New York State Department of Health

# Board for Professional Medical Conduct

2011-2013 Report

# Office of Professional Medical Conduct
# New York State Department of Health

Riverview Center, 150 Broadway, Suite 355
Albany, NY 12204-2719

**Main Number**: 518-402-0836
**Complaints/Inquiries**: 1-800-663-6114
**E-mail Inquiries**: opmc@health.ny.gov
**Physician Information:** www.nydoctorprofile.com *or* www.health.ny.gov

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## 2011 - 2013 REPORT

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### Executive Summary

The State Board for Professional Medical Conduct (Board) was created by the New York State Legislature in 1976 and, with the Department of Health's (DOH/Department) Office of Professional Medical Conduct (Office/OPMC), administers the State's physician discipline program. Its mission is patient safety -- to protect the public from medical negligence, incompetence and other kinds of professional misconduct.

The Board, through the OPMC, investigates complaints made against the more than 110,000 physicians, physician assistants and specialist assistants and prosecutes those charged with misconduct. It also monitors licensees who have been impaired or who have been placed on probation by the Board.

The Program achieved the following during 2011 - 2013:

- The Board imposed an average of 380 final actions per year over the 3 year period. Of those, 75% (287 per year) were serious sanctions, including the loss, suspension, or restriction of a physician's medical license.

- An average of 7,395 complaints were received per year, 13% lower than the number received in 2010. The Office reviewed and closed an average of 7,200 complaints per year over the 3-year period. These closures include various administrative reviews, as well as full field investigations assigned to the Regional Offices.

- An average of 2,791 full field investigations were closed per year, for a total of 8,373 investigations completed over the 3-year period.

- The average time to complete an investigation remains about nine months, consistent with completion times in 2008, 2009, and 2010.

- The average number of investigations completed per investigator per year over the 3 year period was 40, exceeding the program target.

- The OPMC monitored an average of 1,337 physicians during per year, an all-time high.

# Protecting Patient Safety by Addressing Medical Conduct

## Board for Professional Medical Conduct

The State Board for Professional Medical Conduct, with the Department of Health's Office of Professional Medical Conduct, administers the State's physician discipline program. Its mission is to protect the public from medical negligence, incompetence and other kinds of professional misconduct by the more than 110,000 physicians.[1] The Board is a vital patient safety protection for those who access New York's health care system.

Public Health Law (PHL) Section 230(14) requires a report to the Legislature, the Governor and other executive offices, the medical profession, medical professional societies, consumer agencies and other interested persons. This report discusses the Board's 2011, 2012, and 2013 experience.

The Board consists of 123 physician and non-physician lay members. Physician members are appointed by the Commissioner of Health with recommendations for membership received largely from medical and professional societies. The Commissioner, with the approval of the Governor, appoints lay members of the Board. By law, the Board of Regents appoints 20 percent of the Board's membership.

Through its activity, the Board ensures the participation of both the medical community and the public in this important patient safety endeavor.

## Office of Professional Medical Conduct

The OPMC's mission is to carry out the objectives of the Board to deter medical misconduct and promote and preserve appropriate standards of medical practice. Through its central office in Albany, New York and six field offices (Buffalo, Rochester, Syracuse, New York City, New Rochelle and Central Islip), the OPMC:

- Investigates all complaints and, with assistance of counsel, prosecutes physicians formally charged with misconduct;
- Monitors physicians whose licenses have been restored following a temporary surrender due to incapacity by drugs, alcohol or mental impairment;
- Monitors physicians placed on probation by the Board;

[1] In this report, "physician" and "licensee" refer to licensed medical doctors [MDs], doctors of osteopathy [DOs], physicians practicing under a limited permit, medical residents, physician assistants and specialist assistants.

- Oversees the contract with the Medical Society of the State of New York's Committee for Physician Health (CPH) – a non-disciplinary program to identify, refer to treatment and monitor impaired physicians;

- Collects and maintains reports of medical malpractice claims filed in New York State and their dispositions;

- Oversees the administration of the New York State Physician Profile, a single point of information for the education, training, practice, legal actions and professional activities of every physician licensed and registered to practice in New York State; and

- Supports all Board activities, including appointments, training, committee work and policy development, recruiting medical experts and coordinating the procedures for the 60 committees of the Board that were convened annually, on average, over the 3 years from 2011 through 2013.

# New York's Medical Conduct Process

Public Health Law (PHL) and Education Law (EL) govern the State's physician discipline program. The process is defined in PHL Section 230, while the definitions of misconduct are found in Sections 6530 and 6531 of the Education Law. The process is described in Figure 1.

