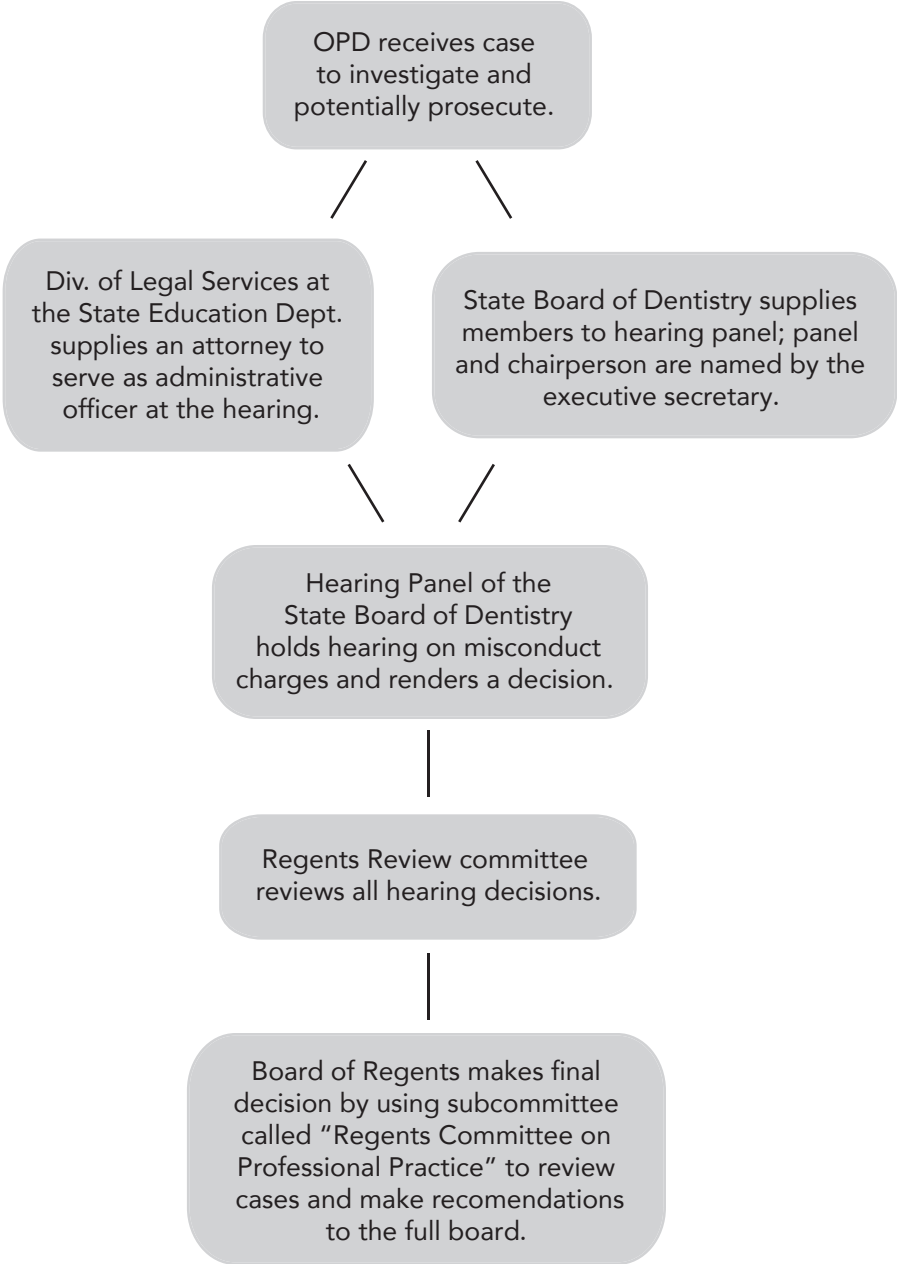


New York State Dental Association

When OPD Knocks

A Guide For The Dentist
Investigated For Professional Misconduct





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Every year approximately 10 percent of the dentists in New York State are the subject of complaints to the state Office of Professional Discipline (OPD) alleging professional misconduct. Regardless of whether complaints are unjustified, frivolous or malicious, all complaints are investigated by OPD and all pose a threat to the dentist's ability to practice. They should be taken seriously.

The New York State Dental Association strongly urges you to be prepared for the day when you may be the target of a misconduct complaint. Read this guide carefully. It will help you to understand the system for the adjudication of professional misconduct and will prepare you for the possibility of defending yourself within that system.

