A dark blue presentation slide with yellow and white text. The title 'Health Law 101' is in large white font. Below it, 'NYSBA Bridging The Gap' is in smaller white font. The speaker's name 'Jeffrey J. Sherrin, Esq.' is in yellow, followed by his email 'jsherrin@oalaw.com' and phone number '518-462-5601' in yellow. At the bottom is the logo for 'O'CONNELL ARONOWITZ ATTORNEYS AT LAW' in white.

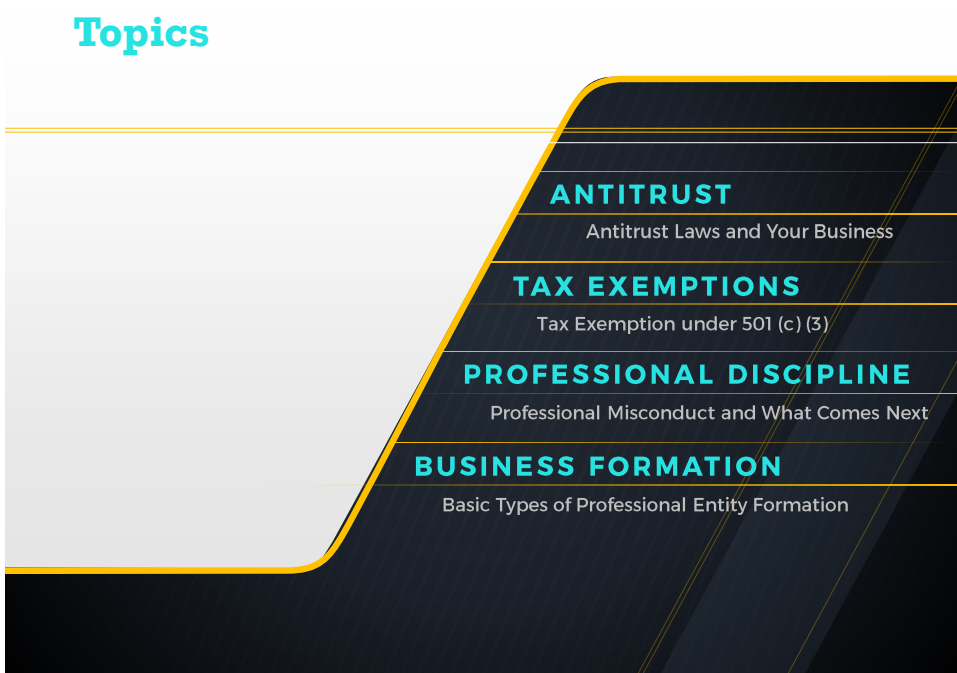
Health Law 101

NYSBA Bridging The Gap

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O'CONNELL ARONOWITZ
ATTORNEYS AT LAW

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A presentation slide with a light blue background on the left and a dark blue background on the right. The word 'Topics' is in large blue font on the left. On the right, four topics are listed in yellow: 'ANTITRUST' (with subtitle 'Antitrust Laws and Your Business'), 'TAX EXEMPTIONS' (with subtitle 'Tax Exemption under 501 (c) (3)'), 'PROFESSIONAL DISCIPLINE' (with subtitle 'Professional Misconduct and What Comes Next'), and 'BUSINESS FORMATION' (with subtitle 'Basic Types of Professional Entity Formation').

Topics

- ANTITRUST**
Antitrust Laws and Your Business
- TAX EXEMPTIONS**
Tax Exemption under 501 (c) (3)
- PROFESSIONAL DISCIPLINE**
Professional Misconduct and What Comes Next
- BUSINESS FORMATION**
Basic Types of Professional Entity Formation

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Health Care Antitrust

Content courtesy of Professor Melissa Zambri, Esq.
Albany Law School Health Care Compliance
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Purpose of Antitrust Laws?