**Figure 1. The Professional Medical Conduct Process**

PROFESSIONAL MEDICAL CONDUCT PROCESS

**Investigation**

A **complaint** is reviewed to determine if there are issues which warrant an investigation. The investigation may consist of interviews, reviewing documents (such as medical records) and other evidence, and consultation with medical experts.

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The complete **investigation** is reviewed by supervisors and medical staff.

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If there is **no evidence of misconduct**, the case is closed.

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A **Committee of the Board** (Board Investigation Committee) reviews all possible misconduct cases and recommends whether a hearing is warranted.

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**Hearing**

A DOH attorney prepares a Notice of Hearing and **Statement of Charges** which describes the substance of the alleged misconduct.

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The **Hearing** provides the physician, with his/her attorney, an opportunity to present witnesses and evidence on his/her own behalf. The hearing is before a **Board Committee** of two physician members and a lay member. An Administrative Law Judge presides over the hearing process.

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**Decision**

The **Hearing Committee** determines **Findings of Fact**, conclusions and imposes a penalty, if appropriate.

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**Review Board**

Either the Department or the physician may **appeal** the hearing committee decision to the review board, consisting of five members of the board, three of whom are physicians. The Review Board issues a **Final Order**.

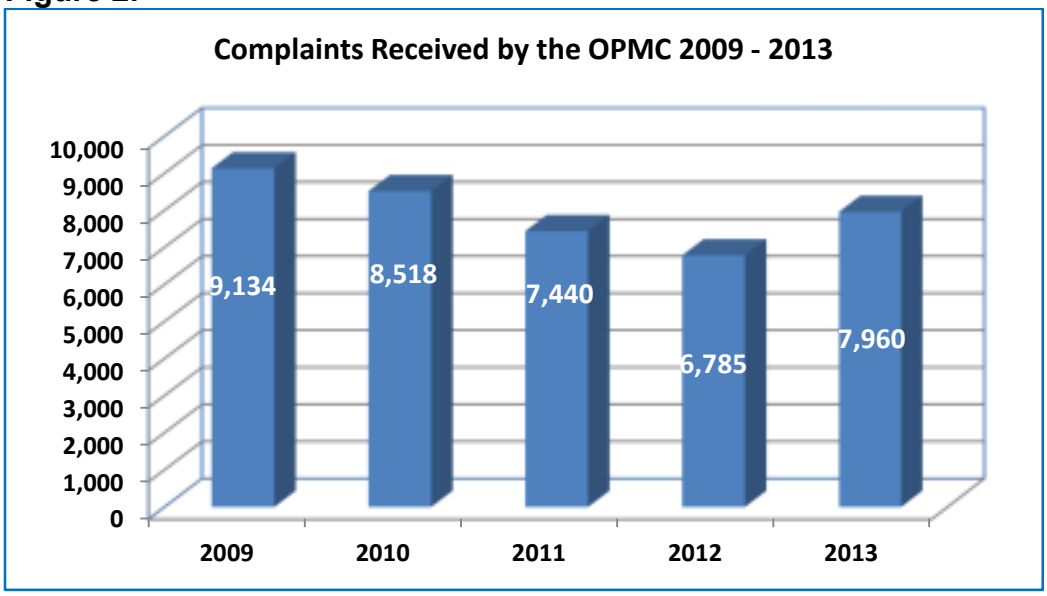
## Complaints

The OPMC is required by PHL Section 230(10) to review every complaint it receives. Complaints come from many sources including the public, the health care community and others. Complaints may also be opened as a result of a report in the media or a referral from another government agency.

Between 2011 and 2013, the OPMC received an average of 7,395 complaints annually. This is 13 percent lower than the number received in 2010 (see figure 2).

Every complaint is reviewed to determine whether the subject of the complaint is a physician (thereby falling under the OPMC's jurisdiction), and whether the allegation, if found true, would be medical misconduct. Many complaints fail to meet one or both of these thresholds. The OPMC makes referrals to other agencies as appropriate.

