

Challenge Medical Indemnity



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What happens if a Doctor is complained to the Medical Council

by Grace Keegan,
Kennedys Law

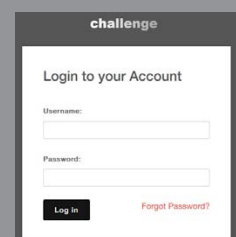


GDPR Refresher

by Joanne O'Sullivan,
Kennedys Law

24 Hour 7 Day Consultant Helpline

The number of the Helpline is
085 8065794



Consultant Online Portal

All Challenge clients also have 24 hour, 7 day communication channel and access to their insurance documents via our online client portal at www.challenge.ie



Dear Consultant,

Welcome to our Challenge Medical Indemnity newsletter – February 2019 edition,

I am pleased to update you on the following matters relevant to you and indemnity insurance to private healthcare services in Ireland.

- I am pleased to advise that our scheme underwriters (CNA) have made a move to Brexit proof our relationship by moving insurance transactions via the EU as opposed to directly from the UK which is good news for all concerned in this uncertain period for EU-UK business relations. This change came into effect from 01st January 2019 for administrative and regulatory purposes and will remain this way regardless of future Brexit outcomes. This is a positive development which will prevent disruption to our consultant clients over the coming year. The status of insurer security and Challenge local support services remain unaffected.

We are also querying Brexit plans with all other underwriting markets to ensure continuity of coverage for our corporate healthcare clients.

- We have worked very successfully with the Medical Council over the past 12 months to ensure all of our consultants doctors are purchasing coverage that meets with the requirements set out in the Medical Practitioners (Amendment) Act 2017
- We look forward to the upcoming findings of the government expert group who have been reviewing the law of torts and the current systems for the management of clinical negligence claims. On request, Challenge submitted a comprehensive document outlining our beliefs on what changes need to be made to improve the medical negligence environment for patients, healthcare providers and indemnity suppliers.
- Over the past 7 years, we have reduced indemnity costs significantly for many private doctors, hospitals, clinics, and dentists. More recently we are also receiving positive feedback from our clients about the additional value of having access to our local service and knowledge of the indemnity and legal environment, particularly in a time of being sued or when being investigated by the Medical Council.

In this newsletter edition, we are delighted to be bringing you an informative and comprehensive article on:

1. What happens if a Doctor is complained to Medical Council, by Grace Keegan, Kennedys Law
1. A brief GDPR Refresher by Joanne Kennedy, Kennedys Law

Challenge are committed to delivering comprehensive indemnity at competitive rates, we are also committed to delivering service levels which integrate with the busy schedule of a private healthcare practice in Ireland.

Thank you for your continued support,

Regards

David Walsh
Managing Director
Challenge.ie

What happens if a doctor is complained to the Medical Council

– by Grace Keegan, Senior Associate, Kennedys



Being the subject of a Medical Council complaint can be stressful. The feelings of stress can often be amplified by a lack of understanding of the process and a feeling of isolation.

Grace Keegan, Senior Associate at Kennedys Law, one of Challenge Indemnity's expert legal advisors, provides a practical insight as to what to expect when you are involved in a Medical Council Complaint or Fitness to Practise Inquiry.

Challenge Indemnity and its panel of expert legal advisors are here to assist with every stage of the process.

Who can complain?

The overwhelming majority of complaints to the Medical Council in respect of clinicians are made by members of the public. Anybody can, however, make a complaint. This includes patients or their family members, employers, other healthcare professionals, members of the public, and the Medical Council itself.

What to do first?

The first piece of correspondence that you will receive from the Medical Council is confirmation that a complaint has been made. A copy of the complaint will be provided, and you will be asked to provide your comments.

It is imperative that you notify Challenge Indemnity immediately upon receipt of the complaint by telephoning the dedicated 24-hour Challenge helpline or emailing the Challenge team who will guide, assist and support you with the entire process.

Depending on the nature and gravity of the complaint, Challenge Indemnity's legal team may appoint its panel solicitors to assist you with the complaint.

Your Challenge team will likely ask you to provide a factual written response to the complaint at this stage, which will inform your advisors as to how best to proceed.

You are under no obligation to provide any formal response to the complaint at this stage.

Investigation

The Medical Council appoints a case officer to manage each complaint, who reviews each complaint and determines an investigation plan. This may include identifying

- documentation required (eg medical records, personnel records etc);
- persons to be interviewed;
- expert reports to be commissioned.

This case plan is then considered by the Preliminary Proceedings Committee (PPC) at its next monthly meeting. The PPC usually approves the case plan, and can also direct that the Case Officer carries out any other investigations that it deems appropriate.

