New York State Department of Health

Board for Professional Medical Conduct

2010 Annual Report

Office of Professional Medical Conduct
New York State Department of Health

433 River Street, Suite 303
Troy, NY 12180-2299

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

---

Board for Professional Medical Conduct
2010 Annual Report

Table of Contents

Board for Professional Medical Conduct
2010 ANNUAL REPORT

.

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 90,000 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 2010:

- The Board imposed 307 final actions, the highest since 2006. Of those, 59% (182) included the loss, suspension, or restriction of a physician's medical license.

- According to the Federation of State Medical Boards (www.fsmb.org) the Board imposed more actions that resulted in loss of license than any other state in the nation.

- 8,501 complaints were received, 24% higher than five years ago. The Office reviewed and closed 9,108 complaints, the 2nd highest in a decade.

- The Office closed 4,024 investigations, the 2nd highest ever and referred 322 physicians for charges of misconduct. Despite challenges faced due to the State's fiscal crisis, the average time to complete an investigation remains about nine months, consistent with completion time in 2008 and 2009.

- The average number of investigations completed per investigator increased from 35 in 2009 to 47, a 34% increase, resulting from improved training, management and monitoring initiatives implemented by the program.

- The OPMC monitored over 1,300 physicians during the year, an all-time high.

- New criteria to commence an investigation based on medical malpractice information were implemented, improving the use of this information as a predictor of possible misconduct.

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 90,000 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 an annual 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 2010 experience.

The Board consists of 144 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 the appropriate standards of medical practice. Through its central office in Troy, New York and seven field offices (Troy, 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;
- 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;

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

- 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 more than 100 hearing committees that are convened annually.

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 personal interviews, obtaining documents, such as medical records, and consultation with medical experts.

↓

The complete **investigation** is reviewed by supervisors and medical staff. If there is no evidence of misconduct, the case is closed.

↓

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

↓

Hearing

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

↓

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 and an Administrative Law Judge.

↓

Decision

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

↓

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**.

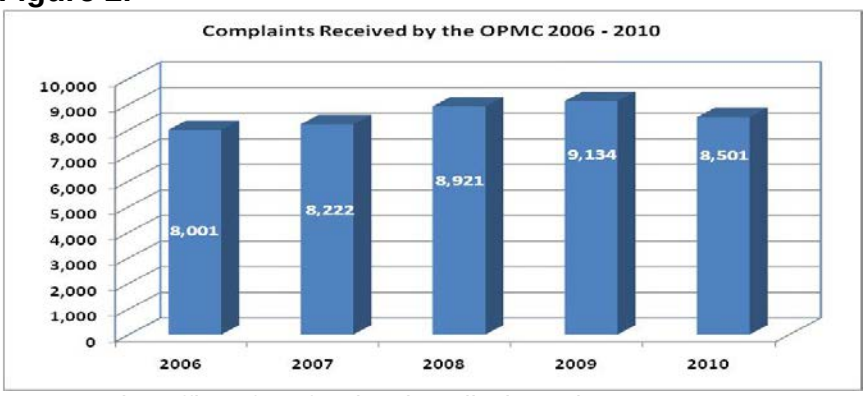
Complaints

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.

In 2010, the OPMC received 8,501 complaints, about the same as the average for the prior four years (see Figure 2), and about 24% higher than in 2005.

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.

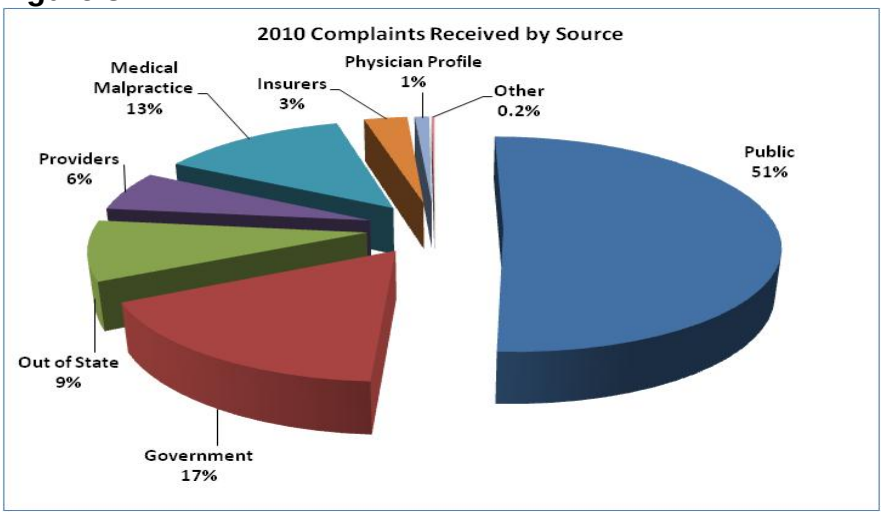
Figure 2.