What is the Office of Professional Discipline (OPD)?

OPD is the office within the New York State Education Department responsible for investigating and prosecuting reports and complaints of professional misconduct in order to ensure that dentists, as well as all other licensees, are generally fit to practice. OPD is also responsible for enforcing the penalties imposed upon licensees by the Board of Regents at the completion of investigations and successful prosecutions.

Who can you call if you are contacted by OPD?

NYSDA's professional team is here to help. You are encouraged to telephone NYSDA using its toll-free number, 1-800-255-2100. Simply state that you have a question regarding professional discipline. Your call will be referred to a NYSDA executive whose conversation with you will be kept strictly confidential. In addition, a copy of legal guidelines for the practice of dentistry will be sent to you on request.

Is OPD the enemy?

A: No. OPD is simply an office entrusted with the duty of ensuring the public that the professional services they receive are “professional” in the true meaning of the term. OPD seeks not just to discipline practitioners, but to promote good practice. To this extent, OPD’s mission is the same as yours.

Who can register a misconduct complaint against you with OPD?

Patients. Insurance companies. Other dentists. Your employees. State agencies. Hospitals. Anyone can accuse you of professional misconduct; and complaints may be made anonymously.

You should also realize that some complaints stem from actions that a dentist may not immediately associate with misconduct proceedings. For example, insurance carriers are required to refer to OPD the names of dentists who have had malpractice settlements against them. The Health Department, after reprimanding or fining a dentist for improper prescription writing, may refer the matter to OPD. A licensee convicted of driving while intoxicated may be subject to a disciplinary action.

Do you have the right to know the name of your accuser?

No. While you may be able to identify the person by the nature of the complaint, you don't have a right to such information. Indeed, OPD will even investigate anonymous complaints.

What should you do if you're visited by an OPD Investigator?

Do NOT panic and do not discuss the facts of the case with the investigator until you have an opportunity to collect your thoughts, refresh your memory and privately review your records. The knock on your door by OPD is likely to fluster you, and you are apt to blurt out whatever you can remember. Under such circumstances, recollections may not be accurate or complete and may damage your case, making it more difficult to defend against a misconduct charge. As a precaution, assume that the investigator is recording your conversation, which makes it impossible for you to correct statements after you have had time to review your records and refresh your memory.

Also, you should instruct your staff not to discuss any matter or provide any records to an investigator without your approval.

Note: The investigator is not required to advise you that any statement you make may be used against you as evidence, nor does the investigator have to advise you to speak with an attorney.

Can you be accused of unprofessional conduct if you do not “cooperate” with OPD?

Not necessarily. There is no requirement that you “cooperate” with OPD other than that your conduct should not violate Section 29.1(b)(13) of the Rules of the Board of Regents. Section 29.1(b)(13) defines as unprofessional conduct “failing to respond within 30 days to written communications from the Education Department or the Department of Health and to make available any relevant records with respect to an inquiry or complaint about the licensee’s unprofessional conduct. The period of 30 days shall commence on the date when such communication was delivered personally to the licensee. If the communication is sent from either department by registered or certified mail, with return receipt requested, to the address appearing in the last registration, the period of 30 days shall commence on the date of delivery to the licensee, as indicated by the return receipt.”

What constitutes a “response” to an OPD communication has never been formally established. However, it is certainly inappropriate to ignore OPD. It would also be inappropriate to fail to turn over records that have been requested validly by OPD. In certain instances there may be legal grounds for objecting to an OPD request for records or other information. You are entitled to talk to your attorney before replying to an OPD communication or request for records. You do not gain any advantage by being either overly friendly or unfriendly to OPD. The OPD investigators and prosecutors are professional staff and they are trained not to be swayed or influenced by such behaviors. Therefore, it is best to conduct yourself professionally during any misconduct investigation.

Can you ask the investigator to return at another time?

Yes. You do not have to interrupt patient treatment. You have every right to request the investigator to return at a mutually convenient time.

What if the investigator asks you to sign something?

Never sign anything without reviewing it with an attorney. Above all, never admit to any wrongdoing unless your attorney advises you to do so. Don't be influenced by an investigator's promise that the case may be dropped if you sign a statement admitting a minor infraction. An investigator is not authorized to make such promises, and the signed statement may ultimately be the only evidence upon which OPD can prosecute.

Do you have the right to an attorney?