You will be provided with any information obtained by the Case Officer investigating the complaint.

Structuring a response to a complaint

Your Challenge team will advise you in relation to whether a response is required in relation to the complaint and will assist you with drafting the response.

Your response should include your professional background at the outset, setting out a brief summary of your experience, your current employment position and any areas of special interest. A curriculum vitae can be attached as an appendix if required. This will provide the reader with context in respect of your experience.

The response should set out a factual chronology of treatment provided, referencing the medical records as appropriate. Comments in relation to particular treatment provided, work practices or circumstances should be based on fact.

Clinicians often worry that they have no particular recollection of the events in question. It is perfectly adequate to make this clear in your response, and to refer to the contemporaneous medical records and your standard usual practice.

If there is a particular reason as to why you have a clear recollection of the events in question, then also make this clear. For example: *'I remember this case due to its complexity, as it was subsequently discussed at a multi-disciplinary team meeting'*. This provides additional credibility to your evidence and version of events.

If you would like to offer an apology in your response, this can be included. An apology is not an admission of liability and, in the right context, can demonstrate insight and empathy.

What happens if a doctor is complained to the Medical Council (Continued)

Your response is exactly that, yours. You must be entirely happy with the contents of your response, and be willing to stand over its content. The Challenge team will assist you in preparing your response but you must read it carefully and ensure that it accurately reflects your version of events, before it is sent to the Medical Council.

A copy will be sent to the Medical Council, the complainant for their comments and also any expert instructed in the matter. Further, if the complaint is referred to a Fitness to Practise Committee (FTP Committee) Inquiry, your response will also be available to the Committee members (see below). It is therefore imperative that you are entirely happy with the substance and form of your response.

When to provide a response?

Depending on the nature of the complaint, the Challenge team may recommend that certain information is obtained by the Case Officer, prior to providing a response. There will often be factual witness statements and medical records or investigation files, which will be of assistance when drafting a response.

However, if an expert is to be instructed, it is helpful for the expert to have your comments prior to preparing his or her report. This provides a context for the expert upon which to base his or her views, rather than simply the medical records. This is particularly important where a UK based expert is instructed by the Medical Council. UK experts may be unfamiliar with the practicalities of working in the Irish healthcare system and your statement can be very useful to provide context to the expert.

You are however, under no legal and/or professional obligation to provide a written response to the complaint unless the PPC orders that you do so. Failure to comply with an order to provide a written response to the PPC can result in a further referral to the Medical Council.

Preliminary Proceedings Committee (PPC)

Once their investigation is complete the Case Officer prepares a Case Report, detailing all of the relevant information obtained from their investigation. Your Challenge team will be provided with a copy of the Case Report and all accompanying documentation, which they will share with you. You will then have 21 days to consider the material and provide any further response. The Challenge team will advise you on whether any further response is required and will assist you with drafting it. The matter will then be considered by the PPC at its next meeting.

Interestingly, having considered the information supplied by the Case Officer, the PPC does not make a decision on the case. It simply provides an opinion as to whether any further action should be taken about the complaint.

If it considers that there is a prima facie case to warrant further investigation, it refers the complaint to the FTP Committee.

Alternatively, the PPC may form an opinion that:

- There is insufficient cause to warrant further action, and the complaint file should be closed; or

- The complaint should be referred to another body/authority, or to a professional competency scheme; or
- The complaint should be resolved by mediation or other informal means (in practice this option is rarely recommended).

Either way, you will be notified of the PPC's opinion.

At its next meeting, the Medical Council will be notified of the PPC's opinion, and the Council then makes a final decision based on the PPC's opinion.

How long?

The length of time taken for the PPC and Case Officer to investigate a complaint can vary hugely, depending on the nature and complexity of the complaint. However, even with a straightforward complaint, it is unlikely to be concluded in less than 5 months. A more serious or complex complaint can be at the PPC / investigation stage for up to 12 months.

Impact on Clinicians

It is important to remember that the majority of complaints are closed after investigation. In 2017, 82% of the complaints investigated by the PPC were found to warrant no further action.

Notwithstanding this, the stress on clinicians who find themselves involved with a complaint, cannot be underestimated. This is particularly apparent, where the investigation process is drawn out over a number of months.

As stated at the beginning of the article, being involved in a Medical Council complaint can feel very isolating. However, the experienced Challenge team will be on hand to support you and advise you at every stage. Where appropriate, it may also be helpful to seek support from your GP, family and friends.