- **Promote Competition**
- **Protect Consumers**
- **Prevent abuse of market power**
 - If activity **does not** increase market power effects, it raises no antitrust concerns.
 - If activity **does** increase market power effects, it may raise antitrust concerns.
 - Need to balance market power effects vs. efficiency effects

Health Care Antitrust

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The Competition (Antitrust) Laws

Sherman Act

- § 1: prohibits contracts, combinations or conspiracies in restraint of trade (multi-firm conduct)
- § 2: prohibits monopolization (primarily single-firm conduct)

Clayton Act

- prohibits acts that lessen competition or tend toward monopolies

Donnelly Act - New York's Antitrust Law

- New York General Business Law Sections 340 - 347
- Similar to Sherman Act
- Prohibits price fixing, bid rigging, territorial and customer allocations, monopolization, boycotts, and tying arrangements.

Health Care Antitrust

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Examples of Antitrust Violations

Price Fixing

- Agreeing to fix the price of a product or service

Bid Rigging

- Agreements among bidders regarding which companies will bid for certain contracts, or what prices bidders will offer

Market Allocation

- Agreement not to compete for specific customers, in specific geographic area, or with regard to specific products

Group Boycotts

- Pharmacists agreeing not to fill prescriptions for certain drugs due to low reimbursement rates

Tying Arrangements

- Seller with market power over product ("tying product") will only sell to buyer who agrees to buy another one of seller's products ("tied product")

Health Care Antitrust

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Sherman Act

Section 1: Standard of Analysis

Per se violations

- Conclusively presumed illegal
 - Agreements on prices
 - Division of markets
 - Group boycotts
 - Tying arrangements

Rule of reason analysis

- Conduct illegal if anticompetitive effects outweigh procompetitive benefits (Balancing Test)
- Evidence of purpose and effect of the particular restraint on competition

Health Care Antitrust

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Elements to Consider

There are several elements that are considered when deciding to bring an antitrust claim:

- Standing
- Interstate Dealings
- Relevant Market
- Provider Services Market
- Geographic Market for Provider Services
- Damages
- Uncertainty of Success
- Relevant Case Law
- Time Frame
- Costs
- Governmental Involvement

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Sherman Act

Section 1

Section 1 is violated when three elements exist simultaneously:

- A conspiracy, combination or constraint
- An unreasonable restraint of trade
- An effect on interstate commerce

Health Care Antitrust

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Unreasonable Restraint on Competition

In determining whether a restraint of trade is reasonable, the courts will look at:

- The facts peculiar to the business in which the restraint arises
- The conditions before and after the restraint imposed
- The nature of the restraint and its effects, actual or probable
- All relevant facts, including the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the purpose sought to be attained

Health Care Antitrust

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Violations Alleged Of Type Antitrust Laws Intended To Prevent

Because the antitrust laws are designed to protect competition rather than a single aggrieved competitor, the party bringing suit must prove that the alleged violations affect consumers in general and not just the welfare of a single patient.

Health Care Antitrust

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Sherman Act

Section 2

Prohibits monopolization, attempted monopolization, and conspiracies to monopolize.

Monopolization requires proof of:

- Monopoly Power
Power to control prices or exclude competition i.e. substantial amount of market power
- Willful acquisition or maintenance of monopoly power by "predatory" or "unreasonably exclusionary" conduct
Conduct is "predatory" if it has significant exclusionary effects on defendant's actual or potential competitors AND the conduct promotes none of the values that competition is meant to promote

Attempted Monopolization

- Specific intent to monopolize relevant market
- Predatory conduct to implement intent
- "Dangerous probability" of acquiring monopoly power if predatory conduct continued

Health Care Antitrust

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Sherman Act

Section 2 Violations

To prove monopolization, a plaintiff must:

- Define the product market monopolized
- Delineate the geographic market in which the monopoly is taking place
- Show the defendant acquired their monopoly power willfully (as opposed to achieving it naturally through the quality of their products), often by conducting themselves as predators

Look at the product market and geographic market

Health Care Antitrust

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Exceptions and Immunities

Federal Governmental Immunity

State Action Immunity

- Immunizes state government
- Private parties must meet two prong standard:
 - Challenged restraint must be only clearly articulated and expressed as state policy
 - The policy must be "actively supervised" by the state itself
- Certificated of Public Advantage (Copa's)
 - FTC takes issue with Copa's

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Who Enforced Antitrust Laws?

