

GETTING PRACTICAL WITH **MEDICAL STAFF**

GOVERNANCE, CREDENTIALING & PEER REVIEW

Never Forget Fundamentals

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An Overview of Medical Staff and Peer Review Essentials

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Overview

- Significance of the "medical staff" and "medical staff bylaws"
- Significance of "peer review"
 - Legal significance of peer review
 - Peer review immunity
 - Peer review confidentiality/privilege
- Potential effects of failed peer review and future challenges
- Fostering effective peer review
- FPPE and OPPE



What Do We Mean by the Medical Staff?

- Formation required by federal and state law (and accreditation standards) for the self-governance of a hospital's health care providers
- Must be organized pursuant to Medical Staff Bylaws, with a formal leadership structure, that have been approved by the Medical Staff and the Governing Board
- The Medical Staff performs significant "peer review" functions: credentialing, quality review, corrective action, OPPE, FPPE, and others



Applicable Laws

- Health Care Quality Improvement Act of 1986
- Medicare conditions of participation
- State hospital licensure laws and regulations
- State professional licensure laws and rules
- Accrediting organization elements of performance (e.g., Joint Commission and HFAP)
- State case law
- Medical staff bylaws, rules and regulations and related policies



Medical Staff Bylaws

- Address organization and function of medical staff
- Address credentialing and membership eligibility, related requirements, and the process for credentialing
- Address quality review functions and corrective action
- Should provide a "roadmap" for "peer review" immunity and confidentiality
- Must be regularly reviewed/updated
- Should not be viewed as "one size fits all"



Medical Staff Membership & Clinical Privileges

- "Membership" is distinct from "Clinical Privileges"
 - You can be a member of the medical staff with no or limited authority (privileges) to provide health care services
 - Conversely, you can maintain clinical privileges without membership
- Rights of "membership" are category-specific and may vary substantially
- Membership and Clinical Privileges both minimally require MEC recommendation and Governing Board approval
- Recent COP guidance promotes membership of clinically privileged providers



What We Mean by "Peer Review"

- Peer review is defined (created) by state and federal law
- **Peer review is universally intended to promote thorough and candid review and, in doing so, improve "quality of care"**
- Statutes define (consistent with this purpose) pertinent aspects of peer review
 - What we call peer review (peer review committee, review organization, etc.)
 - When we must/may engage in peer review
 - Who may be a peer reviewer (composition requirement)
 - Permitted functions/subject matter
 - Procedure for peer review (credentialing, corrective action, etc.)
 - What aspects of peer review are confidential
 - Under what circumstances immunity available



What We Mean by "Peer Review"

- Peer review is much broader than taking punitive action
- Quality of care (and thus peer review) may extend to:
 - Review of qualifications (i.e., credentialing)
 - Complaints and concerns regarding competency and professional conduct (disruptive behavior)
- In addition to credentialing and corrective action, other hospital/medical staff processes may qualify as peer review:
 - Focused Professional Practice Evaluation
 - Ongoing Professional Practice Evaluation



What We Mean by "Peer Review"

- Other peer review processes continued:
 - Mortality/morbidity conferences
 - Aspects of clinical service, department, section meetings
 - Aspects of utilization review
 - Others
- Why do we care?
 - Furthering patient safety/quality of care (**paramount**)
 - Legal/regulatory compliance
 - **Confidentiality and immunity**



Peer Review Confidentiality

- Protection for "legitimate" peer review is broad and should be maximized
- Like immunity, confidentiality is intended to promote effective peer review
- Privilege typically extends to communications to and records and determinations of peer review committees
- Generally includes committees and personnel of committees
- Confidentiality is typically NOT an option
- Breach of confidentiality may lead to sanction and loss of immunity



Exceptions to Confidentiality

- Like the requirement of confidentiality, permitted uses/exceptions are dictated by state statute
- Exceptions may/may not include:
 - Physician review of peer review file
 - Original source documents
 - Peer review committee to peer review committee
 - Adverse event reporting
 - Government investigation
 - Internal business usage (e.g., employment)
- Know when you can/cannot share peer review
 - Consider sharing agreements



Peer Review Immunity

- "Immunity" is intended to promote effective peer review
- Immunity takes two general forms:
 - Immunity against damages
 - Absolute immunity
- Immunity is not a given
- State statutes generally afford immunity where peer review is conducted in good faith, which is generally presumed
- State immunity does not necessarily preclude "judicial review" or "injunctive relief"
- Federal immunity is afforded by the Health Care Quality Improvement Act (HCQIA)



Federal Immunity – HCQIA

- Provides immunity from civil damages where four requirements are met
- Requirements:
 - **"Professional review action"** taken by **"professional review body"** in furtherance of quality of care
 - Reasonable investigation of matter
 - Action taken is reasonable in light of investigation
 - Notice and hearing rights are extended to affected practitioner