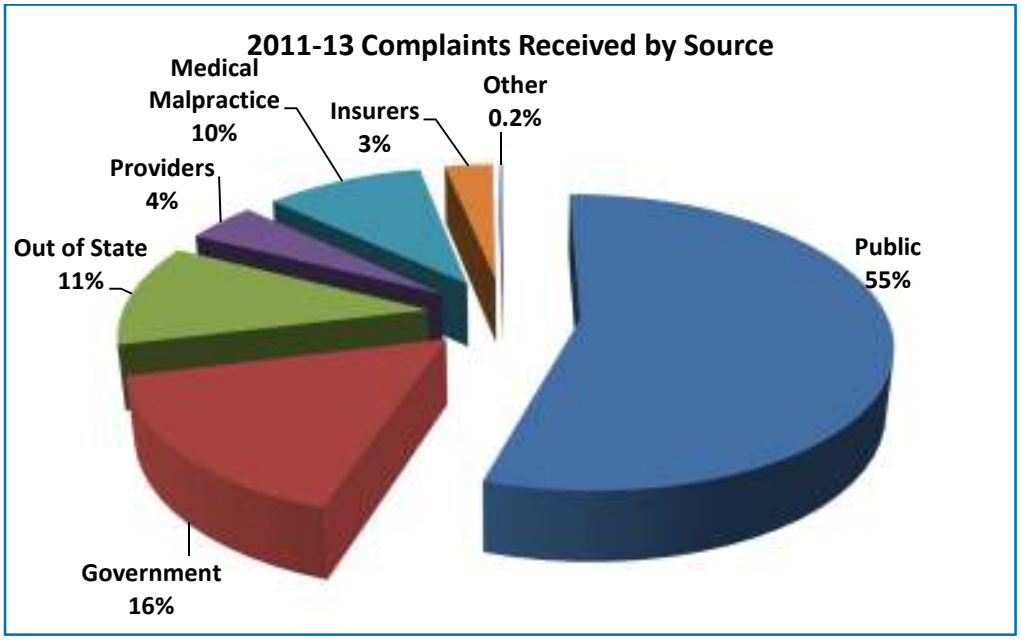
**Figure 2.**




Source: The Office of Professional Medical Conduct

About 55 percent of the complaints received between 2011 and 2013 came from the public (see Figure 3), slightly higher than 2010.

**Figure 3.**




Source: The Office of Professional Medical Conduct

## Investigations

OPMC investigators and clinicians, including Board Certified physicians, gather and analyze all relevant information from documents such as medical records and interviews to determine whether the evidence suggests that misconduct occurred.

OPMC investigations include strong confidentiality protections. For example, Public Health Law requires the OPMC to keep the name of the complainant confidential. The very existence of an investigation is also confidential until completed. These provisions exist for the protection of both the complainant and the physician under review.

The physician is ensured due process throughout. The physician may submit relevant information to the OPMC at any time during the investigation. The physician has a right to be interviewed by the OPMC to comment on the issues under investigation if the OPMC intends to refer the matter to the Board. The physician may have an attorney present and may bring a stenographer to transcribe the interview, at his/her expense.

Cases are not referred to the Board when there is insufficient evidence to proceed or the issues are determined at that point to be outside its jurisdiction.

The Board can collect valuable information through its PHL § 230(7) authority; through a committee, the Board may:

- direct a physician to submit to a medical or psychiatric examination when the committee has reason to believe the licensee may be impaired by alcohol, drugs, physical disability or mental disability;

- direct the OPMC to obtain medical records or other protected health information pertaining to the licensee's physical or mental condition when the Board has reason to believe that the licensee may be impaired by alcohol, drugs, physical disability or mental disability or when the licensee's medical condition may be relevant to an inquiry into a report of a communicable disease; and

- direct a physician to submit to a clinical competency examination.

With these tools, the Board can determine the presence and magnitude of any issues facing the physician, and evaluate if these issues might present a risk to patients.

In investigations related to clinical care, information gathered by the OPMC is reviewed by medical experts who are board-certified in their specialty, currently in practice and who are not employed by the OPMC. The expert identifies whether the physician under review met minimum standards of practice or did not. The peer review aspect of the process is key to making fair and appropriate determinations.

When the evidence indicates that misconduct has occurred, it is presented to an investigation committee of the Board for review. If a majority of the committee, comprised of two physician members and one public member, concurs with the Director of the OPMC (Director) that sufficient evidence exists to support misconduct, and after consultation with the Executive Secretary to the Board, the Director directs counsel to prepare charges. From 2011 - 2013, the OPMC referred an average of 268 physicians for charges each year, including 290 in 2013.

The Board is required to make charges public no earlier than five business days after charges are served upon a physician after an investigation committee has unanimously concurred with the Director's determination that a hearing is warranted. A statement advising that the charges or determinations are subject to challenge by the physician will accompany the charges.

