

In the New York State Courts

By Leonard M. Rosenberg

In 4-3 Decision, Court of Appeals Rules That an Independent Medical Examination Creates a “Limited” Physician-Patient Relationship Such That Allegations of Negligence in the Performance of an IME Is Subject to the 2-1/2 Year Statute of Limitations for Medical Malpractice

Bazakos v. Lewis, 12 N.Y.3d 631, 883 N.Y.S.2d 785 (2009). Plaintiff sued a physician who performed an independent medical examination (“IME”) of plaintiff. The IME was performed on behalf of a party adverse to plaintiff in a personal injury action. Plaintiff sought damages for injuries allegedly sustained during the IME. Plaintiff commenced the lawsuit approximately 2 years and 11 months after the IME took place. Defendant IME physician moved to dismiss the suit as untimely under the statute of limitations for medical malpractice actions. The Appellate Division, with two justices dissenting, ruled that because a physician performing an IME does not have a physician-patient relationship with the person being examined, the action is not for medical malpractice and thus is subject to the three-year statute of limitations application to ordinary negligence claims. The Appellate Division then granted leave to appeal to the Court of Appeals.

In a 4-3 decision, the Court of Appeals reversed the Appellate Division and held that plaintiff’s claim was a claim for medical malpractice governed by the two-year, six-month statute of limitations for medical malpractice actions pursuant to CPLR 214-a.

Plaintiff alleged that during the IME, defendant “took plaintiff’s head in his hands and forcefully rotated it while simultaneously pulling,” thereby injuring plaintiff. The Court of Appeals held that such conduct constituted medical treatment by a licensed physician, and the negligent performance of that act was



not ordinary negligence, but a “prototypical act of medical malpractice.” Despite plaintiff’s contention that there is no physician-patient relation-

ship between the doctor performing an IME and the person undergoing it, the court ruled that “the relationship between a doctor performing an IME and the person he is examining may fairly be called a ‘limited physician-patient relationship,’” pointing out that “this language is used in an American Medical Association opinion describing the ethical responsibilities of a doctor performing an IME.”

The court further explained that the limited relationship between an examinee and a physician performing an IME imposes a duty on the physician to perform the examination in a manner not to cause physical harm to the examinee. Plaintiff was injured because a doctor failed to perform competently a procedure requiring the doctor’s specialized skill. Accordingly, the court ruled that plaintiff’s claim that defendant breached his duty of care while performing an IME is a claim for medical malpractice governed by the two-year-and-six-month statute of limitations, and as such, plaintiff’s lawsuit was untimely.

Chief Judge Lippman filed a dissenting opinion strongly disagreeing with the majority’s decision and rationale, and, in a separate opinion, voted to affirm the Appellate Division’s decision in which Judges Pigott and Jones joined.

The dissent pointed out the longstanding rule that “[c]onduct may be deemed malpractice, rather than negligence, when it ‘constitutes medical treatment or bears a substantial relationship to the rendition of medical

treatment by a licensed physician.’” The dissent reasoned that “bereft of any medical treatment rationale or application, the IME physician’s conduct during his examination of plaintiff is not amenable to description as medical malpractice within the meaning of CPLR 214-a.” In reaching his conclusion, Judge Lippman explained that although the defendant may have employed medical techniques in his independent medical examination of plaintiff, it is apparent that no medical treatment was intended or provided. Defendant conducted the exam simply for the purpose of providing litigation support services for the benefit of plaintiff’s adversary.

The dissent acknowledged that defendant owed plaintiff a limited duty not to harm him in the process of performing the IME; however, the breach of such a duty was ordinary negligence, and not medical malpractice, as defendant had no duty to competently diagnose, inform or, indeed, to treat the plaintiff during the performance of an IME.

Further, the dissent noted that independent medical examinations “are emphatically not occasions for treatment, but are most often utilized to contest the examinee’s claimed injury and to dispute the need for any treatment at all.” Accordingly, the minimal duty owed to plaintiff by defendant did not arise out of a doctor-patient relationship; rather the duty is one of a general responsibility, frequently enforceable in tort, to refrain from causing foreseeable harm, which is appropriately classified as ordinary negligence.

Judge Lippman asserted that the majority’s denomination of such conduct as “medical malpractice” was achieved “only by dint of an exercise in judicial artifice untethered to any law or to the actual nature of the transaction known euphemistically as an ‘independent’ medical examina-

tion,” and thus maintained that the decision of the Appellate Division should be affirmed.