Fitness to Practise (FTP) Inquiry

Having investigated the complaint, if the PPC considers that there is a case to warrant further action, it will refer the complaint against you to the FTP Committee for an Inquiry.

Public or private?

The FTP Committee Hearing is an adversarial hearing, which is ordinarily heard in public. In certain cases, the Challenge legal team can apply for the hearing to be heard in private.

Recent years have seen a welcome fall in the number of inquiries heard in public from 45% in 2015 to 28% in 2017.

It is, however, entirely within the discretion of the FTP Committee to allow the hearing to be heard in private. Ordinarily, such applications are granted where the allegations against your ability to practise relate to your health, or where you obtain medical evidence which demonstrates that the stress of a public hearing would adversely impact on your health.

What happens if a doctor is complained to the Medical Council (Continued)

Alternatively, the Committee may order that your identity (and/or the identity of the complainant) be anonymised.

If the hearing is held in public, there can be considerable media interest. Understandably, this is a cause of great anxiety for practitioners. The Challenge team is very experienced in media management in these circumstances, and will support and advise you accordingly.

Notice of Inquiry

The Medical Council will instruct solicitors to carry out further investigations based on the file prepared by the PPC. On completion of their investigations, a Notice of Inquiry will be provided to you and the Challenge team. This sets out the allegations of professional misconduct¹, poor professional performance² and/or a relevant medical disability³ against you.

The Notice of Inquiry will also list the factual and expert evidence upon which the allegations are based - for example: any relevant medical records, expert reports and witness statements from factual witnesses. This evidence will be contained within the Inquiry Booklet which will be served on you, and the contents of which will be agreed between the Challenge team and the legal team for the Medical Council.

In accordance with the principles of natural justice, the solicitors instructed by the Medical Council must serve ALL evidence gathered during their investigation. It is important to note that you are also entitled to see the evidence gathered by the Medical Council, which is not being relied upon at hearing, including draft witness statements, attendance notes of telephone calls with witnesses, handwritten accounts of meetings with witnesses etc. This can often be useful in assessing the credibility of witnesses.

Investigations carried out by your legal team

In the meantime, the Challenge team will carry out its own investigation of the allegations against you. Expert evidence will often be obtained, and statements may be sought from factual witnesses and/or character witnesses as identified by you. A barrister will also be instructed to represent you at the hearing.

Inquiry

Inquiries are usually held in the Medical Council's premises at Kingram Place, Dublin. Three members of the FTP Committee hear the Inquiry, one of whom must be a medical member. There is, however, no requirement that he/she be of the same speciality as you. A legal assessor provides legal advice as required to the FTP Committee, and a stenographer takes an accurate record of the Inquiry.

At the outset the barrister / advocate, instructed on behalf of the CEO of the Medical Council, will set out the case against you.

The allegations must be proven beyond reasonable doubt, which is a very high burden to meet.

In the UK, fitness to practise allegations must only be proven on the balance of probabilities.

The CEO will call expert and factual witnesses to support the allegations. The complainant will often be called as a factual witness. Your barrister will have the opportunity to cross examine each witness, and the FTP Committee members may also ask questions of each witness.

Once the CEO has presented its case, you are entitled to call any expert, factual and/or character evidence in your defence. You may wish to give evidence under oath, although you are under no obligation to do so.

Decision and Fitness to Practise Report

Having heard the entirety of the evidence, the FTP Committee will retire to consider its decision. This can take anywhere from a few hours to several days, depending on the volume and complexities of the allegations.

When the FTP Committee returns with its decision, the Chairman must state whether each allegation has been factually proven, and provide reasons for its decision.

The FTP Committee then prepares a report for the Medical Council, with its recommendations as to what sanction should be imposed, in light of their findings.

Medical Council – Sanction Hearing

The FTP Report will be considered by the Medical Council at the next Council meeting (usually within 4-8 weeks of the conclusion of the Inquiry). If the FTP Committee failed to make any findings against you, the Medical Council will dismiss the complaint.

If however there are any findings of professional misconduct or poor professional performance made against you, the Medical Council will consider the FTP report and the recommendations on sanction.

At this meeting, the Challenge team will make submissions as to the appropriate sanction that should be imposed, and character references/testimonials can be circulated to the Council in support of these submissions. It is important that you attend this meeting with your legal team, as the Council members may wish to ask you questions.

Whether you are found guilty of professional misconduct or poor professional performance, the range of sanctions available range from:

¹ Conduct that experienced, competent and reputable doctors consider disgraceful or dishonourable; and/or conduct that falls seriously short of the standards of conduct expected of doctors.