Yes. Your right to an attorney is fundamental at every stage of a disciplinary proceeding. It is important that you engage an attorney knowledgeable in disciplinary matters at the earliest stage of the proceeding unless you are completely satisfied that you have no exposure whatsoever. Don't forget that attorneys are not necessarily qualified to practice every aspect of their profession. If you need an attorney who has experience in disciplinary matters, seek a referral. You may call NYSDA to obtain the services of the NYSDA Legal Services Panel.

At all times, remember that your license and your livelihood are at stake. Do not underestimate the seriousness of the charges against you or be lulled into believing that OPD will accept your explanation as evidence of your innocence. A reasonable expenditure for competent legal counsel may be a wise investment.

Do you have to hand over your records?

Not necessarily. You cannot be forced to release records unless the records are identified as directly related to a specific, valid OPD inquiry. Even then, you should only release copies of the records—never the original records. A patient’s consent is not required to release records in a professional conduct investigation. However, OPD cannot make a blanket request to see patient records that are unrelated to a specific OPD inquiry.

Be aware that Section 29.1(b)(13) of the Rules of the Board of Regents states that it is unprofessional conduct to fail to respond within 30 days to written communications from the Education Department and to make available any relevant records with respect to an inquiry or complaint about the licensee’s unprofessional conduct. This rule applies to those situations where OPD has made a valid request for identified records; it does not override the need for a subpoena in certain cases. If you have any doubts about the validity of an OPD request for records, you should immediately consult your attorney.

If you refuse to surrender your records, can they be subpoenaed by OPD?

Yes. OPD does have subpoena power. However, if the subpoena is overly broad and cumbersome, it can be limited in scope by challenging it in the courts. OPD cannot conduct a “fishing expedition” in the hope that it will uncover evidence of professional misconduct.

What is your best defense against OPD?

By far the best defense against a professional disciplinary investigation is prevention—practicing so as to prevent an investigation from occurring. Adopt a preventive practice philosophy based upon the assumption that the patient is always right. You will find that a patient who is satisfied with your efforts to correct a problem is not likely to register a complaint with OPD.

Remember, a disciplinary complaint, justified or not, reflects a breakdown in the doctor-patient relationship. Do everything possible to preserve that fundamental relationship. Participating in Peer Review through NYSDA is an excellent way to accomplish this goal.

Also, know the law and regulations that define the practice of dentistry. You shouldn't guess which procedures an assistant or hygienist can legally perform. You should know the meaning of the terms "general" and "personal" supervision. You cannot afford to practice in a state of statutory and regulatory ignorance. Any law, rule or regulation pertaining to disciplinary matters may have interpretations and ramifications beyond the scope of knowledge of a dentist. The facts of each individual case are different and may change the application of the law. A competent attorney should be consulted.

What is professional misconduct?

All the definitions of professional misconduct in dentistry can be found in subarticle 3 of Article 130 of the Education Law, plus Part 29 of the Rules of the Board of Regents. Examples of professional misconduct are: filing claims with insurance companies for unnecessary procedures or for procedures that were never performed; false or misleading advertising; negligence or incompetence, such as leaving an open margin or cementing an ill-fitting bridge; practicing while impaired by alcohol or drugs; splitting dental fees with non-dentists; allowing dental auxiliaries to perform procedures for which they are not licensed; failing to keep records for a period of six years; abandoning a patient under the need of immediate care.

The above examples do not cover all instances of professional misconduct; and you should be aware that virtually any complaint can be categorized under the broad terms of incompetence or negligence.

What are the penalties for professional misconduct?

All the penalties for professional misconduct can be found in Section 6511 of the Education Law. Penalties can range from “guilty with no further action” to revocation of a dentist’s license. Other penalties are: censure and reprimand; suspension of a license for a fixed period of time; partial suspension of a license in a particular area until a course of retraining is completed in that area; suspension of a license until a course of therapy or treatment is completed (such as substance abuse treatment or psychiatric treatment); annulment of a license or registration (such as where a license has been fraudulently obtained); limitation on registration or issuance of any further license (such as geographic limitations); a maximum fine of \$10,000 per specification of charges; requiring pursuit of additional education or training, and a maximum of 100 hours of public service.

Penalties can be imposed singly or in any combination. Penalties may be stayed in whole or in part, and probation may be imposed in conjunction with any penalty. Probation terms often include items that could otherwise be characterized as penalties, such as requiring practice only under supervision of another dentist, requiring practice monitoring by another dentist with random review of a dentist’s records, or requiring performance reports to be submitted by an employer.