Second Circuit Court of Appeals Holds That Whether Medical Residents Are Exempt from FICA Taxes Is a Question of Fact, Not Law

United States of America v. Memorial Sloan-Kettering Cancer Center, 563 F.3d 19 (2d Cir. 2009). The Second Circuit Court of Appeals decided two cases from the Northern and Southern Districts of New York that both raised the question of whether post-graduate medical residents can invoke the Federal Insurance Contributions Act (“FICA”) tax exception for “students.” Both District Courts held that medical residency programs at Albany Medical Center (“AMC”) and Memorial Sloan-Kettering Cancer Center (“MSKCC”), respectively, are not “schools” and the residents are not “students” under FICA. The Southern District also held that the funds provided to the medical residents of MSKCC were not “scholarships” under the Tax Code, and therefore not exempt from FICA taxes on that basis.

FICA funds Social Security through payroll taxes. However, FICA carves out a “student exception,” which excludes from the definition of employment any services performed by a student “in the employ of a school, college, or university[,] ... who is enrolled and regularly attending classes at such school, college, or university.” 26 U.S.C. § 3121(b) (10). AMC filed a refund application for the FICA taxes it had paid for medical residents from 1995 to 1999. When the IRS failed to act on AMC’s application, AMC filed a lawsuit in the Northern District of New York to collect the refund. MSKCC filed for a refund of FICA taxes it paid between 2001 and 2003. The IRS issued a refund to MSKCC, but then later reversed its position and sued MSKCC in the District Court for the Southern District of New York to recover the refund. Both AMC and MSKCC (collectively the “Hospitals”)

argued that their medical residents are students, and thus eligible for this exception under the plain meaning of the statute. MSKCC also argued that the monies it provided to its medical residents were “scholarships” and not wages under § 3121(a), and therefore were exempt from payroll taxes under FICA.

The government argued that the language of the student exception was ambiguous, and therefore required a review of the legislative history. The District Courts, based on the legislative history, held that Congress did not intend for the student exception to apply to medical residents. Accordingly, the District Courts ruled that medical residents were ineligible for the student exception as a matter of law.

The Court of Appeals, agreeing with decisions of the Sixth, Seventh, and Eleventh Circuits, held that the statute is unambiguous and that whether medical residents are “students” and the Hospitals are “schools” are questions of fact, not questions of law. Further, these “separate factual inquiries depend on the nature of the residency program in which the medical residents participate and the status of the employer.”

Accordingly, the Court of Appeals vacated the District Court decisions and remanded the cases for “a particularized review of whether [the Hospitals’] medical residents qualify for the student exclusion.” However, the Court affirmed the Southern District’s holding that the monies paid by MSKCC to the medical residents are not scholarships, because these payments were conditioned upon services that the residents promised to provide MSKCC.

Court Holds That Limited Non-Medical Information Contained in Medical Record Is Not Privileged Under Statutory Physician-Patient Privilege and HIPAA

Jackson v. Jamaica Hospital Medical Center, 61 A.D.3d 1166, 876 N.Y.S.2d 246 (3d Dep’t 2009). After being

convicted of murder, Plaintiff brought a fraud action against the hospital where his victim had been transported by ambulance after being shot. Plaintiff alleged that inconsistencies between other official documents and defendant’s medical records for the murder victim, which were allegedly fraudulently created by defendants, deprived him of the ability to present a viable defense at his criminal trial. Plaintiff filed a motion to compel discovery of limited non-medical information contained in the victim’s medical records. Specifically, Plaintiff sought the time of all calls to the Hospital, the victim’s time of arrival at the emergency room, and time of death. Plaintiff requested that all confidential and privileged material be redacted. The trial court granted Plaintiff’s motion to compel discovery.

The Appellate Division held that the documents sought by Plaintiff, as redacted, are not privileged under the statutory physician-patient privilege (CPLR 4504(a)) or under Health Insurance Portability and Accountability Act (“HIPAA”) (42 U.S.C. § 1320(d), *et seq.*), and must be disclosed. The court found that the defendants, as the party objecting to disclosure, did not show that the material sought is protected from disclosure under state or federal statutory law.

