Distinguishing Peer Review Processes: Corrective Action, FPPE, Professional Conduct and GME Due Process

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Overview

- Understanding and distinguishing:
  - Corrective Action and Fair Hearing Process
  - FPPE Process
    - Related consideration for NPDB
  - Professional Conduct Process
- Distinguishing GME due process from above

MEDICAL STAFF SEMINAR 2025

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) and other application rules, regulations, policies and procedures

Medical Staff Processes

- The Medical Staff plays a central role in the following "peer review" processes:
  - Credentialing/Recredentialing
  - Ongoing Professional Practice Evaluation
  - **Focused Professional Practice Evaluation**
  - **Corrective Action and Fair Hearing Process**
  - **Professional Conduct requirements**
- In implementing these processes, the Medical Staff will need to make peer review determinations and potentially take appropriate "action"
- **GME processes** are generally separate and distinct from Medical Staff processes

Types of Medical Staff "Action"

- Medical Staff "action" generally falls into one of the following categories:
  - Corrective Action
    - Adverse Corrective Action (aka a "professional review action")
      - Based on competency or conduct
      - Restricts the ability to exercise membership or clinical privileges
      - Examples: revocation, denial, suspension, prospective review, non-routine credentialing, others
    - Non-Adverse Corrective Action
  - Administrative Action

The “Corrective Action” Process

- The organized Medical Staff is required by federal law, state law and accreditation standards to:
  - Maintain a process that allows the Medical Staff to identify quality concerns and to take appropriate action to investigate and address these concerns
  - This process involves a formal “investigation” that may result in Non-Adverse Corrective Action **and/or Adverse Corrective Action**
- This process must be set forth in your Medical Staff Bylaws
- Should track the requirements for Federal Peer Review Immunity

The "Corrective Action" Process

- Federal law provides for immunity in the event the Medical Staff recommends and/or takes an Adverse Action (aka a "professional review action")
- Federal Immunity requires that:
  - The action be in furtherance of quality of care;
  - There was a "reasonable investigation";
  - There was a "reasonable action" resulting from the investigation; and
  - The practitioner was provided a "fair hearing"
- Your Medical Staff Bylaws outline the process for formal investigation and potential corrective action
- MEC typically drives this process and makes such recommendations

The “Fair Hearing” Process

- Also required (as noted above) for Federal Peer Review Immunity
- Except for a summary suspension, the right to a fair hearing must be extended before the Medical Staff/Hospital can impose “adverse action”
  - Minimum (safe harbor) requirements for the fair hearing and related notices/rights are set forth in the Federal Health Care Quality Improvement Act
  - This process must also be addressed in the Medical Staff Bylaws
- HCQIA permits up to 14 days of summary action (when threshold is met) before a hearing must be offered in relation to a summary action (except where state requirements are more stringent)

The FPPE Process

- Focused Professional Practice Evaluation is a more recent requirement
- Established by Joint Commission (2008)
  - MS.08.01.01 – "The organized medical staff defines the circumstances requiring monitoring and evaluation of a physician's or other licensed practitioner's professional performance."
  - Two types of FPPE:
    - Routine evaluation for new or additional clinical privileges; and
    - Evaluation of practitioner performance when "issues affecting the provision of safe, high quality patient care are identified."

The FPPE Process

- The Medical Staff is required to develop a policy for FPPE
- With respect to FPPE for performance concerns, JC requires:
  - The triggers that indicate the need for performance monitoring are clearly defined (triggers can be single incidents or evidence of a clinical practice trend)
  - The decision to assign a period FPPE is based on the evaluation of a physician's or other licensed practitioner's current clinical competence, practice behavior, and ability to perform the requested privilege
  - Criteria are developed that determine the type of monitoring to be conducted
  - The measures employed to resolve performance issues are clearly defined
  - The measures employed to resolve performance issues are consistently implemented

The FPPE Process

- Accordingly, FPPE generally involves:
  - A period of focused review or monitoring to evaluate the concern; and
  - Depending upon the findings, initiating measures to address the concern (aka "corrective action")
- As noted above, corrective action may involve "adverse action" and/or "non-adverse action"
- However, as also noted above, the Medical Staff must offer fair hearing rights before "adverse action" can be implemented
- Therefore:
  - The committee responsible for conducting FPPE (if not the MEC) may be permitted to implement non-adverse action (ideally with report to MEC), but must typically submit any recommendations for adverse action to the MEC in the form of a "Request for Corrective Action"
  - The MEC would then vet the request and consider a formal investigation, which my lead to a recommendation for adverse action

Does “FPPE” constitute an “investigation”?