Federal Trade Commission (FTC)

Antitrust Division of the Department of Justice (DOJ)

State Attorneys General

Private Enforcement

Health Care Antitrust

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DOJ and FTC Statements of Antitrust Enforcement Policy in Health Care

Analyzes health care provider networks under antitrust principles

Goal: To ensure a competitive marketplace in which consumers will have the benefit of high quality, cost effective health care and a wide range of choices

- Expanded consumer choice
- Increased competition

Health Care Antitrust

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Rome Ambulatory Surgical Center vs. Rome Memorial Hospital

Rome Memorial Hospital had exclusive contracts for ambulatory surgery with two third party payers

A question of material fact was raised in regards to this and whether it had anti-competitive effects

Rome Ambulatory Surgical Center also raised claims against the hospital for attempted monopolization

Ultimately, the court ruled that there was not sufficient facts to make an inference that the competition was restrained and also that the center failed to demonstrate monopoly power

Health Care Antitrust

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New York vs. St. Francis Hospital

New York State brought an antitrust lawsuit against the St. Francis Hospital, claiming that it fixed the rates, terms and conditions of the services they provided.

This wrongfully divided the market for many of those services, in violation of the Sherman Act Section 1 and the Donnelly Act

The court ultimately concluded that the conduct of the hospital were per se violations of the Sherman Act and that there was no entitlement of state-action immunity. Therefore the court granted New York States motion for summary judgement.

Health Care Antitrust

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Tax Exemptions for the Health Care Industry

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Exemption Qualification

- **26 USC 501(c)** provides that “Corporations . . . organized and operated exclusively for . . . charitable, scientific . . . purposes, . . . , [and where] *no part of the net earnings of which inures to the benefit of any private shareholder or individual*” are exempt organizations. (emphasis added).
- Private shareholders or individuals are persons having a personal and private interest in the activities of the organization. *Id.*

Tax Exemptions for the Health Care Industry

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Exemption Qualification

- **Charitable in the context of section 501(c)(3) includes, but is not limited to, “the relief of poverty and the promotion of health.”**

Federation Pharmacy Services Inc. v. Commissioner of Internal Revenue.
72 TC 687, 694 (1979), aff'd 625 F2d 804 (8th Cir. 1980).

Tax Exemptions for the Health Care Industry

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Exemption Qualification

- **26 CFR 1.501(c)(3)-1(c) provides, in part that**
 - “an organization will be regarded as ‘operated exclusively’ for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.”
- **Case Law**
 - “If an organization is engaged in a single activity directed at achieving various purposes, some of which are described in section 501(c)(3) and some of which are not described in that section, the organization will fail the operational test where the purpose not described in that section is more than insubstantial.”

Ass'n for Honest Attorneys v. Commissioner of Internal Revenue.
2018 WL 1611611, at *9 (U.S. Tax Court 2018), citing *Redlands Surgical Servs. v. Commissioner*, 113 T.C. 47, 71 (1999), aff'd, 242 F.3d 904 (9th Cir. 2001).

- *This concept should be kept in mind where providers are expanding*

Tax Exemptions for the Health Care Industry

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Organizational Documents

- **An organization's organizing documents must state that it is organized and will be operated for charitable purposes and that upon dissolution its assets will be distributed for exclusively charitable purposes, either explicitly in the governing documents or by operation of law. 26 CFR 1.501(c)(3)-1(b)(2).**

Tax Exemptions for the Health Care Industry

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Community Benefit Requirement

- **To qualify as a tax-exempt provider the community benefit standard of Rev. Rul. 69-545, 1969-2 C.B. 117 must also be met.**
 - "The community benefit test requires consideration of a variety of factors that indicate whether an organization is involved in the promotion of health on a **community-wide basis**." IHC Care, Inc. v. C.I.R., 2001 WL 1103289, at 12 (2001)(emphasis added).
 - *E.g., An HMO that did not offer its health plan to the general public failed to meet the community benefit standard. Id.*

Tax Exemptions for the Health Care Industry

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Private Benefit v. Inurement

- **501(c)(3) explicitly prohibits inurement of earnings to private shareholders or individuals but it does not directly discuss private benefit.**
- **The distinction between inurement and private benefit is that private benefits can go to people outside of the corporation, while inurement focuses on benefits to an individual within or closely related to the corporation**

See American Campaign Academy v. Commissioner, 92 T.C. 1053 (1989) (defining private benefit as "nonincidental benefits conferred on disinterested persons that serve private interests").