Federal Immunity – HCQIA

- Courts will apply an "objective standard" in light of the "totality of circumstances"
- Bad faith irrelevant – as long as the four factors are met
- Bylaws compliance important but not sole factor
- Presumption in favor of peer review committee
- Poliner v. Texas Health System



Indiana "Peer Review Statute"

- I.C. 34-30-15-1
- Specific composition requirement for "peer review committees"
- Statute affords extensive confidentiality for process – communications, records, determinations
- Specific procedure for due process
- Statute affords extensive immunity – generally consistent with the HCQIA
 - Exception for "bad faith" (good faith presumed)



Illinois "Peer Review Statute"

- Medical Practice Act, 225 ILCS 60
- Hospital Licensing Act, 210 ILCS 85
- Requires specific due process (medical staff members)
- Statute affords extensive confidentiality where information generated as part of ongoing process
 - Courts are increasingly taking a narrow view of "ongoing process"
- Statute affords extensive immunity – arguably more extensive than the HCQIA
 - Exception for "willful and wanton misconduct"



Michigan "Peer Review Statute"

- MCL 331.531-533
- General composition requirement
- Statute affords extensive confidentiality for process
 - Recent amendments create exceptions intended to further intent of peer review
- Statute affords extensive immunity
 - Extends to "good faith" peer review



Wisconsin "Peer Review Statute"

- Wisconsin Stat. Ann. 146.37 and 146.38
- Specific reference to "peer review committees" and governing boards (broad functional requirement)
- Statute affords extensive confidentiality (includes incident reports) subject to specific exceptions
- Expressly contemplates legitimate sharing
- Statute affords extensive immunity
- Exception for "bad faith" (good faith presumed)
- Considerations: opportunity to review records, receipt of final report, fair hearing rights, presentation of evidence, right to cross-examination



Kansas "Peer Review Statute"

- Actually a series of statutes
 - Kan.Stat.Ann. § 65-442
 - Kan.Stat.Ann. § 65-4915
 - Kan.Stat.Ann. § 65-4921 through 4930
- Defined terms include (but are not limited to):
 - Health Care Providers
 - Health Care Provider Groups
 - Peer Review
 - Peer Review Committee and Peer Review Officer



Kansas "Peer Review Statute"

- Immunity from "damages or other relief" per § 65-4926
 - Available to individuals reporting or providing information to [peer review committees] or investigating on behalf of [peer review committees]
 - Must act in "good faith"
 - Exception when there is clear and convincing evidence of known false reports
- Limited liability against action for damages per § 65-442
 - Available to Board and Medical Staff Committee members
 - Extends to acts, statements, and proceedings
 - Must act in good faith and without malice



Kansas "Peer Review Statute"

- Extensive confidentiality and privilege protections
 - "Reports, statements, memoranda, proceedings, findings and other records submitted to or generated by peer review committees" are privileged
 - Limited exception when a provider contests the revocation, denial, restriction or termination of medical staff privileges
 - Limited exception when provider is subject of a licensure action
 - Limited exception for sharing with other peer review committees
 - Exception for "original source" information
 - Peer review committee "owns" the privilege
 - Standard of Care determinations and required reports are privileged and confidential



Implications of Failed Peer Review

- Failure to achieve the purpose of peer review
 - Increased risk of harm to patients
 - Increased risk of harm to colleagues and other hospital personnel
 - Missed opportunities to rehabilitate
- Financial implications
 - Decreased reimbursement
 - Loss of business
 - Cost of litigation





Implications of Failed Peer Review

- Litigation with subject physician
 - Not all errors can be corrected
 - Wrongful disclosures leading to damaged professional reputation (defamation per se)
 - Medical staff bylaws may be deemed a contract
 - Claims for "tortious interference"
 - Claims for "emotional distress"



Implications of Failed Peer Review

- Litigation with third parties
 - Workplace harassment
 - Disruptive physicians
- Compliance/False Claims/Qui Tam
 - U.S. ex rel Rogers v. Azmat, Satilla Health Services CV 507-92, S.D.Ga.
 - Concerns regarding surgeon's high complication rate allegedly ignored
 - Allegedly led to patient harm and wrongful termination of complainant



Implications of Failed Peer Review

- Professional Liability
 - Incident reports
 - Disclosures creating "admissions"
 - Disclosure defining "standard of care"
 - Disclosures satisfying requirement of "expert testimony"
- Negligent failure to disclose
 - NPDB and State reporting requirements



Fostering Effective Peer Review

- Effective Medical Staff Bylaws and related policies
 - Outline formal process ("roadmap") for review
 - Process tracks state/federal law
 - But is reasonably flexible and can be followed
- Peer review education
 - Peer review does not equal "discipline"
 - What is/is not a peer review process
 - Compliance with process
 - Sharing and using peer review information
- Effective Peer review documentation



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