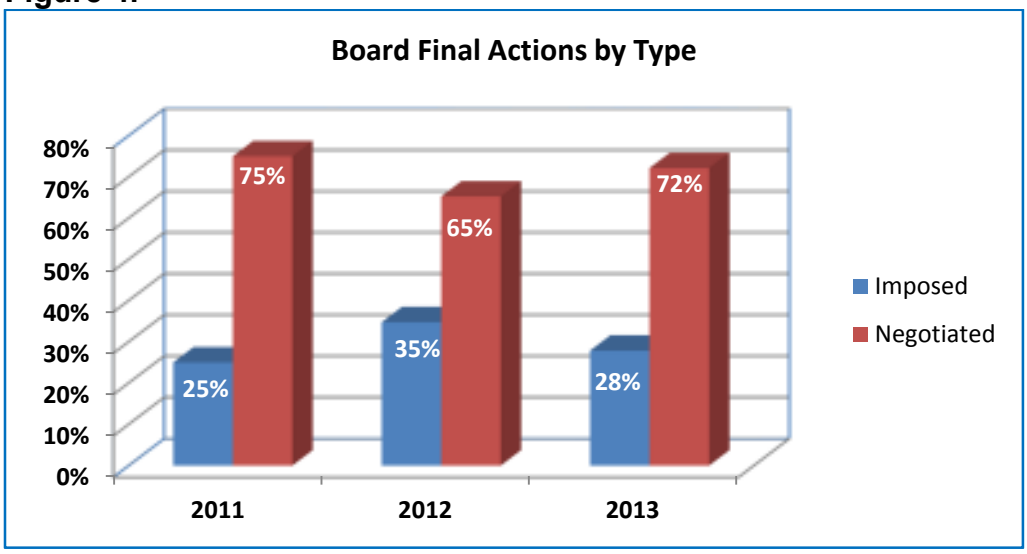
The committee may take actions other than concurring that a disciplinary hearing is warranted. These range from a recommendation to the Commissioner of Health that a physician's practice be summarily suspended because he or she poses an imminent danger to the public health, to a confidential administrative warning if there is substantial evidence of professional misconduct of a minor or technical nature or of substandard medical practice which does not constitute professional misconduct.

**Disciplinary Hearings**

In some cases that are referred for charges, a disciplinary hearing is avoided through a signed consent agreement between the physician and the Board. These agreements

include terms that adequately protect the public and address the physician's misconduct without incurring the time and costs of a hearing. Approximately 71% of Board actions between 2011 and 2013 resulted from negotiated agreements. (See Figure 4).

**Figure 4.**




Source: The Office of Professional Medical Conduct

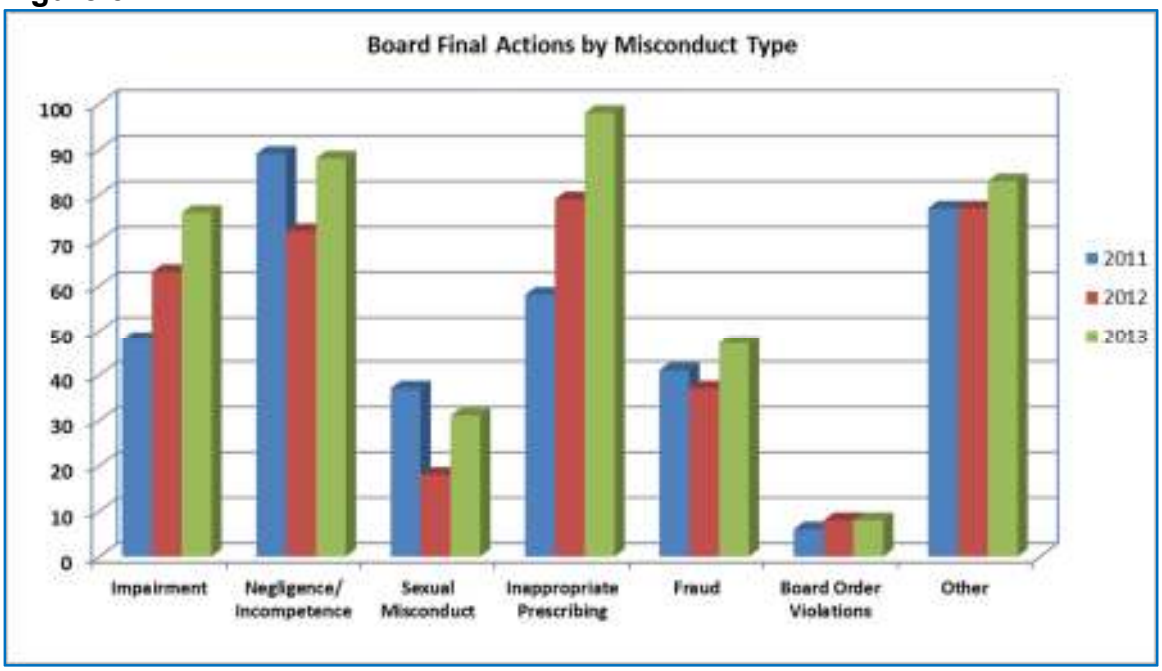
If the case proceeds to a hearing or the Commissioner of Health orders a summary suspension, another three-member Board panel (two physicians and one lay member) hears the case. An administrative law judge assists the committee on legal issues, and evidence and testimony may be presented by attorneys for the Department and the physician.

