

Legal Manual for New York Physicians

Fifth Edition

Editors

Patrick Formato, Esq.
Abrams, Fensterman,
Fensterman, Eisman,
Formato, Ferrara, Wolf
& Carone, LLP

Joel M. Greenberg, Esq.
The Greenberg, Dresevic,
Iwrey, Kalmowitz, Lebow
& Pendleton Law Group

Donald R. Moy, Esq.
Garfunkel Wild, P.C.

New York State Bar Association publications are intended to provide current and accurate information to help attorneys maintain their professional competence. Publications are distributed with the understanding that NYSBA does not render any legal, accounting or other professional service. Attorneys using publications or orally conveyed information in dealing with a specific client's or their own legal matters should also research original sources of authority.

We consider the publication of any NYSBA practice book as the beginning of a dialogue with our readers. Periodic updates to this book will give us the opportunity to incorporate your suggestions regarding additions or corrections. Please send your comments to: Publications Director, New York State Bar Association, One Elk Street, Albany, NY 12207.

Copyright 2017
New York State Bar Association
All rights reserved
ISBN:978-1-57969-527-9
Product Number: 41326

BIOGRAPHIES

ELLEN F. KESSLER, ESQ.

Ellen F. Kessler is a partner of Ruskin Moscou Faltischek, P.C., where she is a member of the firm's health law department. Prior to her career in law, Ms. Kessler had a distinguished career in nursing and nursing education at St. Barnabas, Bronx Lebanon and Brooklyn Veterans Hospitals. She is a graduate of the State University of New York Downstate Medical Center College of Nursing, Columbia University Teacher's College and Hofstra University School of Law.

BARBARA D. KNOTHE, ESQ.

Barbara D. Knothe, a partner in Garfunkel Wild, P.C.'s Health Care Practice Group, has over 20 years of experience in the health care field. A registered nurse with critical care experience, Ms. Knothe has extensive experience in the representation of health care providers, with special emphasis on regulatory and corporate transactions. Transactions include mergers and acquisitions of hospitals, nursing homes, home health agencies, physician practices and other providers, and accounts receivable and asset-based financings. Ms. Knothe has particular experience in EMTALA, the 340B Program, licensure and treatment issues, Joint Commission and HIPAA, as well as physician and medical staff issues, and closure of hospitals and other health care facilities. Ms. Knothe represents physicians and other licensees in investigations before the Office of Professional Medical Conduct and other disciplinary agencies, and in hearings before Medicare and other payors. Ms. Knothe received her B.S.N. from SUNY Brockport and her J.D. from Pace Law School.

LAWRENCE F. KOBAK, D.P.M., ESQ.

Lawrence F. Kobak is Senior Counsel in Frier Levitt's Healthcare Department, working in the Uniondale, New York office. Prior to joining Frier Levitt, Larry was a partner at Kern, Augustine, PC, and at Abrams, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, where he was director of the firm's Office of Professional Medical Conduct (OPMC) and Office of Professional Discipline (OPD) Defense. Mr. Kobak has extensive experience representing physicians in connection with licensure issues, as well as successfully defending physicians before Medical Boards, OPMC, OPD investigations, as well as Medicare Fraud, Fraud & Abuse, Hospital Actions, RAC Audits, Medicare Audits, OIG Fraud, Health Care Fraud, Medical Audits, and Health Plan Billing Audits. As a licensed podiatrist prior to becoming an attorney, Mr. Kobak served as the international president of the Academy of Ambulatory Foot and Ankle Surgery.

EVE GREEN KOOPERSMITH, ESQ.

Eve Green Koopersmith is a partner at Garfunkel, Wild, P.C. She joined the firm in 1994 and is head of the Discharge Planning and Elder Law Practice Group. Ms. Koopersmith's practice includes discharge planning, elder law, guardianship proceedings, Medicaid planning, litigation on behalf of hospitals and nursing homes, general health care and regulatory matters and compliance issues for nursing homes and home health agencies.