² A failure to meet the standards of competence (whether in knowledge and skill and/or the application of knowledge and skill) that can be reasonably expected of doctors practising that speciality of medicine

³ A physical or mental disability (including addiction to alcohol or drugs) that may impair the doctor's ability to practise medicine or a particular aspect of medicine.

What happens if a doctor is complained to the Medical Council (Continued)

- Advice, admonishment or censure in writing (the least severe)
- A censure in writing and fine up to €5,000
- Conditions attached to registration (these will be published on your registration)
- Transfer of your registration to another division of the register
- Suspension from the register for a specified period
- Cancellation from the register
- Prohibition from applying for a specified period for the restoration of your registration

Appeal

You will be notified of the Council's decision on sanction. Where the Council decides to impose an advice, admonishment or written censure, you have no right of appeal. For all other sanctions, you have a period of 21 days to appeal that sanction to the High Court.

High Court – Ratification

If you do not appeal the sanction, following the expiry of the 21 days, the Medical Council must apply to the High Court for ratification of its decision. This is important, as the sanction does not come into effect until ratified by the Court.

Of equal importance is to note that this ratification hearing takes place in open court. Consequently, if your FTP Inquiry was held in private, there is a risk that details of the case may be reported in the media at the sanction stage. There is no requirement for you to attend this High Court hearing.

Recent trends

Recent years have seen Regulatory Bodies impose more serious sanctions on professionals in cases of dishonesty. This is more in keeping with practice in the UK, where dishonesty, particularly in the medical profession, often results in removal from the register.

Further, your conduct outside of work is also having more of an impact on FTP Inquiries in recent years. You are reminded to ensure that all social media usage is appropriate to the standard of conduct expected of your profession.

Conclusion

Being subjected to a complaint to the Medical Council is an anxious and fearful place to find yourself as a practitioner.

It is important that you seek immediate assistance from the Challenge team who will advise and support you through every step of the process.

It is important that you seek immediate assistance from the Challenge team who will advise and support you through every step of the process.

It is also important to remember that the Medical Council and its advisors must prove any allegations against you beyond all reasonable doubt. This is a high threshold to meet and is reflected in the statistics.

Between 2015 and 2017 the number of FTP Inquiries that made no findings against practitioners doubled from 19% to 38%, which is a very welcome development.

3 key things to remember if you receive a medical council complaint**1.**

Do not respond directly to the Medical Council

2.

Notify Challenge of the complaint immediately on the 24 Hour Helpline
085 8065 794

3.

Start to prepare a factual statement to send to the Challenge Team



Grace is a Senior Associate in the Healthcare Team at Kennedys Law. Grace is dual qualified in Ireland (2008) and in England & Wales (2010).

Grace specialises in medical defence law, and has defended a wide variety of clinical malpractice claims in the Superior Courts.

She has a special interest in the area of professional regulation, and has extensive experience in defending clinicians before the Irish Medical Council, the General Medical Council and the Nursing and Midwifery Council in the UK.

Grace has advised extensively on the Medical Practitioner's Act 2007, ethical guidance for practitioners, and on issues relating to the principles of natural justice and fair procedures in the context of regulatory proceedings.

GDPR Refresher

– by Joanne O’Sullivan, Kennedys Law



1.

Paper Records should be stored securely in a locked cabinet where only authorised personnel have access to the keys.



2.

Electronic Record access should only be designated to authorised personnel with unique log-ins and passwords. Staff should be warned that passwords should not be obvious and are not to be shared.

3.

Medical Photographs should only be taken using a designated office camera and the camera should be stored in a secure locked cabinet.



4.

Gmail and Hotmail accounts can be used to send special category health data but these email systems are not secure and an encrypted/GDPR compliant portal should always be the preferred method to communicate with patients and third parties. If using Gmail, explicit consent should be sought from the recipient beforehand. A GDPR privacy notice should be included in the signature line of an email, sent from a Hotmail or Gmail account, stating that the content is confidential and is to be read by the recipient only.

5.

Post can be used to send letters containing special category health data but secure email is the preferable method, in terms of providing the best security for the sharing of information.



6.

Fax Machines can be used to send special category health data, but again, secure email is a more secure method. If sending a fax, you should ensure that you use a cover sheet stating that the information in the fax is confidential and for the recipient only.



7.

Telephone Calls are an acceptable and efficient way to communicate special category health data with patients. It is important, however, to clarify the identity of the caller, through security questions, in order to ensure that the information is being passed to the correct individual. This could involve asking simple questions including the caller’s date of birth and current address.

8.

WhatsApp should not be used to send special category health data.