The Board hearing committee rules on whether misconduct exists or not by sustaining or not sustaining specific charges. If the committee sustains charges, it decides on an appropriate penalty. Penalties can range from a censure and reprimand to license revocation, including suspension of a physician's license, limitation of his or her practice, requiring supervision or monitoring of a practice, or a fine. Hearing committee determinations are immediately made public.

Revocations, actual suspensions and license annulments go into effect at once and are not stayed (postponed) if there is an administrative appeal. Other penalties are stayed until the period for requesting an appeal has passed, and if there is an appeal, disciplinary action is stayed until there is a resolution.

Most of the final Board actions are related to five areas of misconduct: negligence/incompetence, sexual misconduct, inappropriate prescribing, impairment, and fraud (See Figure 5).

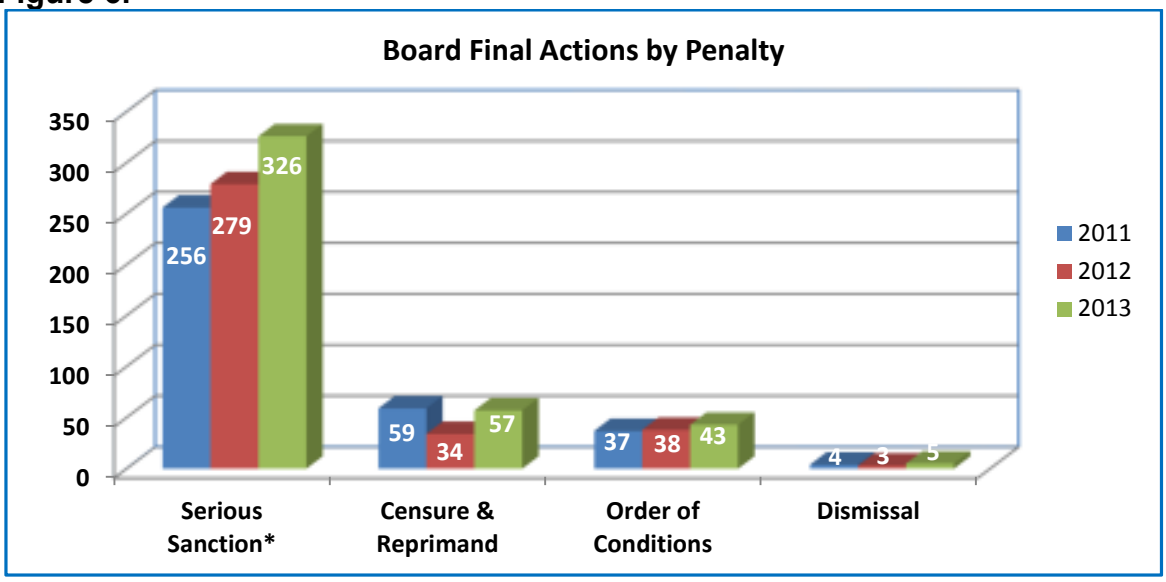
**Figure 5.**




Source: The Office of Professional Medical Conduct

Between 2011 and 2013, the Board issued an average of 380 final actions; an average of 287 of these final actions (75%) were serious sanctions including the revocation, surrender, or suspension of a physician's medical license, or a limitation or restriction placed on the doctor's license (see Figure 6).

**Figure 6.**




* Serious sanctions include revocations, surrenders, suspensions and restrictions or limitations of medical licenses.

Source: The Office of Professional Medical Conduct

The Board has jurisdiction over all physicians licensed to practice in New York. Many physicians who are trained in New York move to live and practice in other states but retain their New York license. When a medical board in the state in which they practice takes an action against the physician, New York and any other state in which the physician is licensed are notified through the Federation of State Medical Boards (FSMB).

The Board may impose a penalty against the physician to ensure that the physician does not come to New York to practice, or to ensure that, if the physician does commence practice in New York, appropriate monitoring provisions are in place to protect the health and safety of patients. This patient safety goal is the foundation for all Board actions, whether imposed against physicians practicing in New York or elsewhere.