Note: The adverse publicity that follows the imposition of professional discipline action is frequently the harshest punishment of all, especially for dentists practicing in small communities.

What are the procedures for imposing a penalty?

There are four basic disciplinary procedures that can be used by OPD:

Administrative Warning: The Administrative Warning may be employed for first-time violations of a minor and technical nature, such as isolated instances of advertising or record keeping violations, or other first-time isolated violations that do not directly affect or impair public health, welfare or safety. The Administrative Warning is a confidential letter that is sent to the professional. The fact that it has been issued is not a matter of public record. No penalty is imposed by the Administrative Warning.

Violations Committee: The Violations Committee can be used for minor and technical violations where the range of penalties is limited to “guilty with no further action,” censure and reprimand, and/or a maximum fine of \$500 per specification of the minor and technical charges. The Violations Committee can only be used if the dentist admits guilt to the minor and technical violation. If the dentist contests guilt, then the Violations Committee lacks jurisdiction to hear the matter.

The Violations Committee consists of three members of the New York State Board for Dentistry, including at least one public member. Committee members determine the penalty to be imposed from among the limited range of available penalties. Their decision is final and a matter of public record

Direct Referral: Cases where professional misconduct is based on a criminal conviction, on having been found by another state to have committed professional misconduct, or on having been found guilty of a New York State Public Health Law Article 33 (controlled substances) violation by the Commissioner of Health, can be referred directly to a regents Review Committee, bypassing the State Board for Dentistry. The only issue before the Regents Review Committee (a three-member panel consisting of at least one Regent and, usually, two retired judges) is determining an appropriate penalty from among the full range of penalties available.

The decision of the Regents Review Committee is automatically reviewed by the Board of Regents, and becomes a matter of public record once the Board of Regents makes a final determination in the matter. For certain out-of-state misconduct Direct Referrals technical legal defenses are available, based on court cases, for which an attorney should be consulted to see if these defenses apply to a particular case.

Disciplinary Hearings: Disciplinary Hearings are formal administrative hearings conducted by a three-member panel of the State Board for Dentistry, including at least one public member. A dentist is entitled to a Disciplinary Hearing whenever he/she wishes to contest charges of misconduct (other than charges that are brought by Direct Referral).

The hearing panel determines the facts of the case, the guilt or innocence of the charges, and the penalty to be imposed. The decision of the panel of the State Board for Dentistry is automatically reviewed by a Regents Review Committee; and the decision of the Regents Review Committee is automatically reviewed by the Board of Regents. Disciplinary Hearing results become a matter of public record once the Board of Regents has made a final determination in the matter.

A Disciplinary Hearing can result in the imposition of any penalty, the dismissal of some or all of the charges, or an order that the case be re-heard.

Disciplinary Hearings can be settled by the dentist's agreeing to sign a consent order. The consent order process requires that the dentist plead guilty to one or more of the charges and accept a penalty agreed upon with OPD.

The most drastic form of a consent order is a License Surrender Agreement, whereby a dentist gives up his or her license to practice dentistry. All consent orders and License Surrender Agreements must be signed by a member of the State Board for Dentistry, a member of the Board of Regents, the Executive Director of OPD, and the dentist involved. They must be reviewed and approved by the Committee on the Professions – a three member panel composed of designated officials of the New York State Education Department – and by the Board of Regents.

When OPD Knocks

In cases where the public health, welfare or safety warrants emergency action against a dentist, OPD may seek a summary suspension of the dentist to be followed by a Disciplinary Hearing. The summary suspension process requires that a hearing be held by one member of the Board of Regents to determine if such a suspension is warranted. The Board of Regents automatically reviews the decision of this one regent. If summary suspension is granted, the regular Disciplinary Hearing must then be promptly scheduled and held.

Summary suspension results in the immediate suspension of a dentist's license to practice pending the final outcome of the Disciplinary Hearing. It becomes a matter of public record once the Board of Regents approves the action.

Contacting OPD

The laws and regulations pertaining to practicing dentistry in New York State can be found at: www.nysed.gov

If more detailed information is required, you may contact the New York State Board for Dentistry by calling (518)474-3817 ext. 550 or by email at dentbd@mail.nysed.gov.

For Additional Questions and Information

Members may contact the New York State Dental Association for more information regarding investigations from OPD.

The NYSDA offices are open during normal business hours Monday through Friday from 9 am to 5 pm. NYSDA can be reached by phone at (518)465-0044 or by email at info@nysdental.org.

Notes

Notes

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