In reaching its decision, the court first analyzed whether the state law physician-patient privilege barred disclosure of the information sought by Plaintiff. The physician-patient privilege prohibits disclosure of any information acquired by a physician in connection with a patient’s medical treatment. The court ruled that the very narrow information sought by Plaintiff regarding timing of certain events, as documented in victim’s medical records on date of his death, was not information necessary to victim’s medical treatment, but merely documented facts regarding time data that would be obvious to a layperson. Thus, the court found that

this information was not privileged under state law.

The court similarly concluded that HIPAA, which regulates disclosure of protected health information, including individually identifiable health information in connection with provision of health care to an individual, did not bar disclosure of the limited information sought by plaintiff. The court reasoned that the information sought by Plaintiff did not constitute protected health information, as it has no apparent connection to the victim's physical condition or medical care.

OPMC Has Authority to Subpoena Confidential HIV-Related Patient Information for Use in Misconduct Investigation; However, Such Disclosure Must Be Limited to That Which Is Necessary for the OPMC's Investigation and Patients Whose Records Are to Be Produced May Submit Objections to the Court and Request Appropriate Redactions

Anonymous v. N.Y.S. Dep't of Health, State Bd. for Prof'l Medical Conduct, 65 A.D.3d 491, 884 N.Y.S.2d 410 (1st Dep't 2009). The petitioner is a licensed physician whose practice focuses on treating patients with HIV and HIV-related conditions. In connection with a professional misconduct investigation, the New York State Office of Professional Medical Conduct ("OPMC") requested the medical and billing records for nine of petitioner's patients during its investigation of petitioner. After petitioner expressed concern about the release of confidential HIV-related patient information, the State Board for Professional Medical Conduct ("Board") issued a subpoena for the records.

The physician notified the patients whose records were subpoenaed, seeking their consent to release the information. None of the patients gave consent. Thereafter, petitioner moved to quash the subpoena and included affidavits from two patients objecting to the production of their records. Petitioner argued that the

records sought contained confidential information protected under Public Health Law § 2782(1), which prohibits disclosure of HIV- or AIDS-related patient information except in limited circumstances, and that the Board was not a party to whom disclosure could be made under one of the statute's limited exceptions.

The Board argued that it was entitled to the disclosure of the medical records under two exceptions. The first exception, § 2782(1)(g), permits disclosure to a health officer when mandated under federal or state law. The second exception, § 2782(6), permits disclosure to federal, state, or local government agencies that have oversight over a provider possessing confidential HIV-related information. In addition, the Board argued that the overarching goal of the Public Health Law protection is to safeguard the privacy of persons seeking treatment for HIV, and not to shield a provider and delay disclosure of information necessary to an investigation into alleged professional medical misconduct. The lower court denied petitioner's motion to quash, finding that the Board was entitled to full disclosure.

The Appellate Division held that under Public Health Law § 2785(2) the Board was acting within its legal authority to issue the subpoena and, based on an in-camera review of the initial complaint against the petitioner, found that the Board had a good-faith basis for seeking the information.

However, the court noted that issues to be determined were the extent of disclosure permitted, and whether patients have standing to challenge the production of their medical records. While § 2785(4) provides that a patient whose confidential HIV-related information is being sought should be given notice of the application and an opportunity to appear for the purpose of providing evidence, the statute provides that service of a subpoena is not subject to that procedure.

Nonetheless, the court held that § 2785(6)(a) does not authorize "blanket and wholesale" disclosure. Rather, § 2785(6)(a) limits the disclosure of confidential HIV-related information to that which is necessary for the Board to conduct a legitimate investigation. Accordingly, the Appellate Division ordered the redaction of materials not necessary to the investigation, and further directed that the patients whose records were sought be given the opportunity to submit any objections to the court, and to request appropriate redactions.

Appellate Division Rules That Parents, as Administrators of Their Son's Estate, Have No Right to Son's Sperm

Speranza v. Repro Lab Inc., 62 A.D.3d 49, 875 N.Y.S.2d 449 (1st Dep't 2009). Parents, as administrators of their son's estate, brought an action against a tissue bank seeking to obtain possession of their deceased son's sperm specimens deposited prior to his death. Plaintiffs also sought a preliminary injunction ordering the tissue bank to preserve the sperm pending the outcome of the action. The motion court denied injunctive relief and, *sua sponte*, dismissed the action due to legal and public policy considerations. The Appellate Division affirmed.