## Appeals

Either side may appeal the decision of a hearing committee to the Administrative Review Board (ARB), comprised of three physician members and two lay members of the Board. The ARB hears all administrative appeals.

There are no appearances or testimony in the appeals process. The ARB reviews whether the determination and penalty of the hearing committee are consistent with the hearing committee's findings and whether the penalty is appropriate. The ARB must issue a written determination within 45 days after the submission of briefs.

From 2011-13, the ARB issued 34 decisions. (See Figure 7) The ARB upheld the hearing committee determination 94 percent of the time, and upheld the penalty imposed half of the time.

**Figure 7**

**Administrative Review Board Statistics 2011 - 2013**

| | 2011 | 2012 | 2013 |
|---|---|---|---|
| Administrative Review Board Decisions | 10 | 12 | 12 |
| | | | |
| Hearing Committee Determination Upheld | 10 | 11 | 11 |
| Hearing Committee Determination Not Upheld | 0 | 1 | 1 |
| | | | |
| Hearing Committee Penalty Upheld | 5 | 7 | 5 |
| Hearing Committee Penalty Increased | 3 | 2 | 4 |
| Hearing Committee Penalty Decreased | 2 | 3 | 3 |

Source: The Office of Professional Medical Conduct

## Physician Monitoring Program

### Impaired Physicians

Ensuring that physicians who may be impaired by an illness can safely practice medicine is a priority patient safety goal of the Board. PHL§ 230(13) allows a physician who is temporarily incapacitated, is not able to practice medicine and whose incapacity has not resulted in harm to a patient, to voluntarily surrender his or her license to the Board. The OPMC uses this tool to identify these impaired physicians, rapidly remove them from practice, refer them to rehabilitation and place them under monitoring upon their return to active practice to ensure that they practice safely.

When a surrender is accepted, the Board promptly notifies entities, including the State Education Department (SED) and each hospital at which the physician has privileges. The physician whose license is surrendered notifies all patients of temporary withdrawal from the practice of medicine. The physician is not authorized to practice medicine, although the temporary surrender is not deemed to be an admission of permanent disability or misconduct. At the end of 2013 the OPMC was holding 64 temporarily surrendered licenses, four more than in 2010.

A surrendered license may be restored when the physician can demonstrate to the Board that he/she is no longer incapacitated for the active practice of medicine. A Board committee (two physicians and one lay member) determines whether the physician has made an adequate showing as to his or her rehabilitation. Of the fourteen physicians who petitioned the Board for license restoration between 2011 and 2013, twelve were granted restoration, one was denied and one petition was withdrawn.

If the Board restores the license, the physician is placed under a minimum monitoring period of five years. Monitoring terms generally require abstinence from drugs and/or alcohol with random and unannounced drug screens, a medical practice supervisor, a treatment monitor and self-help group attendance such as Alcoholics Anonymous. As of December 31, 2013, the OPMC was monitoring 494 licensees who were in recovery from alcohol, drugs, mental illness or physical disability.

### Probation

The OPMC also monitors physicians placed on probation, pursuant to a determination of professional misconduct, under PHL Section 230(18). The Board places a physician on probation when it determines that he/she can be rehabilitated or retrained in acceptable medical practice. It is the same underlying concept used in placing physicians impaired by drugs/alcohol under monitoring.

The OPMC monitors physicians using tools such as reviewing a random sample of the licensee’s office and patient records, conducting onsite visits, assigning another physician to monitor the licensee's practice, auditing billing records, and testing for the presence of alcohol or drugs.

Probation ensures compliance with the Board order, and supports the physician's education and remediation. Working with professional societies, hospitals and individual practitioners, the program allows for close scrutiny of the physician's practice, early identification of necessary adjustments to and support for the physician's rehabilitation and training. The OPMC monitored and average of 1,337 licensees during the reporting period, an all-time high. Sometimes, a physician does not comply with the terms of his/her Board order. In 2013, the Board referred ten physicians to a disciplinary hearing for failure to comply with probation terms.

**Committee for Physician Health and the Board for Professional Medical Conduct**

The OPMC oversees the contract with the Medical Society of the State of New York, Committee for Physician Health (CPH) – a non-disciplinary program to identify, refer to treatment and monitor impaired physicians. The CPH and the Board, through a Joint Committee, monitor the program's activities and develop recommendations to enhance the impaired physician program's patient protection and physician support effectiveness.

