Track 3 – Session 3

Finding Immunity in Discipline: National Practitioner Data Bank, Peer Review and Immunity

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About the Presenter...

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FINDING IMMUNITY IN DISCIPLINE: NPDB, PEER REVIEW & IMMUNITY

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Agenda

1. Health Care Quality Improvement Act
2. National Practitioner Data Bank
3. Common, Difficult Issues Presented
4. Common Mistakes
HEALTH CARE QUALITY IMPROVEMENT ACT (HCQIA)
Health Care Quality Improvement Act

- Passed in 1986 as response to court decisions holding participants in peer review processes liable for damages.

- Two objectives
  - Standardize reporting of physician quality concerns;
  - Provide immunity for entities that engage in due process for physician discipline.

HCQIA Congressional Findings

- The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

- There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

- This nationwide problem can be remedied through effective professional peer review.

- The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

- There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.
HCQIA: Immunity Protection

- Generally, participants in a peer review action as well as the entity are immune from liability in damages under any law in the U.S., other than for civil rights laws, as long as the professional review action is taken:

1. In the reasonable belief that the action was in the furtherance of health care;
2. After a reasonable effort to obtain the facts of the matter;
3. After adequate notice and hearing procedures are afforded to the physician involved; and
4. In the reasonable belief that the action was warranted by facts known after such reasonable effort to obtain the facts and after the adequate notice and hearing.
HCQIA: Immunity Protection

42 U.S.C. s. 11112 (a):

“A professional review action shall be presumed to have met the preceding standards necessary for the [immunity] protection … unless the presumption is rebutted by a preponderance of the evidence.”

HCQIA: Immunity Protection

Immunity from individual claims of impacted physicians:

• Defamation;
• Anti-trust;
• Restraint of trade;
• Tortious interference;
• Breach of contract.
HCQIA: Immunity Protection

Exception to immunity: 42 U.S.C. s. 11111 (b):

If the Secretary has reason to believe that a health care entity has failed to report information [to the NPDB], the Secretary shall conduct an investigation. If, after providing notice of noncompliance, an opportunity to correct the noncompliance, and an opportunity for a hearing, the Secretary determines that a health care entity has failed substantially to report information in accordance with section 11133(a) of this title, the Secretary shall publish the name of the entity in the Federal Register. The protections of subsection (a)(1) of this section shall not apply to an entity the name of which is published in the Federal Register under the previous sentence with respect to professional review actions of the entity commenced during the 3-year period beginning 30 days after the date of publication of the name.

HCQIA: Notice and Hearing

Entity deemed to have met requirement for adequate notice and hearing if certain conditions are met (or waived by physician):

- Notice of proposed action;
- Notice of hearing;
- Conduct a fair hearing.
**HCQIA: Notice and Hearing**

Physician rights in fair hearing:

- To representation by an attorney or other person of physician’s choice;
- To have a record made of the proceedings;
- To call, examine and cross-examine witnesses;
- To present evidence determined to be relevant by the hearing officer, regardless of admissibility in a court of law;
- To submit a written statement at the close of the hearing

“A professional review body’s failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards [for immunity].”
HCQIA: Medical Staff Bylaws

• Tie due process rights under bylaws to when reports are required to the NPDB

  − The purpose of including any action that is reportable to the NPDB as part of this definition is to allow for the immunity to attach to actions that a physician might claim

  − It is also fair to provide this level of due process when a report is to be made, given the significance of a report in the NPDB to future employment prospects.
NATIONAL PRACTITIONER DATA BANK (NPDB)

NPDB

- Created by HCQIA

- Collects information on physicians and dentists, as well as other licensed professionals, related to professional competence and conduct

- Makes that information available to other entities and individuals
NPDB: Reporting Standard

• Reports required by “health care entities” which take “professional review actions that adversely affect the clinical privileges of a physician for a period of longer than 30 days” or who “accept surrender…while under investigation…or in return for not conducting an investigation or proceeding….”
NPDB: Professional Review Action

• Professional review action means an action or recommendation:
  − (1) Taken in the course of reviewing privileges;
  − (2) Based on the professional competence or professional conduct of an individual health care practitioner which affects or could affect adversely the health or welfare of a patient or patients; and
  − (3) Which adversely affects or may adversely affect the clinical privileges or membership in a professional society of the health care practitioner.

NPDB: Professional Review Action

• Professional review action excludes actions primarily based on:
  − The health care practitioner's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis;
  − Any other matter that does not relate to the competence or professional conduct of a health care practitioner.
COMMON, DIFFICULT
ISSUES PRESENTED

NPDB: Investigations

• An investigation is not defined in statute or regulation.

• Threshold issues to determine if investigation triggers report:
  – Focused on an individual practitioner;
  – Concerning the professional competence and/or professional conduct of practitioner.
NPDB: Investigations

• Fact of an investigation is not, in and of itself, a reportable event.

• But must report if:
  – accept surrender of privileges while under investigation; or
  – in return for not conducting an investigation or proceeding

NPDB: Investigations

• Investigation runs from “the start of an inquiry” until a final decision by the “decision-making authority.”