Tax Exemptions for the Health Care Industry

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Revenue Derived from Incidental Services

- **"Under § 511 of the Internal Revenue Code, organizations that have tax-exempt status under I.R.C. § 501 still must pay income tax on:**
 - **'unrelated business taxable income'**
 - **income received from the conduct of a trade or business unrelated to its exempt purpose."**

Texas Farm Bureau v. U.S., 53 F.3d 120, 123 (5th Cir. 1995).

Tax Exemptions for the Health Care Industry

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Revenue Derived from Incidental Services

- **“To constitute taxable, unrelated business income under § 511 to § 513, the activity that generates the income must satisfy three elements:**
 - 1. the activity from which the income is derived must be a trade or business;**
 - 2. that is regularly carried on by the taxpayer; and**
 - 3. the conduct of the trade or business must not be substantially related to the organization’s exempt purpose.”**

Id. at 124 (internal quotation marks omitted).

Tax Exemptions for the Health Care Industry

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Losing Tax Exemption

AHS Hospital Corp., v. Town of Morristown

Docket Nos: 010900-2007, 010901-2007, 000406-2008 (N.J. Tax Ct. June 25, 2015)

- **Tax exemption for the hospital’s main campus was denied by the Tax Court**
- **The Tax Court applied the New Jersey’s profit test**
- **The Tax Court denied the property tax exemption because it could not distinguish the non-profit activity from the for-profit activities carried out by physicians**

Tax Exemptions for the Health Care Industry

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Losing Tax Exemption

AHS Hospital Corp., v. Town of Morristown

Docket Nos: 010900-2007, 010901-2007, 000406-2008 (N.J. Tax Ct. June 25, 2015)

- **The Tax Court reviewed the executive salaries and determined that the hospital failed to demonstrate the reasonableness of the compensation paid to its executives and that the compensation paid to numerous physicians indicated a prohibited profit-making purpose**
- **The tax exemption was denied almost in its entirety**
 - The court concluded that the property tax exemption was applicable to the parking garage, operation of the auditorium and the operation of the fitness center.
 - However, a cafeteria in the hospital failed to meet the profit test because it was operated through a profit-sharing contract with Aramark.

Tax Exemptions for the Health Care Industry

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New York State Law

- **RPTL 420-b:**
 - provides that real property owned by a corporation or association which is organized exclusively for [among other things benevolent or scientific purposes] shall be exemption from taxation
 - states that "if any portion of such real property is not used exclusively to carry out thereupon one or more of the purposes listed in subdivision one of this section, but is:
 - leased or
 - otherwise used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be exempt

Tax Exemptions for the Health Care Industry

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New York City's Exemption Application

- **In certain parts of New York City:**

- It may be possible to receive a partial non-profit property tax exemption if the owner meets the same criteria as for a full exemption but leases part of the property to another user

Partial Exemption Eligibility information available at:

www1.nyc.gov/site/nfp/eligibility/partial-exemption-eligibility.page

Tax Exemptions for the Health Care Industry

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New York City's Exemption Application

Additional Sources:

www.irs.gov/pub/irs-tege/eotopic04.pdf

www.irs.gov/pub/irs-tege/eotopic90.pdf

Tax Exemptions for the Health Care Industry

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Professional Discipline

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Office of the Professions

- **New York State Education Department**
 - Misconduct involving all professions *except* physicians, physician assistants and specialist assistants

Professional Discipline

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Office of Professional Medical Conduct

- **“OPMC” or the “Office”**
- **New York State Department of Health**
 - Misconduct involving physicians, physician assistants and specialist assistants

Professional Discipline

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What is Professional Misconduct?