The decedent deposited a number of semen specimens with the tissue bank and completed and signed a form entitled "Ultimate Disposition of Specimens." On this form, the decedent selected an option that authorized and instructed the tissue bank to destroy the semen vials upon his death. Six months later, the decedent died and his parents were named administrators of his estate. When the plaintiff administrators contacted the tissue bank to inquire about the samples, the tissue bank informed them that the decedent had deposited the specimens for his use only, and that his specimens were not screened for use by the public. The decedent's mother pleaded with the bank's president not to destroy the

specimens until she could determine her legal options, and that she would continue to pay the annual storage fee. The tissue bank acceded to this request. Plaintiff administrators then began to search for a surrogate mother to be artificially inseminated with the decedent's sperm in the hope of producing a grandchild for them. They later contacted the tissue bank to obtain the specimens, only to be told that the lab could not produce the specimens because the decedent specified that they be destroyed upon his death.

Plaintiffs sought a declaration that the estate is the rightful owner of the specimens. Their theory was that by accepting yearly payments from them after their son's death, the tissue bank breached and terminated their agreement with the decedent, or waived or relinquished any obligation it had to destroy the specimens, and Plaintiff constructively became the rightful and proper owners of the specimens. Plaintiff administrators also sought a preliminary injunction ordering the tissue bank to preserve the specimens pending the outcome of the action. The Supreme Court denied Plaintiffs' motion for a preliminary injunction and then, *sua sponte*, dismissed the action because the specimens had not been tested, and therefore it would violate law and public policy to release the sperm to the Plaintiffs for their own use.

The Appellate Division's main consideration in affirming the lower court's decision was the potential harm to the public that would occur if the sperm were released to the administrators. According to regulations set forth by the New York State Department of Health, semen specimens are only subject to extensive screening and testing for infectious disease when they are produced by a "donor" (a person who provides reproductive tissue for use in procedures performed on recipients other than the donor's regular sexual partner) or a "directed donor" (a person

who provides reproductive issue to a surrogate who is not the regular sexual partner of the recipient). In this case, the decedent provided specimens as a "depositor" (a man who deposits reproductive tissue prior to intended or potential use in procedures performed on his regular sexual partner). Therefore, the specimens were not tested at the time they were deposited, and could never be tested subsequent to the decedent's death. Plaintiffs' proposed use of the specimens for a surrogate would violate Department of Health regulations, which continued to apply in these circumstances to protect the public from infectious disease.

The Appellate Division further noted that reformation is only available to correct a mutual mistake to conform an agreement to the original intent of the parties. The agreement here represented the decedent's desire to have the sperm available to him to procreate only if he survived, and did not protect any possibility that his genetic tissue would be used after his death. In fact, the decedent explicitly provided for the destruction of the specimens upon his death. Therefore, the agreement could not be reformed as Plaintiffs suggested because that was not the original intent of the decedent and the tissue bank. Further, the Court held that Defendant's acceptance of storage fees from Plaintiffs did not provide Plaintiffs with a right to an ownership interest over the specimens.

Accordingly, because "the legal obligations with regard to the possession and handling of the semen specimens are dictated solely and completely by the applicable Department of Health regulations" ...and "the purpose of the statute is to protect the surrogate mother, and thereby the general public, from disease," the Court held it could not avoid the regulations, "[E]ven though we recognize the joy that ignoring those regulations could bring to Plaintiffs."

Physician's Suit Against U.S. Federation of State Medical Boards for Reporting the Suspension of His Medical License in Britain Dismissed for Lack of Jurisdiction and Failure to State a Claim

Dabiri v. Federation of States Medical Boards of the United States, Inc., et al., No. 08-4718, 2009 WL 803126 (E.D.N.Y. March 25, 2009). Plaintiff-physician brought an action against the Federation of States Medical Boards of the United States, Inc. ("FSMB") and the General Medical Council ("GMC"), a British statutory entity that oversees physicians' fitness to practice medicine. The Plaintiff alleged that GMC deprived him of due process by suspending his medical license in England without notice and hearing, and by providing that information to FSMB, which, in violation of its own rules, included the suspension in its medical disciplinary database in the U.S.

Plaintiff claimed he learned of the suspension seven years later when he requested a copy of FSMB's summary of reported actions related to his medical practice, which summary included a statement that FSMB only considered reports from state boards, federal agencies and federal departments, and that it assumed no responsibility for errors or omissions contained in the report.