• Fact that practitioner not aware or not yet informed of investigation does not matter.
  – Investigation will still have commenced, even if no notice yet given.
NPDB: Investigations

NPDB Reporting

When to Report & When not to Report

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Scenario 11

Resignation during a “preliminary inquiry” not considered a “Formal Investigation”

- Surgeon has been the subject of numerous complaints at the Hospital by nursing staff. As a side note, surgeon was previously dating one of the OR nurses and the relationship ended poorly. The medical staff bylaws provide that the MEC can request the department chair or other designee to conduct a preliminary inquiry into complaints.
- The Chair of Surgeon initiates a preliminary inquiry by discussing the complaints with surgeon and speaking with various OR nurses. While this preliminary inquiry is ongoing, surgeon resigns from the medical staff.
NPDB: Investigations

• Considerations

− The 2015 version of the NPDB Guidebook apparently takes a broad interpretation of the term “investigation.”

− It is not clear, however, if the scenario that the director of the NPDB presented in 2012 is still valid.
NPDB: Investigations

• General Thoughts:
  − Consider including provision for a “preliminary inquiry” in medical staff by-laws to at least allow potential for argument that it is not an “investigation.”
    • Can make the determination at the time implemented if need be.
  − May allow for health systems to take advantage of opportunity to allow physician to resign without report.
NPDB: Reporting Standard

- Reports required by “health care entities” which:
  1. take professional review actions that adversely affect the clinical privileges of a physician for a period of longer than 30 days
  2. accepts surrender of privileges
     1. while under investigation…or
     2. in return for not conducting an investigation or proceeding….”

NPDB: Professional Review Action

- Professional review action excludes actions primarily based on:
  - The health care practitioner’s participation in prepaid group health plans, **salaried employment**, or any other manner of delivering health services whether on a fee-for-service or other basis;
NPDB: Professional Review Action

- Professional review action means an action or recommendation:
  - (1) Taken in the course of reviewing privileges;

NPDB: “Salaried Employment”

- Attorneys have seized on the language in the regulations which excludes actions that are primarily based on the physician’s participation in salaried employment to argue:
  - Actions taken by human resources staff based on employment are not reportable to the NPDB; and
  - Investigations conducted by the human resources staff are not investigations that trigger reporting obligations for a physician who resigns during that human resources investigation
NPDB: “Salaried Employment”

Professional Review - Alternative Employment Termination Procedure

Example: A practitioner disputed a report of the revocation of clinical privileges. The hospital has a system of professional review established under its bylaws and delivers health care services. The hospital also has an "employment termination procedure." The employment termination procedure was used by the hospital to end a practitioner’s employment without use of the professional review process. The practitioner’s privileges were revoked by the employment termination process, but no action was taken through the professional review process.

The practitioner was given no option in how the termination would occur.

Outcome: The Secretary directed that the report be voided from the NPDB since the professional review process had not been followed in terminating the practitioner’s privileges. The termination was not a professional review action.

September 2001

NPDB: “Salaried Employment”

NPDB Reporting

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Scenario 6

Contract Termination

- Radiologist employed by a hospital had an employment contract which provided that if the employment contract was terminated for any reason, her medical staff privileges at the Hospital would automatically terminate.
- Radiologist developed a history of being disruptive by yelling at nurses and a radiology technicians. After several months of employee complaints, Human Resources terminated her employment contract, citing the 90 day termination without cause provision.
- Because her employment contract was terminated the radiologist’s medical staff privileges automatically terminated and she was not offered a hearing through the medical staff bylaws.

NOT REPORTABLE – Radiologist’s privileges were automatically terminated without having been the subject of a professional review action. Her contract was terminated without cause; and, therefore, her automatic termination of privileges is not reportable.
- If the Hospital or Medical Staff initiated an investigation to look into her professional misconduct and her contract was terminated due to her professional misconduct, then her termination would have been a professional review action that is reportable.
NPDB: “Salaried Employment”

• November 2014 article in AHLA publication referenced a Dept. of Health and Human Services decision that appears to take the position that “an investigation and review performed by the hospital’s HR department and administration may constitute an ‘investigation’ for purposes of Data Bank reporting.”

No-Cause Terminations and Data Bank Reports: Does a No-Cause Termination Mean No Lawsuit? Susan O. Scheutzow Sean P. Malone Kohrman, Jackson & Krantz PLL Cleveland, OH. Available at https://www.healthlawyers.org/Members/PracticeGroups/MSCPR/Documents/MedStaff_Nov14.pdf

NPDB: “Salaried Employment”

• General Thoughts:

  - Carefully consider and fully understand the risk of relying on a human resources investigation as a means of avoiding reporting.

  - Risk is that you lose immunity under HCQIA for failing to report to NPDB for three years.
COMMON MISTAKES
Common Mistakes: General

- Not acting in short window of time before hearing process or investigation is triggered
- Not exploring negotiated report language as a means of resolving disputes
- Not plowing ahead with hearing process in face of strategies of physician to stall

Common Mistakes: Reporting

- Failing to report
- Failing to report a “summary suspension” that lasts more than 30 days.
- Not tying definition of a reportable event to a fair hearing under medical staff by-laws
- Not reporting to the state medical examining board
Common Mistakes: Hearing

- Failure to follow medical staff bylaws in fair hearing process
- Taking excessive time to schedule and hold hearing
- Not utilizing a fair hearing officer
- Not allowing physician “leeway” to ensure fairness

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Thank You

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