Source: The Office of Professional Medical Conduct

About 51 percent of the complaints received came from the public in 2010 (see Figure 3), consistent with prior years' experience.

Figure 3



Source: The Office of Professional Medical Conduct

Investigations

OPMC investigators and clinicians, including 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 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. In 2010, 322 physicians were referred for charges.

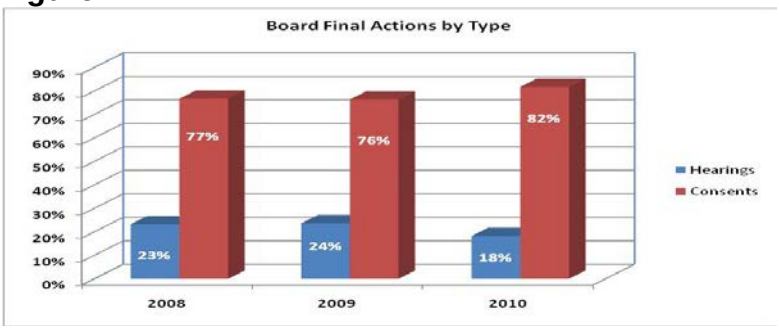
The Board is required to make charges public no earlier than five business days after charges are served upon a physician after an investigation committee has unanimously concurred with the director's determination that a hearing is warranted. A statement advising that the charges or determinations are 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. From 2008-2010, about 80% of all Board actions resulted from consent 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.

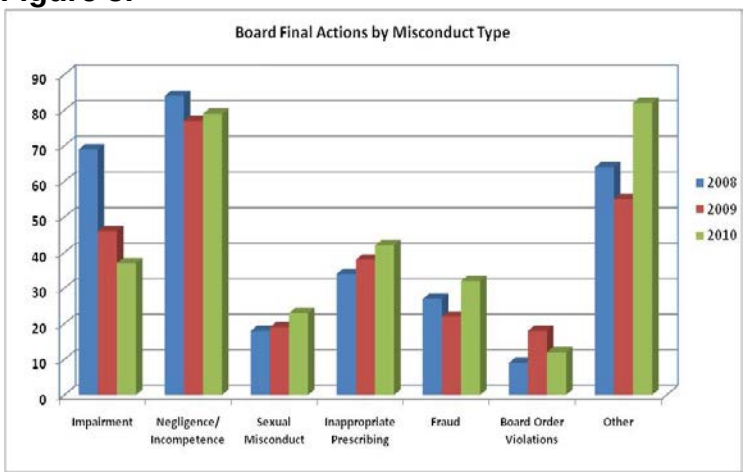
The Board hearing committee rules on whether misconduct exists or not by sustaining or not sustaining specific charges. If the committee sustains charges, it decides on an appropriate penalty. Penalties can range from a censure and reprimand to license revocation, including suspension of a physician's 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).

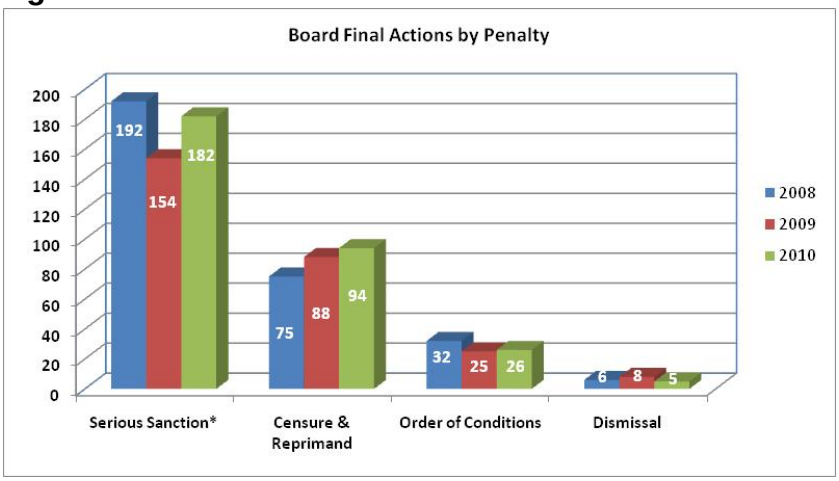
Figure 5.