After FSMB denied Plaintiff's request to remove the GMC suspension from his record, plaintiff commenced this action seeking equitable relief and damages for loss of income when he could not secure employment, purportedly because of the inclusion of his suspension in the FSMB database.

The court granted GMC's motion to dismiss for lack of subject matter jurisdiction because GMC was an "agency or instrumentality of a foreign state" immune from the court's jurisdiction pursuant to the Foreign Sovereign Immunities Act ("FSIA"). In so holding, the court rejected Plaintiff's contention that GMC fell

under an exception to the immunity rule because GMC was engaged in “commercial activity” when it charged fees for its oversight of physicians and their fitness to practice medicine. Even if true, these activities were insufficient to establish commercial activity to bring GMC within the FSIA exception, particularly because GMC was a public, charitable organization not organized for commercial activity.

As for the claims remaining against FSMB, the court granted its motion to dismiss the complaint for lack of subject matter jurisdiction because Plaintiff failed to allege the amount in controversy against FSMB was in excess of the \$75,000.

Further, FSMB’s motion to dismiss for lack of personal jurisdiction was granted. The mere collection of information about Plaintiff or other physicians residing in New York, absent any evidence that FSMB actually had contacts within the state, was insufficient to establish personal jurisdiction. Plaintiff did not allege FSMB sent any reports about him to any entity or person in New York, only that FSMB “avail[ed] itself of the opportunity to do business in New York each time it collect[ed] and exchange[d] information with others regarding plaintiff.” Without more, the court had no personal jurisdiction over FSMB.

Finally, the court granted FSMB’s motion to dismiss for failure to state a claim upon which relief may be granted. The only allegations against FSMB were that it recorded Plaintiff’s suspension and disseminated that information in violation of its own rules that it would only distribute information from official reports provided by state boards, federal agencies or departments. These allegations were insufficient to establish a claim of defamation because plaintiff did not dispute the truth of the information reported by FSMB. Moreover, there was no claim that FSMB violated plaintiff’s due process rights because

FSMB was not a state actor. Finally, Plaintiff did not claim that FSMB had any knowledge of the suspension hearings or any role in the suspension, which would be required to support a claim that FSMB aided and abetted GMC in causing a tort against Plaintiff.

Fourth Department Appellate Division Holds That a Plaintiff Who Sues a Nursing Home Based on Traditional Tort Causes of Action May Also Assert a Claim Under Public Health Law § 2801-d

Kash v. Jewish Home & Infirmary of Rochester, N.Y., Inc., et al., 61 A.D.3d 146, 873 N.Y.S.2d 819 (4th Dep’t 2009). Public Health Law § 2801-d provides patients of residential health care facilities with a private right to sue the facility for a failure to meet standards of care that deprives the patient of a right or benefit. The remedies provided by this law “are in addition to and cumulative with any other remedies available to a patient, at law or in equity or by administrative proceedings.” The patient is entitled to punitive damages and attorneys’ fees, and any damages recovered by the patient are “exempt for purposes of determining initial or continuing eligibility for Medicaid.”

Plaintiff, a patient at Defendant nursing home, alleged that she suffered permanent spinal cord injuries due to the home’s negligence. Plaintiff sued the home for negligence, and thereafter moved to amend her complaint by adding cause of action under section 2801-d. Plaintiff later admitted that she sought section 2801-d damages to ensure that she could recover compensation for her injuries while retaining Medicaid eligibility to pay for her ongoing care. The Supreme Court denied the motion, relying on two prior decisions.

In *Goldberg v. Plaza Nursing Home Comp.*, the court granted the nursing home’s summary judgment motion to dismiss the section 2801-d cause of action because the Plaintiff had the right to bring an action predicated

upon the defendant’s negligence. The *Goldberg* court relied on legislative history in concluding that the “purpose [of the statute] was not to create a new personal injury cause of action based on negligence when that remedy already existed.” In *Doe v. Westfall Health Care Ctr.*, the court, by relying on the statute’s clear language, permitted the plaintiff to assert the 2801-d cause of action despite the fact that she already asserted traditional torts causes of action. The *Doe* court reasoned that the conduct that formed the basis of the litigation (i.e., patient was raped by an employee of the nursing home) was precisely the sort that the statute was designed to target, but that recovery for such conduct was often barred for plaintiffs who sue at common law. In that case, a negligence cause of action against the facility could have been difficult to establish because of the probable absence of the requisite element of foreseeability, i.e., the facility’s lack of prior knowledge of the employee’s criminal tendencies.

