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MEMORANDUM

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**TO:** Philip Schuh, CPA  
Executive Vice President, MSSNY

**FROM:** Donald R. Moy, Esq.

**DATE:** December 20, 2017

**RE:** May a physician consult the Prescription Monitoring Program Registry (PMP) to access the controlled substance history of a potential patient for the purpose of deciding whether to accept or decline the individual as a patient?

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Relevant statutes: Public Health Law §3343-a and §3371

At the previous MSSNY Council meeting, it was asked whether there is a violation of the law if a physician consults the PMP not to make prescribing or dispensing determinations regarding a patient, but to review the controlled substance history of an individual who may potentially be a patient, for the purpose of determining whether to accept or decline the individual as a patient.

Public Health Law §3343-a requires the Commissioner of Health to maintain an electronic system for collecting, monitoring and reporting information concerning prescribing and dispensing of controlled substances. Subdivision 2 of §3343-a, requires practitioners to consult the PMP prior to prescribing or dispensing a schedule II, III or IV controlled substance.

Subdivision of §3343-a, in relevant part, states:

öDuty to consult prescription monitoring program registry; practitioners. (a) Every practitioner shall consult the (PMP) prior to prescribing or dispensing any controlled substance listed on schedule II, III or IV of section (3306) of this article, for the purpose of reviewing a patient's controlled substance history as set forth in such registry; provided, however, that nothing in this section shall preclude an authorized practitioner, other than a veterinarian, from consulting the registry at his or her option prior to prescribing or dispensing any controlled substance.ö (underlines my emphasis).

The second clause in the sentence gives the physician the option to consult the PMP prior to prescribing or dispensing. However, the second clause must be read together with the prior clause which pertains to reviewing a öpatient'sö controlled substance history. In other words,

although a physician may consult the PMP prior to prescribing or dispensing, there still must be a physician-patient relationship before the physician may consult the PMP to review the patient's controlled substance history.

Public Health Law §3371 requires the Department of Health to maintain confidentiality of patient information and records kept by the Department. The statute enumerates certain exceptions, including an exception allowing disclosing information to the PMP and to authorized users of the PMP. Subdivision 1 of §3371, in pertinent part, reads:

§1. No person who has knowledge by virtue of his or her office of the identity of a particular patient shall disclose such knowledge, or any report or record thereof, except:

(d) to the (PMP) and to authorized users of such registry as set forth in subdivision two of this section;

(e) to the practitioner to inform him or her that a patient may be under treatment with a controlled substance by another practitioner for the purposes of subdivision two of this section, and to facilitate the department's review of individual challenges to the accuracy of controlled substances histories pursuant to section (3343-a) of this article. (underlines my emphasis).

Accordingly, paragraph (e) authorizes a practitioner to consult the PMP, but the authorization is limited to accessing information pertaining to a patient. The reference to individual challenges to accuracy refers to Public Health Law §3343-a.6, which provides that procedures must be developed to enable individuals to request his or her own controlled substances history.

Subdivision 2 of §3371 refers to the terms and conditions in which the PMP may be accessed. Subdivision 2, in pertinent part, states:

The (PMP) may be accessed under such terms and conditions as are established by the department for purposes of maintaining the security and confidentiality of the information contained in the registry, by:

(a) a practitioner, or a designee authorized by such practitioner pursuant to paragraph (b) of subdivision two of section (3343-a) or section (3361) of this article, for the purposes of: (i) informing the practitioner that a patient may be under treatment with controlled substance by another practitioner, (ii) providing the practitioner with notifications of controlled activity as deemed relevant by the department, including but not limited to a notification made available on a monthly or other periodic basis through the registry of controlled substances activity pertaining to his or her patient, (iii) allowing the practitioner, through consultation of the (PMP), to review his or her patient's controlled substances history as required by section (3343-a) or section (3361) of this article and (iv) providing to his or her patient, or person authorized pursuant to paragraph (j) of subdivision one of this section, upon request, a copy of such patient's controlled

substance history as is available to the practitioner through the (PMP)í ö  
(underlines my emphasis)

Thus, a practitioner is authorized by Public Health Law §3371(2)(a) to access the PMP, but the authorization is limited to accessing information concerning a öpatientö.

Each time a practitioner accesses the PMP, the practitioner must attest as follows:

öThrough this registry, the New York State Department of Health collects and disseminates information regarding prescriptions for controlled substances pursuant to Section 3343-a and in compliance with Section 3371 of the New York State Public Health Law. Pursuant to Section 3343-a of the New York State Public Health Law, only licensed practitioners or pharmacists who are authorized to prescribe or dispense a prescription drug and their designees are authorized to request and view confidential information, and only in relation to the treatment and/or prescription of a patient or customer. The use of this registry by unauthorized persons, or for unauthorized purposes, is strictly prohibited.ö  
(underlines my emphasis).

A related question that was asked was öWhen is the physician-patient relationship created?ö and öIs the physician-patient relationship created solely by virtue that the physician has consulted the PMP?ö In general, the physician-patient relationship is created when the physician renders professional services, such as diagnosis or treatment, and such services are accepted by the individual. In general, the mere scheduling of an appointment, without more, does not establish the physician-patient relationship. However, if the medical practice has affirmatively advised the prospective patient as to a course of treatment and the prospective patient reasonably relies on such advice, it is possible that the physician-patient relationship has been created. Whether the physician-patient relationship existed at the time the physician consulted the PMP may be a question of fact. In a given case, the physician might assert that it was necessary to access the PMP to make a tentative diagnosis, which arguably would be consistent with the purposes of Public Health Law §3343-a and 3371.

### Conclusion

It appears that accessing the PMP to learn the controlled substances history of a potential patient, not for the purpose of diagnosis or treatment, but for the purpose of deciding whether to accept or decline the individual as a patient is not an authorized purpose of the PMP, and could be determined by the Department of Health to violate Public Health Law §3343-a and 3371. We are aware of no case in which a physician had been charged with a violation of this law.