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?

- Required "entity" formed by federal and state law for the self-governance of a hospital's physician health care providers
- Organized by medical staff bylaws with formal leadership (officers) and committees and subject to legal processes
- Performs significant "peer review" function: Credentialing and Quality Review
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

• The medical staff bylaws are critical
• Address organization and function of medical staff
• Address credentialing and membership eligibility, requirements and processes
• Address quality review functions and corrective action
• Roadmap for "peer review" immunity and confidentiality
• May be deemed an enforceable contract
• Must be regularly reviewed/updated
• Medical staff bylaws are NOT 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
• Appointment to medical staff (membership) → Granting of clinical privileges (privileged)
• Both require MEC recommendation and governing board approval
• You can only perform and use what you've been given permission to perform and use
• Recent COP changes pertinent to other "practitioners"/scope of practice
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

• **Professional review body** means a health care entity and the governing body or any committee of a health care entity that conducts professional review activity and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

• **Professional review activity** means an activity:
  – To determine whether the physician may have clinical privileges with respect to, or membership in, the entity.
  – To determine the scope or conditions of such privileges or membership.
  – To change or modify such privileges or membership.
Federal Immunity – HCQIA

- **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 – substantial compliance
- 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"
Tennessee "Peer Review Statute"

- Tenn. Code 63-1-150 and 68-11-272
- "Quality improvement committee" of a "health care organization"
- Participants and functions construed quite liberally
- QICs may share with other QICs – absolute immunity
- Extensive confidentiality – records, testimony and statements
- General immunity when acting in good faith/without malice
  - Presumption of good faith/absence of malice
  - Person alleging bad faith/malice has burden of proving same
Alabama "Peer Review Statute"

- Alabama Code 6-5-333; 22-21-8; 34-24-58
- Expressly defines "peer review committee"
  - Members of a committee of dentists, chiropractors or physicians licensed to practice medicine in Alabama formed or appointed to evaluate the diagnosis or the performance of services of other such practitioners
  - May also mean a committee of physicians/surgeons of hospital or clinic
- Immunity for actions "without malice and in a reasonable belief that such action or recommendation is warranted by the facts made known..."
- Extensive confidentiality protections
- Separate/additional protection for accreditation and quality assurance credentialing materials
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
Minnesota "Peer Review Statute"

- Minn. Stat. 145.61-145.66
- Review Organizations
  - Flexible composition requirements/extensive functions
- Immunity
  - Unless known/should know reports to RO is false
  - Unless motivated by malice; must act "in the reasonable belief" that the action is "warranted by facts known to the person or RO after reasonable efforts to ascertain the facts"
- Confidentiality
  - Strong protection for data/information (including internet-based)
  - Particular exceptions identified (misdemeanor to violate)
Colorado "Peer Review Statute"

- Peer review is an extension of Medical/Nursing Board authority
- "Authorized entity" may establish a "professional review committee"
  - Unique registration requirement (need for strong org chart/bylaws)
- Particular composition requirements depending upon function
  - Majority of voting members must be licensed physicians (re many functions)
  - At least one voting member must be APN when APN under review
- Specific hearing and appeal rights for physicians and APNs
- Extensive confidentiality protections
  - Particular exceptions, including for licensing boards and sharing among AEs/PRCs
  - Significant reporting obligations
- Immunity – largely tracks federal immunity; no immunity when know or should know that information reported to PRC is false
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 third parties

• Negligent credentialing
  – "A hospital has a direct and independent responsibility to its patients, over and above the physicians and surgeons practicing therein, to take responsible steps to (1) ensure that its medical staff is qualified for the privileges granted and/or (2) to evaluate the care provided."

• Workplace harassment
  – Disruptive physicians

• Compliance/False Claims/qui Tam
    • Concerns regarding surgeon's high complication rate allegedly ignored
    • Allegedly led to patient harm and wrongful termination of complainant
Implications of Failed Peer Review

• Medical malpractice
  – Incident reports
  – Disclosures creating "admissions"
  – Disclosure defining "standard of care"
  – Disclosures satisfying requirement of "expert testimony"

• Negligent failure to disclose
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)
  - Breach of contract
    - Medical staff bylaws may be deemed a contract
  - Tortious interference with prospective business
  - Antitrust
  - Emotional distress claims
Fostering Effective Peer Review

• Formal process for review
  – Which 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

• Peer review documentation
  – Appropriate documentation
  – Appropriate communication, storage, use
Please visit Hall Render's blog at http://blogs.hallrender.com for more information on topics related to health care law.

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