With particular experience in patient rights issues relating to hospitals, nursing homes and home health agencies, Ms. Koopersmith is frequently involved in matters concerning advance directives and life-sustaining treatment, discharge planning, retention and treatment issues for psychiatric patients, and assisted outpatient treatment matters. She also regularly advises hospitals and other providers regarding the confidentiality of specially protected records such as HIV, alcohol/substance abuse and mental health records. She also works with families of Special Needs individuals, establishing Supplemental Needs Trusts and advising families on Medicaid matters and other governmental benefits. She also has represented organizations devoted to working with special needs children.

Ms. Koopersmith serves on the Board of Directors of Community Mainstreaming Associates, Inc., a not-for-profit organization providing services to persons with intellectual and developmental disabilities. Ms. Koopersmith has lectured for the New York State Bar Association, the Association of the Bar of the City of New York, Lorman Education Services and Behavioral Health Care Management Institute. She is also a contributing editor of *Guardianship Practice in New York State*, published by the New York State Bar Association. Ms. Koopersmith received her B.A. from Cornell University in 1979 and her J.D. from American University, Washington College of Law, in 1982.

NAOMI R. KREBS, CPA

Naomi R. Krebs serves as the administrative and fiscal director at EISS software. A former New York City auditor with the New York City comptroller's office, she implements and streamlines systems that are fiscal as well as programmatic, are highly detailed, and serve as safety nets to anticipate potential problems. She implements systems to ensure that local and state early intervention regulations and statutes are preserved. Her focus as fiscal administrator is to set up multi-layered systems that stave off problematic issues by anticipating problems before they occur, and determining what systems need to be in place, and the details of implementation of these systems. Ms. Krebs was previously the internal auditor at the Jewish Guild for the Blind, where she conducted both financial and programmatic audits of all departments, including early intervention, pre-school, nursing homes,

[48.24] Department of Defense and Department of Veterans Affairs	870
[48.25] Office of Personnel Management.....	871
[48.26] Practice Tips for Dealing With Administrative Agencies.... Resources.....	871 873

Chapter 49 Office of Professional Medical Conduct

Lawrence F. Kobak, D.P.M., Esq.

[49.0] Overview	877
[49.1] Standard of Conduct.....	877
[49.2] Complaints	887
[49.3] Penalties	890
[49.4] Appellate Avenues	891
[49.5] Practical Considerations	892
Resources.....	893

Chapter 50 State and National Reporting Laws and Requirements/National Practitioner Data Bank

Robert S. Iwrey, Esq.

[50.0] Overview	897
[50.1] National Reporting Banks	897
[50.2] National Practitioner Data Bank	897
[50.3] Healthcare Integrity and Protection Data Bank	903
[50.4] New York State Physician Profile Website.....	903
[50.5] New York State Reporting Requirements	904
[50.6] Mandatory Reporting of Professional Misconduct.....	904
[50.7] Mandatory Reporting of Gunshot Wounds, Knife Wounds and Burns	905
[50.8] Mandatory Reporting of Diseases and Medical Conditions	905
[50.9] Mandatory Reporting of Medical Malpractice Claims by Self-Insured.....	908
[50.10] Mandatory Reporting of Adverse Events in Office-Based Surgery	908
Resources.....	909

Chapter 51 Physician Profiling

Laurie T. Cohen, Esq.

Jay B. Silverman, Esq.

[51.0] Overview	913
-----------------------	-----

[51.1]	Required and Optional Disclosures.....	914
[51.2]	Correcting and Updating Information	917
[51.3]	Sanctions	918
	Resources.....	918

Chapter 52 Committee for Physicians' Health and Physician Impairment
Laurie T. Cohen, Esq.

[52.0]	Overview	921
[52.1]	How the CPH Program Works	921
[52.2]	Confidentiality	923
[52.3]	Reporting/Disclosure Requirements	924
	Resources.....	925

Chapter 53 The Physician-Patient Privilege: Protecting the Confidentiality of Communications Between Patients and Their Health Care Providers

Lawrence N. Gray, Esq.

[53.0]	Introduction	929
--------	--------------------	-----

Chapter 54 Electronic Records and Signatures for the Health Care Provider

Syma Shulman Levine, Esq.