The majority opinion of the Appellate Division, Fourth Department, embarked on its analysis by first examining the statute’s language, which it concluded to be clear and unambiguous in providing remedies in addition to and cumulative with any other remedies. The court then reexamined the precedent decisions, stating that *Goldberg* was the first appellate decision to address section 2801-d, while the *Doe* court modified *Goldberg* to address a particularly heinous set of facts. The court found the *Doe* rule (i.e., one that limits section 2801-d causes of action only to those cases in which recovery under a common-law cause of action would prove difficult or inadequate) unworkable. Under this rule, a court would be required to preliminarily determine the likelihood of recovery under traditional tort causes of action, and *Doe* did not provide criteria for doing so. The court declared that the *Doe* rule creates an ambiguity not present in *Goldberg*, one that will create

the likelihood of inconsistent rulings and unpredictable results. The court was also persuaded by decisions of the First and Third Departments in concluding that a plaintiff is entitled to assert both a cause of action under Public Health Law § 2801-d and traditional causes of action. (Two Justices dissented).

Court Denies Claim for “Wrongful Living” Where Hospital Twice Violated Do-Not-Resuscitate Orders

Cronin v. Jamaica Hospital Medical Center, 60 A.D.3d 803, 875 N.Y.S.2d 222 (2d Dep’t 2009). Plaintiff’s decedent, Peter F. Cronin, was admitted as a patient to Defendant Jamaica Hospital Medical Center (the “Hospital”) with various illnesses. During his hospitalization, the Hospital twice resuscitated Mr. Cronin—thereby prolonging his life—in violation of two Do-Not-Resuscitate orders, which had been issued by the Hospital and executed by decedent’s family.

Plaintiff commenced an action against the Hospital asserting a claim for wrongfully prolonging decedent’s life. The Appellate Division held that no cause of action exists for “wrongful living,” as “the status of being alive does not constitute an injury in New York.” Further, Plaintiff failed to raise a triable issue of fact as to whether Mr. Cronin suffered an injury as a result of the resuscitations. Accordingly, the Appellate Division upheld the Supreme Court’s determination granting the Hospital’s motion for summary judgment dismissal.

Court Holds That Documents Prepared by OPMC During Its Investigation Are Not Subject to Disclosure Under Public Health Law § 230 in the Absence of Any Applicable Exceptions

Hunold v. Community General Hospital of Greater Syracuse, 61 A.D.3d 1331, 876 N.Y.S.2d 828 (4th Dep’t 2009). Plaintiff commenced a medical malpractice action against Defendant Community General Hospital of Greater Syracuse (the “Hospital”). During discovery, Plaintiff sought

documents from non-party New York State Department of Health, Office of Professional Medical Conduct (“OPMC”), which had investigated the care and treatment of the patient. The Supreme Court ordered the OPMC to produce its investigation documents, including any statements made by Defendants.

Applying Public Health Law § 230(10)(a)(v), the Appellate Division, Fourth Department, reversed the order on the grounds that such materials, which concerned possible instances of professional misconduct, were confidential, and not subject to any applicable exceptions. The Appellate Division further held that, because the Board of Professional Misconduct (the “Board”) did not convene to discuss the case, the exception for statements made by parties (here, the Hospital) at a meeting of the Board did not apply under Public Health Law § 230(9). Accordingly, absent any applicable exceptions, the Appellate Division found that the materials sought were not discoverable as a matter of law.

Medicaid IG’s Perfunctory Refusal to Reinstate Physician Is Arbitrary and Capricious

Mihailescu v. Sheehan, No. 117072/08, 2009 WL 1799113 (Sup. Ct., N.Y. Co. June 24, 2009). The Office of Professional Conduct (“OPMC”) and the Board of Professional Medical Conduct (the “Board”) suspended the medical license of petitioner, a psychiatrist, for committing “boundary violations” involving two patients. Petitioner entered into a consent order which provided that if petitioner met certain conditions, after serving a 12-month suspension, she would be permitted to practice in a State-licensed facility (the “Agreement”).