Education Law Article 130

Applicable to all licensed professionals. Includes, but not limited to:

- **Practicing the profession fraudulently, beyond its authorized scope, with gross incompetence, with gross negligence on a particular occasion or negligence or incompetence on more than one occasion**
- **Practicing the profession while the ability to practice is impaired by alcohol, drugs, physical disability, or mental disability**

Professional Discipline

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What is Professional Misconduct?

Education Law Article 130

Applicable to all licensed professionals. Includes, but not limited to:

- **Being habitually drunk or being dependent on, or a habitual user of narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having similar effects**
- **Being convicted of committing an act constituting a crime under**
 - New York State law
 - Federal law or
 - The law of another jurisdiction and which, if committed within New York State would have constituted a crime under New York State law

Professional Discipline

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What is Professional Misconduct?

Education Law Article 130

Applicable to all licensed professionals. Includes, but not limited to:

- **Having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state**
- **Having been found by the commissioner of health to be in violation of article thirty-three (Controlled Substances) of the public health law**

Professional Discipline

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What is Professional Misconduct?

Education Law Article 130

Applicable to all licensed professionals. Includes, but not limited to:

- **Having his license to practice medicine revoked, suspended or having other disciplinary action taken, or having his application for a license refused, revoked or suspended or having voluntarily or otherwise surrendered his license after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation, suspension or other disciplinary action involving the license or refusal, revocation or suspension of an application for a license or the surrender of the license would, if committed in New York State, constitute professional misconduct under the laws of New York State**

Professional Discipline

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What is Professional Misconduct?

Education Law Article 130

Applicable to all licensed professionals. Includes, but not limited to:

- **Refusing to provide professional service to a person because of such person's race, creed, color, or national origin**
- **Permitting, aiding or abetting an unlicensed person to perform activities requiring a license**
- **Committing unprofessional conduct, as defined by the board of regents in its rules or by the commissioner in regulations approved by the board of regents**

Professional Discipline

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What is Professional Misconduct?

- **Additional definitions of “professional misconduct” for specific professions listed under the Rules of the Board of Regents, 8 NYCRR Part 29**
 - 8 NYCRR § 29.5: special provisions for the professions of dentistry and dental hygiene
 - 8 NYCRR §§ 29.2: general provisions for health professions
 - 8 NYCRR 29.14: special provisions for the profession of nursing

Professional Discipline

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What is Professional Misconduct?

Education Law Article 131

Applicable to physicians, physician assistants and specialist assistants. Includes, but not limited to:

- **Practicing the profession with negligence on more than one occasion**
- **Practicing the profession with gross negligence on a particular occasion**
- **Practicing the profession with incompetence on more than one occasion**
- **Practicing the profession with gross incompetence**

Professional Discipline

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What is Professional Misconduct?

Education Law Article 131

Applicable to physicians, physician assistants and specialist assistants. Includes, but not limited to:

- **Practicing the profession while impaired by alcohol, drugs, physical disability, or mental disability**
- **Directly or indirectly offering, giving, soliciting, or receiving or agreeing to receive, any fee or other consideration to or from a third party for the referral of a patient or in connection with the performance of professional services**

Professional Discipline

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What is Professional Misconduct?

Education Law Article 131

Applicable to physicians, physician assistants and specialist assistants. Includes, but not limited to:

- **Permitting any person to share in the fees for professional services, other than: a partner, employee, associate in a professional firm or corporation, professional subcontractor or consultant authorized to practice medicine, or a legally authorized trainee practicing under the supervision of a licensee**
- **Conduct in the practice of medicine which evidences moral unfitness to practice medicine**

Professional Discipline

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What is Professional Misconduct?

Education Law Article 131

Applicable to physicians, physician assistants and specialist assistants. Includes, but not limited to:

- **Delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified, by training, by experience, or by licensure, to perform them**
- **Performing professional services which have not been duly authorized by the patient or his or her legal representative**

Professional Discipline

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What is Professional Misconduct?