David C. Saidoff

Naomi R. Krebs

Erez Edery, Esq.

[54.0]	Introduction	935
[54.1]	Electronic Records and Transactions—Overview	935
[54.2]	Copy Versus Original Record	936
[54.3]	Prevention of Record Alteration	936
[54.4]	Digital Signatures	937
[54.5]	Recommended Methods for Creating and Maintaining Electronic Signatures in PDF Version Only	938
[54.6]	Statutes Related to Electronic Signatures.....	938
[54.7]	Federal	938
[54.8]	Uniform Electronic Transactions Act (UETA)	941
[54.9]	New York Electronics Signatures and Records Act (ESRA)	941

Chapter 42 Physician Compliance With Government Investigations

Lawrence F. Kobak, D.P.M., Esq.

[42.0]	Overview	781
[42.1]	Federal Investigative Agencies	781
[42.2]	Federal Bureau of Investigation	781
[42.3]	U.S. Postal Service	783
[42.4]	Department of Justice/Office of the U.S. Attorney	783
[42.5]	Health and Human Services, Office of Inspector General	783
[42.6]	Drug Enforcement Administration.....	784
[42.7]	Office for Civil Rights	784
[42.8]	Occupational Safety and Health Administration.....	784
[42.9]	State Investigative Agencies	785
[42.10]	Office of the Attorney General	785
[42.11]	Office of Professional Medical Conduct.....	785
[42.12]	Medicaid.....	786
[42.13]	Department of Health	786
[42.14]	Offices of the District Attorney.....	787
[42.15]	Insurance Frauds Bureau.....	787
[42.16]	Practical Considerations	788
	Resources.....	790

Chapter 43 Nonparty Subpoenas and Statutes of Limitations

Esther S. Widowski, Esq.

Todd C. Rubenstein, Esq.

[43.0]	Overview	791
[43.1]	Subpoenas.....	793
[43.2]	Statutes of Limitations	798

Chapter 44 Authority of State and National Medical Boards

Hon. James F. Horan, A.L.J.

[44.0]	Overview	803
[44.1]	Federal Facilities, Registration and Data Collection.....	803
[44.2]	Licensure for Employment and Staff Privileges in Federal Health Facilities	803
[44.3]	Registration	803
[44.4]	Data Collection.....	804
[44.5]	Examination and Specialty Boards	805
[44.6]	Examination Boards	805

Chapter 38 Corporate Practice of Medicine and Fee Splitting

Andrew B. Roth, Esq.

Kimberly J. Gold, Esq.

[38.0]	Overview	731
[38.1]	Bases for Prohibitions Against Corporate Practice of Medicine and Fee Splitting	733
[38.2]	Exceptions	736
[38.3]	Repercussions	739
[38.4]	Specific Applications	742

Chapter 39 Medicaid Fraud and the Collateral Consequences of a Criminal Conviction

Lawrence N. Gray, Esq.

[39.0]	Overview	749
[39.1]	Medicaid Crimes	750
[39.2]	Collateral Consequences of Medicaid Fraud Convictions	753

Chapter 40 Medical Malpractice

Marilyn B. Schatz, Esq.

[40.0]	Overview	757
[40.1]	Elements of a Medical Malpractice Suit	757
[40.2]	Damages	761
[40.3]	Statute of Limitations	762
[40.4]	Informed Consent	763
[40.5]	Documentation	765
[40.6]	Malpractice Litigation: The Process	766
[40.7]	Partnering With the Patient to Minimize Litigation	768
[40.8]	The Malpractice Trial	769
[40.9]	The Good Samaritan	771
[40.10]	Preparing for a Successful Defense	771

Chapter 41 Physicians Charged With a Crime

Alexander G. Bateman, Jr., Esq.

[41.0]	Overview	775
[41.1]	Representation	775
[41.2]	Consequences of Criminal Convictions	776
[41.3]	Medical License	776
[41.4]	Participation in Medicaid and Medicare	777
[41.5]	Third-Party Payer Panel Membership and Hospital Privileges	777