OPMC gave notice of the suspension and Agreement to various State and federal agencies, including the State Medicaid Inspector General (the “Medicaid IG” or “IG”), and as a result, petitioner was excluded from the Medicaid program. After serving her

12-month suspension and meeting all other conditions in her consent order, petitioner applied for reinstatement in the Medicaid program; otherwise, as an excluded provider, petitioner would not be permitted to provide services in a facility that received any federal funds. Due to the license suspension, the IG denied petitioner’s reinstatement application. Petitioner commenced an Article 78 proceeding to set aside the Medicaid IG’s denial of her application for reinstatement.

The IG’s discretionary action could only be set aside if the court found the challenged action to be arbitrary and capricious or lacked a rational basis. The court reviewed the IG’s authority to make its decision by tracing the history of statutes and regulations relevant to respondents’ administrative functions and relationship to the Department of Health (the “DOH”). For the last 40 years, OPMC and the Board have served as the DOH’s investigatory and adjudicatory arms concerning allegations of professional misconduct by physicians. In 2006, the Medicaid IG position was removed from the Executive Department and defined as an “independent fraud-fighting entity within the Department of Health.” The court pointed to the IG’s assumption that he was authorized to assess a physician’s participation with Medicaid, even when his determination was conflicting with OPMC and the Board. Ultimately, the court resorted to practical considerations to determine that the IG’s authority fell short of his presumption of authority.

The court found that since OPMC and the Board were responsible for determining whether petitioner could care for both non-Medicaid and Medicaid patients, the legislature did not likely intend that the Medicaid IG, a non-doctor, create duplicative Departmental work, especially in light of the IG’s lack of investigation and evaluation of the petitioner. The Medicaid IG second-guessed the Department and simply based his determination on the suspension. The prime

avenue of employment contemplated by the Agreement was effectively closed by petitioner's exclusion from participation in the Medicaid program and the Agreement essentially became meaningless.

Instead, the court found that the Medicaid IG is expected to defer to his sister Departmental units for their conclusions. The IG's refusal to reinstate petitioner was found to be arbitrary and capricious as it was baseless and inconsistent with a prior assessment by OPMC and the Board. Accordingly, the court granted Article 78 relief against the IG, directing petitioner's reinstatement to the roster of Medicaid providers.

Appellate Division Affirms Medical License Revocation for Fraudulent Billing, Holding That Physicians Are Ultimately Responsible for the Accuracy of Their Bills

Tsirelman v. Daines, 61 A.D.3d 1128, 876 N.Y.S.2d 237 (3d Dep't 2009). Physician commenced an Article 78 proceeding to challenge a determination of the Hearing Commit-

tee of the State Board for Professional Medical Conduct (the "Committee") that he engaged in fraudulent billing, and that his license should be revoked and a fine of \$100,000 be imposed. The charges were based upon bills submitted to a no-fault automobile insurer for procedures that were neither medically necessary nor actually performed. Petitioner blamed the billing service for misreading his notes, adding a billing code, and stamping his signature on the bills without his authorization. Citing evasive, fabricated and inconsistent testimony, the Committee found petitioner's claims lacked credibility.

The court applied the standard that physicians are ultimately responsible for the accuracy of the bills that they issue, and found that the Committee could infer that petitioner knew the bills were false and that he willfully intended to mislead and deceive the insurer. The charges of fraudulent medical practice, filing false reports, and moral unfitness were sustained. Further, petitioner

failed to establish a deprivation of due process as he did not show that the admission of uncertified and allegedly incomplete patient records unfairly affected the entire proceeding, and submission of additional records would have been redundant, irrelevant, and not exculpatory.

Compiled by Leonard Rosenberg, Esq. Mr. Rosenberg is a partner in the firm of Garfunkel, Wild & Travis, P.C., a full service health care firm representing hospitals, health care systems, physician group practices, individual practitioners, nursing homes and other health-related businesses and organizations. Mr. Rosenberg is Chair of the firm's litigation group, and his practice includes advising clients concerning general health care law issues and litigation, including medical staff and peer review issues, employment law, disability discrimination, defamation, contract, administrative and regulatory issues, professional discipline, and directors' and officers' liability claims.

Reprinted with permission from the *Health Law Journal*, Fall 2009, published by the New York State Bar Association, One Elk Street, Albany, New York 12207.