Education Law Article 131

Applicable to physicians, physician assistants and specialist assistants. Includes, but not limited to:

- **Abandoning or neglecting a patient under and in need of immediate professional care, without making reasonable arrangements for the continuation of such care, or abandoning a professional employment by a group practice, hospital, clinic or other health care facility, without reasonable notice and under circumstances which seriously impair the delivery of professional care to patients clients**
- or

Professional Discipline

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What is Professional Misconduct?

Education Law Article 131

Applicable to physicians, physician assistants and specialist assistants. Includes, but not limited to:

- **Failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient**
- **Failing to provide access by qualified persons to patient information in accordance with the standards set forth in section eighteen of the public health law (access to patient information)**
- **Any practice that seeks to change an individual's sexual orientation**

Professional Discipline

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What is Professional Misconduct?

- **Additional definitions of “professional misconduct” for specific professions listed under the Rules of the Board of Regents, 8 NYCRR Part 29**

- 8 NYCRR § 29.2: general provisions for health professions including physician assistants and specialist assistants
- 8 NYCRR § 29.4: special provisions for the profession of medicine

Professional Discipline

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OPMC

- **Through its Board of Professional Medical Conduct (“BPMC” or the “Board”), the Office handles instances and/or allegations of professional misconduct by physicians, physician assistants, medical residents and specialist assistants (hereinafter “licensees”)**

Proceedings against licensees governed by:

- Public Health Law §§ 230: State board for professional medical conduct; proceedings
- 230-a: penalties for professional misconduct
- 230-b: disciplinary proceedings for physician assistants and specialist assistants
- 230-c: administrative review board for professional medical conduct

Professional Discipline

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Duties of OPMC

- **Investigating complaints against licensees**
- **Coordinating disciplinary hearings against licensees**
- **Monitoring licensees subject to Board orders**

Professional Discipline

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Investigations

- **BPMC can investigate suspected misconduct on its own and must investigate every complaint, regardless of its source**
- **BPMC can obtain and examine records of patients**
- **If through its investigation, BPMC uncovers sufficient evidence of misconduct, the matter can be presented to an investigation committee**

Professional Discipline

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Investigations

- **Prior to being referred, the licensee being investigated must be given the opportunity to be interviewed by OPMC regarding the issues being investigated**
 - Licensee is given notice of the investigation and rights in connection with the interview, including:
 - the licensee's right to be represented by counsel at the interview
 - and to bring a stenographer to transcribe the interview
 - Licensee is responsible for costs of stenographer
 - A copy of the transcription must be given to DOH within 30 days of the interview

Professional Discipline

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Investigations

- Within 30 days of the interview or 15 days after receipt of the transcription, the licensee must be provided with a copy of the report of the interviewer
- In response to the interviewer's report, the licensee may submit written comments or expert opinion or medical or scientific literature that is directly relevant to the issues identified by OPMC

Professional Discipline

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After an Investigation / Interview

- The investigation is closed without presentation to investigation committee and licensee is notified of the same

Professional Discipline

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After an Investigation / Interview

- **The matter is submitted to an investigation committee**
 - If OPMC determines, after consultation with an investigation committee, that any of the following is true, OPMC can conduct a comprehensive review of patient records of the licensee and such office records of the licensee as are related to said determination:
 - Evidence exists of a single incident of negligence or incompetence, a pattern of inappropriate prescribing or medical practice, or impairment by drugs, alcohol, physical or mental disability
 - A recommendation was made by a county medical society or the medical society of the state of New York that warrants further review
 - The facts underlying a verdict in a medical malpractice action warrant further review

Professional Discipline

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After an Investigation / Interview

- **If OPMC, determines after consultation with the investigation committee that a hearing is warranted, the office prepares charges against the licensee**

Professional Discipline

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Charges of Misconduct

- **Contain the material facts underlying the charges but NOT the evidence**
- **Generally, must be served personally on licensee at least thirty days prior to the hearing**
- **Licensee must provide a written answer to each of the charges no later than 10 days prior to the hearing**
 - *Any charges not answered deemed admitted*
- **After service of charges against licensee, OPMC must provide the licensee with any exculpatory information or documentation in its possession**

