

# Never Forget Fundamentals

“An Overview of Medical Staff and Peer Review Essentials”

# MEDICAL STAFF SEMINAR 2023

PRESENTED BY HALL RENDER'S MEDICAL STAFF SERVICES TEAM

**DECEMBER 7-8, 2023**

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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



# The “Medical Staff”

- Formation and organization required by all pertinent law/standards
- Has primary responsibility to the Governing Board for the quality of care provided at the Hospital
  - Credentialing and Re-credentialing
  - Ongoing Quality Review
  - Corrective Action (when required)
- Fulfills this responsibility through **multiple** different "peer review" processes (e.g., credentialing, OPPE, FPPE, corrective action, utilization review, etc.)
- Must maintain Medical Staff Bylaws (which provide a framework for these functions and other required elements)

# Applicable “Rules”

- 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, DNV, ACHC, etc.)
- Medical Staff Bylaws, rules and regulations and related policies
- State “Case Law”

# Medical Staff Bylaws

- Required by law and accreditation standards
- Must address:
  - Organization and functions of medical staff
  - Credentialing and Recredentialing
  - Quality review functions
  - Corrective Action and Fair Hearing Process
- Should (if followed) provided for "peer review" confidentiality and immunity (when applicable)
- Must be regularly reviewed/updated (typically once every 3 years)
- Must be legally compliant but should not be viewed as "one size fits all" (we will discuss further)



# What We Mean by “Peer Review”

- **Legal Significance:** “Peer Review” is defined by state and federal law
  - These definitions can be highly variable state to state
  - Purpose, though, is consistent
    - **Universally intended to promote thorough and candid review and, in doing so, improve "quality of care"**
- **Statutes define 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
- **“Case law” impacts application of these rules state to state**

# 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 and section meetings
  - Others
- Why do we care?
  - Furthering patient safety/quality of care (**paramount**)
  - Legal/regulatory compliance
  - **Confidentiality and immunity**



- General requirements to perform peer review (credentialing, quality review, etc.)
- Federal Immunity (“professional review” bodies)
- Accreditation Standards (incorporate above)
- Patient Safety/Quality Improvement Act



- General requirements to perform peer review
- Definition and requirements for lawful peer review committees
- Requirements for State Immunity
- Requirements (and obligations) for Peer Review Confidentiality



# Membership vs. Clinical Privileges

- Membership and Clinical Privileges both subject to peer review processes
- "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

# Peer Review Confidentiality

- State-Specific (except for Patient Safety Organizations)
- Protection for "legitimate" peer review is broad and should be maximized where appropriate
- 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

# 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
- Federal immunity is afforded by the Health Care Quality Improvement Act ("HCQIA")
- 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 – 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" considering the "totality of circumstances"
- Bad faith irrelevant – if the four factors are met
- Bylaw's 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 and 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



# Missouri Peer Review Statute

- **V.A.M.S. 537.035**

- A committee of “health care providers” with the responsibility to evaluate, maintain, or monitor the quality and utilization of health care services or to exercise any combination of such responsibilities
- “Health care provider” is defined broadly to include Missouri licensed: physicians, dentists, podiatrists, pharmacists, chiropractors, psychologists, nurses, social workers, professional counselors and mental health professionals
- Must be organized/authorized by hospital, medical staff, group practice or other entity/person authorized to form a PRC

# Missouri Peer Review Statute

- **Peer Review Confidentiality**

- “Average” protection
- Case law has narrowed further

- **Peer Review Immunity**

- Average Protection (when performed in good faith)
- Federal Immunity offers more objective protection

# Missouri Peer Review Statute

- “Except as otherwise provided....the interviews, memoranda, proceedings, findings, deliberations, reports, and minutes of peer review committees, or the existence of same, **concerning the health care provided any patient** are privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion...”
- “...[N]o person who was **in attendance at any peer review committee proceeding** shall be permitted or required to disclose any information acquired in connection with or in the course of such proceeding, or to disclose any opinion, recommendation, or evaluation of the committee...”  
(Emphasis added).

# Arizona “Peer Review Statutes”

- Health Care Utilization Review Committee
  - Ariz. Rev. Stat. Ann. §36-441
- Review of “Medical Practices”
  - Ariz. Rev. Stat. Ann. §36-445
- Health Care Quality Assurance Process
  - Ariz. Rev. Stat. Ann. §36-2402
- Arizona Health Care Cost Containment System
  - Ariz. Rev. Stat. Ann. §36-2917

# Arizona “Peer Review Statutes”

- Review of “Medical Practices”
  - Ariz. Rev. Stat. Ann. §36-445
- Governing Body of Hospital or Outpatient Surgical Center shall require:
  - Physicians admitted to Medical Staff
  - Organize into Committees in order to
  - Review Professional Practice (of those with privileges and those applying) for purpose of
  - Reducing Morbidity/Mortality and Improving the Quality of Patient Care
- Extensive confidentiality and immunity protections



# 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

# Questions?



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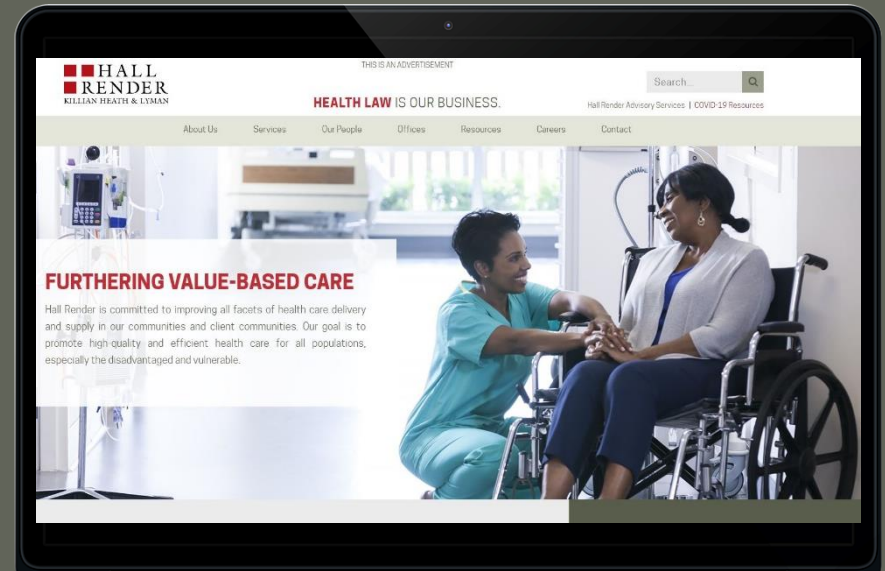
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