Source: The Office of Professional Medical Conduct

In 2010, the Board issued 307 final actions; 182 final actions (59%) 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). Only one state issued more serious sanctions than New York, according to information compiled by the FSMB.

Figure 6



* Serious sanctions include revocations, surrenders and suspensions 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 2008-10, the ARB issued 55 decisions. (See Figure 7) The ARB upheld the hearing committee determination 93 percent of the time, and upheld the penalty imposed in the majority of cases.

Figure 7

Administrative Review Board Statistics 2008 - 2010

	2008	2009	2010
Administrative Review Board Decisions	22	19	14
Hearing Committee Determination Upheld	21	17	13
Hearing Committee Determination Not Upheld	1	2	1
Hearing Committee Penalty Upheld	13	11	6
Hearing Committee Penalty Increased	7	8	7
Hearing Committee Penalty Decreased	2	0	1

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 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 2010, the OPMC was holding 60 temporarily surrendered licenses, 19 fewer than in 2009.

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 five physicians who petitioned the Board for restoration in 2010, three were granted restoration.

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, 2010, the OPMC was monitoring 395 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. During 2010, the OPMC monitored 1,300 licensees. Sometimes, a physician does not comply with the terms of his/her Board order. In 2010, the Board referred seven 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, CPH and 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.

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. In 2010, OPMC received 161 reports from hospitals regarding physician misconduct, 24 (15 percent) of which

were related to concerns of physician impairment. These figures are consistent with the OPMC's prior years' experience.

Medical Malpractice Information

With a growing national interest in the possibility of medical malpractice experience as a 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 Office works with the DOH's Patient Safety Center to identify and implement criteria for establishing a misconduct investigation based on a review of medical malpractice information. As a result of this work, 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 75th percentile dollar amount

Of the 360 investigations completed in 2010 that were based on medical malpractice criteria, about 9 percent resulted in a Board action or administrative warning.

The OPMC and the State Insurance Department (SID) 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.

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 and state specialty societies 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 and practitioners.

New York's Performance in a National Context

The Federation of State Medical Boards (FSMB) is a national not-for-profit organization representing 70 medical boards within the United States and its territories. The FSMB co-sponsors the United States Medical Licensing Examination with the National Board of Medical Examiners.

The FSMB releases an annual report on medical board performance for all 50 states. In 2010:

- The Board imposed more actions resulting in loss of license than any state in the nation;
- New York imposed the 2nd most number of serious actions in the nation. Serious actions are those that result in restriction or loss of license;
- New York's ratio of total actions per 1,000 physicians – 5.09 – was third highest among states with 40,000 physicians or more, behind Texas and Ohio;
- New York's ratio of serious actions per 1,000 physicians increased from 2.91 in 2009 to 3.15 in 2010; in both years, the state ranked 14th in the nation.

Public Citizen, a national consumer advocacy group, issued its annual ranking of state medical board performance, based on physician population data from the American Medical Association and disciplinary data from the FSMB.

For the period 2008-2010, New York ranked 24th in the nation in the number of serious disciplinary actions taken, with 3.03 actions per 1,000 physicians. Louisiana, with 98 total actions, ranked first with 5.98 actions per 1,000 physicians. Minnesota, with 28 actions, was ranked lowest with 1.29 actions per 1,000 physicians. Among states with 40,000 physicians or more, only Illinois had a higher rate than New York.

While these data provide some context for the program's experience, they should not be the sole basis for evaluating performance. Definitions of misconduct and disciplinary processes and rules vary significantly across states. Methodologies used by these organizations differ. Without a mechanism to account for these differences, meaningful comparisons are difficult.

Office of Professional Medical Conduct

Summary Statistics

Year	2007	2008	2009	2010
Complaints Received	8222	8921	9134	8501
Investigations Completed	8024	8568	9486	9108
Licensees Referred for Charges	311	339	228	322
Administrative Warnings/Consultations	99	157	113	84
Summary Suspensions*	16	24	8	13

Final Actions

Surrender	49	47	39	63
Revocation	43	39	29	22
Suspension	83	72	65	87
Censure and Reprimand	80	75	87	94
Dismiss	5	6	8	5
Surrenders under 230(13)	13	34	22	10
Monitoring Agreements	30	32	25	26
TOTAL ACTIONS	**303**	**305**	**275**	**307**

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
Nirav R. Shah, M.D., M.P.H., Commissioner