In 2010, the Joint Committee reviewed emerging developments in drug testing regarding the use of ethyl glucuronide screening and confirmation in urine and recommended program policy revisions which were implemented by the CPH. In addition, the CPH and the OPMC began joint presentations to hospital administrators, risk managers and medical staff regarding the importance of early identification and referral of physicians into an approved therapeutic regimen, before they become impaired for the practice of medicine and put patients at risk.

Over the 3 year period from 2011 through 2013, an average of 534 physicians were enrolled in the CPH, with an average of 93 new enrollees per year. Of the new enrollees, one third of them were self-referrals, and one third of them were referred by their facilities. This demonstrates the effectiveness of the joint CPH/OPMC hospital presentations and outreach efforts. Approximately 10% of CPH participants per year relapse, and must be either re-enrolled in CPH programs, or are referred to the OPMC. CPH and OPMC continue to work in a collaborative manner to increase both patient safety and physician support services.

**Hospital Reporting to the OPMC**

Hospitals are statutorily required to report any information to the Board that reasonably appears to show that a licensee may be guilty of misconduct. Between 2011 and 2013, the OPMC received approximately 100 reports from hospitals each year regarding physician misconduct. Of these, roughly 15-20 percent pertained to concerns of physician impairment. This is consistent with the OPMC's prior years' experience.

**Medical Malpractice Information**

With a growing national interest in medical malpractice experience as a potential predictor of misconduct, the OPMC continually refines its use of malpractice information to identify and investigate potential medical misconduct.

State Insurance Law mandates the reporting of any claim filed for medical malpractice against a physician, physician assistant or specialist assistant, to be reported to the Commissioner of Health and the Superintendent of Insurance.

PHL §230 directs the OPMC to continuously review medical malpractice information for the purpose of identifying potential misconduct. The OPMC currently uses the following criteria for determining whether an investigation should commence:

- six or more payouts over the past five years
- cancellation or non-renewal of the physician's malpractice policy by the insurer due to a concern about quality of care
- addition of a surcharge of 75% or more to a physician's policy
- a single payout amount higher than a specialty- and geography-specific 75$^{th}$ percentile dollar amount

Of the 497 investigations completed between 2011 and 2013 that were based on medical malpractice criteria, about 8 percent resulted in a Board action or administrative warning.

The OPMC and the Department of Financial Services (DFS) continually work together with New York State medical malpractice insurers, hospitals and other mandated reporters to ensure complete and accurate reporting. The OPMC will continue to monitor malpractice experience to maximize its use as a predictor of possible misconduct.

**Ensuring Safety in Office-based Surgery Settings**

PHL §230-d requires licensees to report adverse events following OBS to the DOH's Patient Safety Center (PSC). Adverse events that must be reported include: 1) patient death within 30 days; 2) unplanned transfer to the hospital; 3) unscheduled hospital admission within 72 hours of the OBS for longer than 24 hours; or, 4) any other serious or life-threatening event. Failure to report an OBS adverse event within one business day of when the licensee became aware of the adverse event may constitute professional misconduct. Additional provisions of the law, effective July 14, 2009, require physicians to perform OBS only in accredited practice settings.

After reviewing an Adverse Event Report, if the PSC believes further review and investigation is warranted, it may refer the report to the OPMC for an investigation. At that point, the OPMC will commence an investigation which may include, but not be limited to, the following: medical record review by a board certified physician, interviews of various participants, and a site visit of the office setting.

**Internet Access to Physician Information**

Information regarding the OPMC and the Board can be accessed through the DOH Web site, www.nyhealth.gov, by clicking on "Physician / Physician Assistant – Board

Actions." All disciplinary actions taken since 1990 are posted on the OPMC site, as well as information on how to file a complaint, brochures regarding medical misconduct, frequently asked questions and relevant statutes.

## Expanding Outreach

The OPMC Director, Deputy Director and Chair of the Board meet with county medical societies, state specialty societies, and hospitals to educate physicians about the medical conduct process, outcomes of the Board's work, and how to prevent misconduct. These meetings also provide an opportunity to invite physicians to get involved in the process through the medical expert program. Future outreach efforts are planned for the public, patient groups, medical schools and physician assistant programs, and practitioners.

## Prescribing of Controlled Substances

Over the last several years, the problem of opioid abuse has become increasingly prolific. Together with the Department's Bureau of Narcotic Enforcement (BNE), the Board and the OPMC have battled this public health crisis. The BNE and OPMC commenced an effort to better understand the magnitude of opioid prescribing in New York State, identify potential inappropriate prescribing, investigate and enforce appropriate prescribing standards, and educate prescribers and the public on ways to address this epidemic.