Professional Discipline

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The Hearing

Individuals Present on Behalf of OPMC

- **Hearing Committee Members**
- **Administrative Officer**
 - New York attorney who will have authority to rule on all motions, procedures, objections
 - Does not vote
 - Drafts the conclusions of the hearing committee

Professional Discipline

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The Hearing

Licensee Rights

- **Representation by counsel**
- **Production of witnesses and evidence on his or her behalf**
- **Cross-examination witnesses and evidence produced against him or her**
- **To have subpoenas issued on his or her behalf for production of witnesses and/or evidence**

Professional Discipline

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After The Hearing

Hearing Committee's Determination and Order

- **Findings of fact**
- **Conclusions concerning the charges sustained or dismissed**
- **A determination regarding charges sustained or dismissed**
 - If any of the charges are sustained, the penalty to be imposed or appropriate action to be taken and the reasons for the determination
- **Licensee or the Department of Health can have the committee's decision reviewed by the Administrative Review Board for Professional Medical Conduct**

Professional Discipline

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After The Hearing

Hearing Committee's Determination Becomes Public

- **The hearing committee's findings, conclusions, determinations and order become public upon issuance**
 - If the time to request a review of the committee's determination has not yet expired, or such review has been requested but no determination has been issued, a statement must also be posted indicating that the licensee or DOH may request a review of the committee's determination
 - Statement not required if:
 - the time to request such review has expired and neither party has filed such request or
 - the licensee and the Department of Health both affirmatively decline to request administrative review of the committee's determination or fail to perfect such review

Professional Discipline

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After The Hearing

Hearing Committee's Determination Becomes Public

- **If the hearing committee dismisses any or all the charges, dismissal must be made public within two business days**

Professional Discipline

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Potential Penalties

If Found Guilty of Professional Misconduct

- Censure and reprimand
- Partial or full license suspension
- Limitation of the license to a specified area or type of practice
- License revocation
- Annulment of license or registration
- Limitation on registration or issuance of any further license

Professional Discipline

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Potential Penalties

If Found Guilty of Professional Misconduct

- A fine of up to \$10,000 for each specification of charges of which the licensee is found guilty
- A requirement that the licensee pursue a course of education or training
- A requirement that the licensee perform up to five hundred hours of community service

Professional Discipline

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Vacating or Modifying Determination and Order

- **Subsequent to the conclusion of a professional misconduct proceeding against a licensee, he or she can file a petition with OPMC requesting vacatur or modification of the determination and order issued by the hearing committee or administrative review board, as applicable.**
- **This request may be granted if:**
 - There is new and material evidence that was not previously available which, had it been available, would likely have led to a different result, or
 - If circumstances have occurred subsequent to the original determination that warrant a reconsideration of the measure of discipline

Professional Discipline

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Business Formation

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Formation of Professional Entity

Five Basic Forms



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Sole Proprietorship

- **Limited to One Owner**
- **No state filing or other formalities or advance approvals requires to commence operation**
- **If conducting practice in any name other than owner's legal name, must file a Certificate of Assumed Name with County Clerk**

Business Formation

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Sole Proprietorship

- Income and expenses are reported directly on owner's Form 1040, Schedule C
- **No Limited Liability** – Owner is 100% personally liable for all debts of the practice
- **Not recommended**, due to unlimited liability

Business Formation

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General Partnership

- By definition, must have at least two owners
- No state filing or other formalities or advance approvals required to commence operation
- Certificate of Assumed Name, listing each of the partners, must be filed with the County Clerk
- Income and expenses are **reported** on Partnership Return, Form 1065, and net income is then passed out and taxed directly to each of partners

Business Formation

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General Partnership

- 20% deduction for pass-through entities implemented by 2017 tax law may not apply if individual partner's income above certain level
- **No Limited Liability** - Partners are jointly and severally personally liable for 100% of all of debts of practice
- **Not recommended, due to unlimited liability**

