious and career-threatening situation of a physician facing criminal charges, each may trigger a Profile update obligation.

For those attorneys who represent physicians before the Office of Professional Medical Conduct ("OPMC"), one of the first things mentioned at the physician's Interview by the OPMC

investigator is the physician's need to update their Profile. Ideally as a result of your counsel, your client will be able to inform OPMC that they are in full compliance with their Profile updating obligations. Furthermore, as explained, it is also critical that the physician's Profile information be accurate as misleading information to the Profile constitutes professional misconduct.¹⁵ A relatively simple way to verify your client's accurate reporting to the Profile is to assist them with the completion of their Physician Survey Form. Finally, if your client is faced with the obligation to update a negative change to their Profile (such as a criminal conviction) you may want to consider submitting an optional statement in which the physician can explain the conviction and potentially

limit the reputational damage that can understandably result from such an update

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1. See Buettner and Sherman, New York Daily News, March 8, 2000, "Fight For Law To Open Malpractice Records."
2. See Public Health Law § 2995-a, which lists the information collected by the New York State Physician Profile.
3. The New York State Profile is located at www.nydoctorprofile.com.
4. New York Public Health Law § 2995(1).
5. The non-optional information that a physician must update to the Profile within thirty days of any such change includes education and certification, board certification, teaching appointments, hospital privileges, participation in state or federal health insurance programs, translation services offered at their office, malpractice award payments, license actions, hospital privileging limitations, and criminal convictions. The optional information that a physician must update within 365 days of any such change includes practice office location, publications, professional community service activities, health plan contracts or other affiliations, and the physician concise statement which is an optional statement a physician can include on their Profile.
6. New York Public Health Law § 2995-a (4).
7. The Profile Customer Service Center can be reached at (888) 338-6999.
8. To obtain e-access for Profile updating online contact the New York State Health Provider Network at (866) 529-1890 to apply for an HPN account.
9. Physicians are required to report malpractice judgments and/or settlements pursuant to 10 NYCRR 1000.3, and those judgments or settlements are also separately reported by professional liability carriers pursuant to N.Y. Ins. Law § 315.
10. N.Y.C.R.R. 1000.5(a).
11. A physician is able to appeal a malpractice settlement/award posting to the Profile if they have two or fewer awards/settlements within the most recent 10 years. 10 N.Y.C.R.R. 1000.3(b)(1).
12. 10 N.Y.C.R.R. 1000.3(b)(2)(ii)(a).
13. 10 N.Y.C.R.R. 1000.3(b)(2)(ii)(a).
14. 10 N.Y.C.R.R. 1000.3(b)(2)(ii)(b).
15. See New York Public Health Law § 2995-a (7).

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