The OPMC and the BNE have strengthened their data analysis and data sharing efforts to identify physicians with potential inappropriate and/or excessive controlled substance prescribing. The OPMC added a licensed pharmacist to its staff to enhance its ability to review and interpret prescribing data and trends. The Board received training on the crisis and current standards of care to help it effectively manage physicians who are charged with professional misconduct related to inappropriate/excessive prescribing. All OPMC physician education presentations include a discussion of opioid prescribing, to help physicians understand current standards and how to protect their patients from potential abuse while effectively treating their conditions.

During the reporting period, the OPMC initiated more than 300 investigations related to potential inappropriate and/or excessive controlled substance prescribing. The Board issued 235 orders against physicians found to have committed misconduct related to inappropriate/excessive prescribing. The Board and the OPMC will continue to aggressively respond to this issue.

## OPMC in 2014 and Beyond: Future Initiatives

OPMC continually strives to improve its operations and effectiveness to deter and respond to misconduct, increase patient safety and improve the quality of care for all New Yorkers. As part of its ongoing improvement program, the OPMC in engaged in several educational, policy development, and data initiatives. Some are designed to enhance its use of technology and data to enhance decision making and efficiencies. These initiatives include:

- In 2014, for the first time, the OPMC is working with Physician Assistant (PA) education programs to educate and train PA students on professional misconduct issues – the law, the OPMC and Board processes, professionalism and standards of care, to assist them in ensuring appropriate patient care and avoiding misconduct.

- Potential modifications to the New York State Physician Profile are being researched in conjunction with workforce planners and researchers to improve the Profile's effectiveness in informing consumers, as well as to capture data that can inform assessments and future program development to ensure an effective health care workforce throughout the state.

- OPMC continues to explore methods of increasing the use of data in order to proactively identify physicians who may warrant OPMC review before an adverse event occurs.

- The Executive Secretary of the Board for Professional Medical Conduct participates on the DOH Telehealth workgroup to assist in developing best-practices with regard to telemedicine.

- The OPMC database utilized to track all professional misconduct complaints and case dispositions statewide is being redesigned. The redesign will allow for prompt retrieval of information as well as improving functionality for analysis, investigation, processing, resolution, and monitoring of complaints.

- The Medical Malpractice Data Collection System (MMDCS) is used to collect medical malpractice claim and disposition information as required under Section 315(b) of the New York State Insurance Law. The MMDCS is being updated to make it easier for mandated reporters to submit required data to the system and to retrieve information for their analyses, and to enhance the OPMC's ability to analyze the data for research and investigative purposes.

# Office of Professional Medical Conduct

## Summary Statistics

| Year | 2011 | 2012 | 2013 |
|---|---|---|---|
| Complaints Received | 7440 | 6785 | 7960 |
| Complaints Closed | 7895 | 6894 | 6784 |
| Licensees Referred for Charges | 231 | 284 | 290 |
| Administrative Warnings/Consultations | 110 | 73 | 72 |

## Final Actions

| | 2011 | 2012 | 2013 |
|---|---|---|---|
| Revocation | 39 | 46 | 52 |
| Surrender | 71 | 62 | 69 |
| Summary Suspension | 12 | 44 | 33 |
| Suspension - Actual / Stayed | 49 | 40 | 67 |
| Restriction/Limitation | 73 | 75 | 85 |
| Censure and Reprimand/Probation | 6 | 7 | 7 |
| Censure and Reprimand/Other | 51 | 23 | 47 |
| Fine Only / No Penalty | 2 | 4 | 3 |
| Dismissal | 4 | 3 | 5 |
| Surrenders under 230(13) | 12 | 12 | 20 |
| Monitoring Agreements | 37 | 38 | 43 |
| **TOTAL ACTIONS** | **356** | **354** | **431** |

Source: The Office of Professional Medical Conduct

* PHL§ 230(12) permits a summary suspension when:

- a licensee has pleaded or been found guilty or convicted of committing an act constituting a felony under New York State Law or federal law, or the law of another jurisdiction which, if committed within this State, would have constituted a felony under New York State Law, or when the duly authorized professional agency of another jurisdiction has made a finding substantially equivalent to a finding that the practice of medicine by the licensee in that jurisdiction constitutes an imminent danger to the health of its people, or

- there is information about the possible transmission of a communicable disease or evidence of a condition or activity constituting an imminent danger to the public.

**State of New York**

**Department of Health**
**Howard A. Zucker, M.D., J.D., Acting Commissioner**