Business Formation

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Professional Limited Liability Company (PLLC)

- Can have one or more owners (referred to as members)
- Can therefore be used in lieu of sole proprietorship or general partnership
- **Provides some limited liability protection** - members remain liable for *their own* actions, or the actions of anyone under their supervision (i.e., a nurse), but are not personally liable for malpractice of other members, and are also not liable for general debts of practice, unless personal guaranties executed

Business Formation

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Professional Limited Liability Company (PLLC)

- Formed by filing Articles of Organization with NY Secretary of State
- Notice of formation of PLLC needs to be published once a week in 2 newspapers in County where PLLC located for 6 weeks; depending on county, can be significant expense, particularly in NYC area
- However, prior to filing the Articles of Organization, must submit Articles to NYS Education Department, Office of the Professions, for approval

Business Formation

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Professional Limited Liability Company (PLLC)

- Current turnaround time is at least 4-6 months!
- Until Certificate of Authority is received back from the Office of the Professions, nothing can be filed, and PLLC cannot be created
- If there is only one member of the PLLC, it is treated as a "disregarded entity" for tax purposes, and all of income and expenses reported directly on Form 1040, Schedule C
- If there are 2 or more members of the PLLC, will be treated as a partnership for tax purposes, unless affirmatively elect to be treated as a corporation (not common); Form 1065, Partnership Return, filed

Business Formation

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Professional Limited Liability Company (PLLC)

- 20% deduction for pass-through entities implemented by 2017 tax law may not apply if individual member's income above certain level
- If PLLC uses any name other than its exact legal name in conducting practice, Certificate of Assumed Name must be filed with NY Secretary of State.

Business Formation

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Professional Corporation (PC)

- Can have one or more owners (referred to as shareholders)
- Can therefore also be used in lieu of sole proprietorship or general partnership
- Same limited liability protection as PLLC - only liable for own actions and the actions of anyone under the professional's supervision
- Formed by Filing Certificate of Incorporation with NY Secretary of State

Business Formation

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Professional Corporation (PC)

- **No publication of notice of formation required for PC**
- **As was the case for PLLCs, prior to filing Certificate of Incorporation, must submit Certificate to Office of the Professions for approval**
- **Same turnaround time of 4-6 months applies here as well.**

Business Formation

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Professional Corporation (PC)

- **There are two ways the PC can be taxed:**
 - As a "C Corporation," where all income and expenses are reported by and taxed directly to the PC
 - As a result of 2017 tax bill, top federal tax rate for PCs taxed as C corporations is now 21%; previously, PCs were taxed at a flat rate of 35%
 - If PC is taxed as a C corporation, Form 1120 filed with IRS
 - As an "S Corporation," where all of income and expenses are **reported** on Form 1120S, but then passed out and taxed directly to shareholders
 - **20% deduction for pass-through entities implemented by 2017 tax law may not apply if individual shareholder's income above certain level**
 - **As a result, decision of whether PC should be taxed as C Corporation or S Corporation should only be made after consultation with tax professional**
 - If S Corporation status desired, affirmative election must be filed with IRS and NYS

Business Formation

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Professional Corporation (PC)

- If PLLC uses any name other than its **exact** legal name in conducting practice, Certificate of Assumed Name must be filed with NY Secretary of State.

Business Formation

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Limited Liability Partnership (LLP)

- Must have at least two owners
- Formed as a general partnership, and then **Registration** as an LLP is filed with NY Secretary of State
- Notice of registration must be published in 2 newspapers once a week for 6 weeks
- **No advance approval required by Office of the Professions; is instead notified of Registration after it is filed**
- **Provides same limited liability protection as PLLCs and PCs**

Business Formation

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Limited Liability Partnership (LLP)

- Will be treated as partnership for tax purposes, with income and expenses reported on partnership return, and passed out and taxed directly to partners
- *20% deduction for pass-through entities implemented by 2017 tax law may not apply if individual partner's income above certain level*
- If LLP uses any name other than its **exact** legal name in conducting practice, Certificate of Assumed Name must be filed with NY Secretary of State.

Business Formation

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