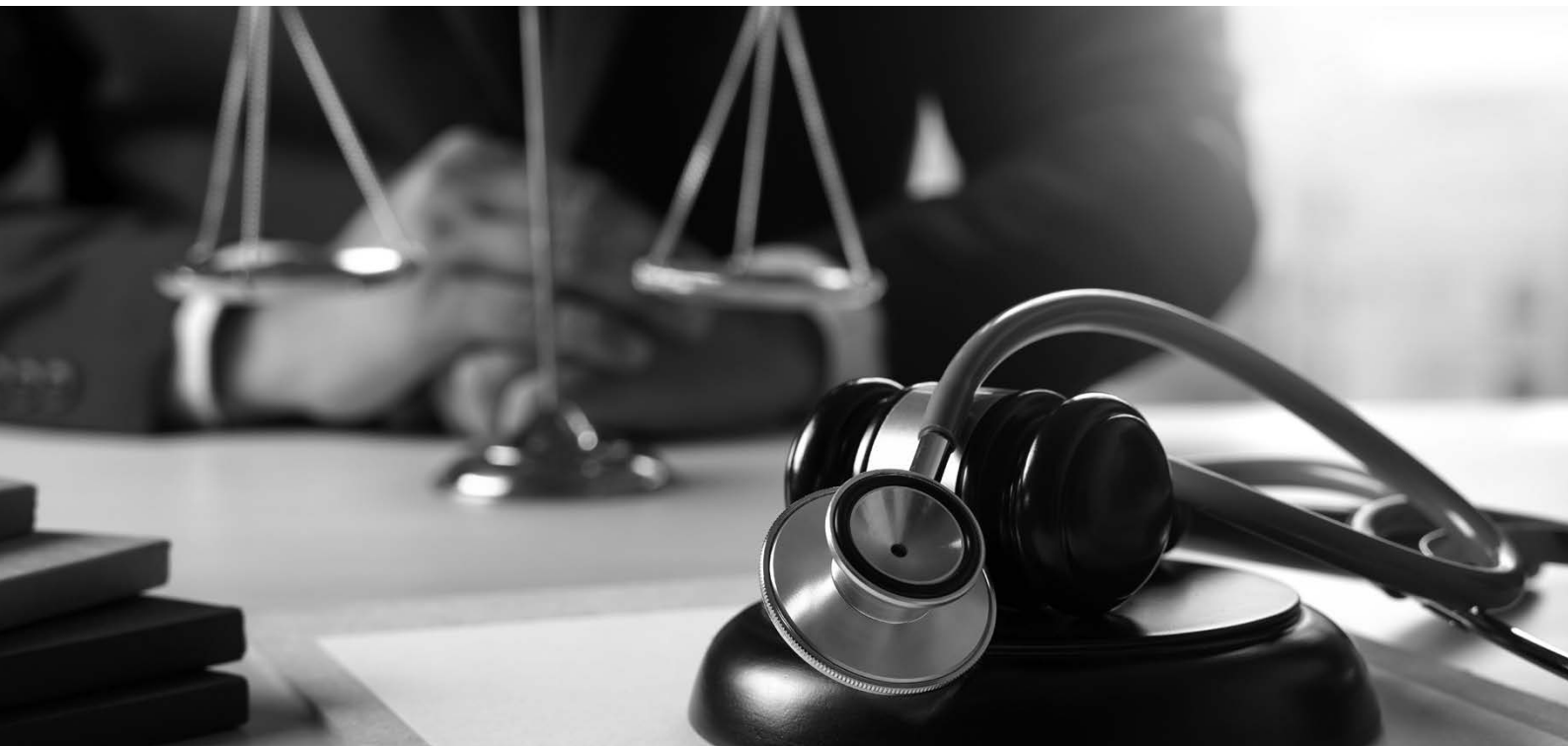
9.

Fees are no longer payable by a patient making a subject access request. However, if it is believed that the patient’s request is manifestly unfounded or excessive (for example where an individual makes repeated requests for the same records) you may decide to either charge a fee, taking into account the administrative costs in dealing with the request(s), or refuse to act on the request(s).



CNA/Hardy and Challenge meet with panel solicitors

The Challenge Healthcare Indemnity Team were pleased to recently host members of the CNA/Hardy claims team for a day at Brokers Ireland HQ in Merrion Square, Dublin 1. This was a very productive day which was led by Nicola Lyons (Head of Claims, CNA), Jessica Lewis (Claims Manager) and Victoria Miller (Technical Claims Specialist, CNA). The day included meetings with our current and prospective panel law firms with lengthy discussions which focussed on the current medical negligence environment and the opportunities which exist to further improve our claims service delivery.



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