- Two general schools of thought in relation to FPPE
- Consistently document the preferred approach/intent
- Terminology matters
- Apply the policy/approach consistently
- Considerations for reporting when NPDB reporting is not implicated

Investigations

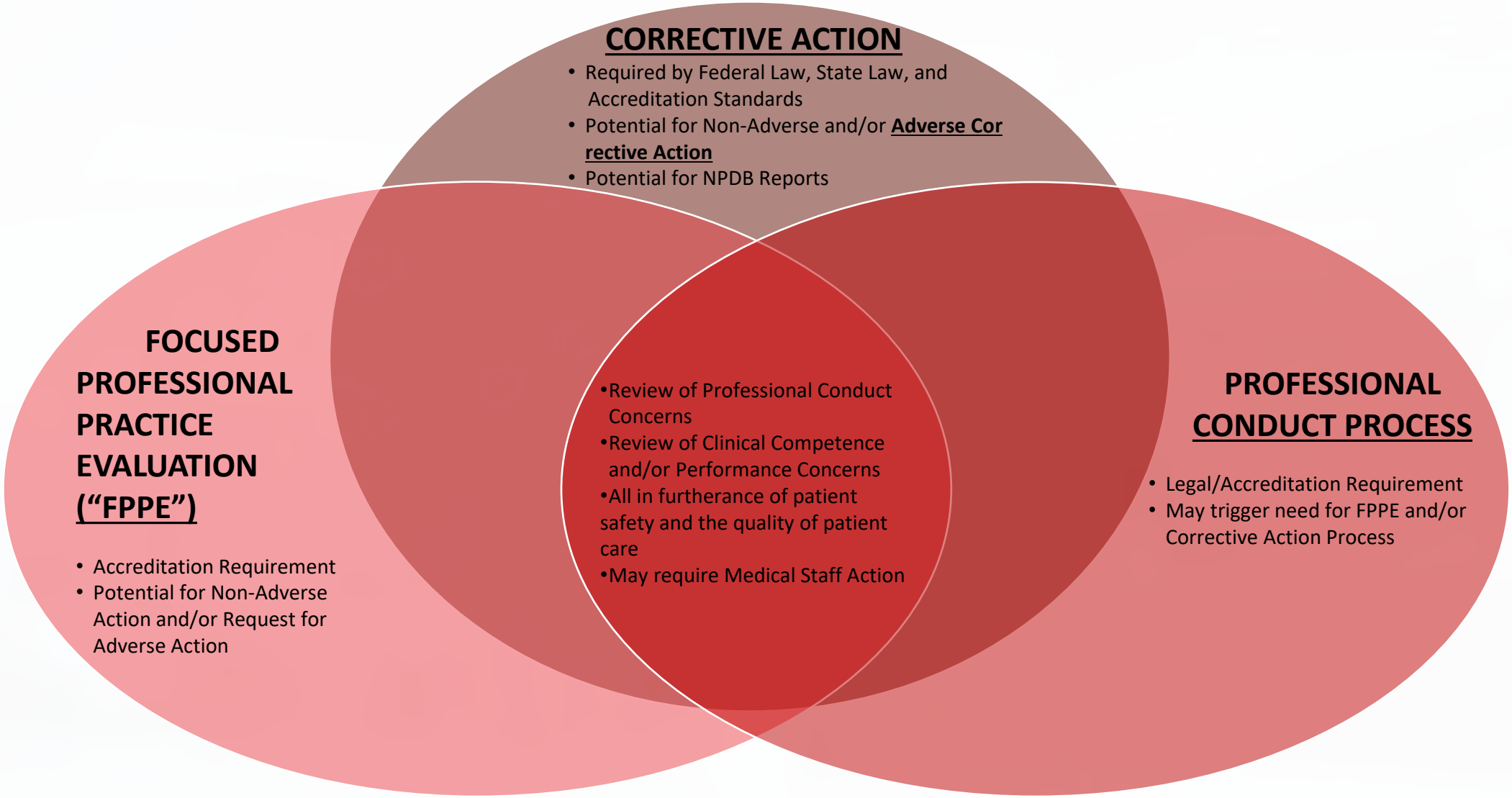
- NPDB Guidelines:
  - The pertinent Bylaws/Policy may define “investigation” – doing so is instructive but not dispositive
  - The investigation must be focused on the practitioner in question
  - The investigation must concern the professional competence and/or professional conduct of the practitioner in question
  - The activity generally should be the precursor to a professional review action
  - An investigation is considered ongoing until a final action or formal closure
  - A routine review of a particular practitioner is not an investigation

Professional Conduct Process

- In addition to the Corrective Action process and the FPPE process, most hospitals maintain a **Professional Conduct Policy/Process**
- Many of these processes originated in response to Joint Commission's attention on Disruptive Behavior
  - 2008 JC Sentinel Event Alert
  - 2009 accreditation standards that became effective on January 1, 2009.
  - The new requirements (in part) mandated that accredited healthcare organizations:
    - Develop a code of conduct that defines acceptable and inappropriate behaviors
    - Create and implement a multi-step process for managing disruptive and inappropriate behaviors
  - Other accreditation bodies followed suit
  - Consideration of professional conduct also inherently required by law

Professional Conduct Process

- Importantly, as an initial matter:
  - Be aware of these policies and the related procedures?
  - Do they remain accurate/current?
  - Can you follow the process?
    - Avoid requirements for “periodic expungement”
    - Consider flexibility/use of “guidelines”
      - Focus on what is/is not acceptable behavior
      - Consider broadly – is not strictly limited to behavior within the hospital
- Consider how this process will interact with Corrective Action and FPPE processes
- Like with FPPE, a committee responsible for addressing professional conduct cannot unilaterally take “Adverse Action”
  - As with FPPE, this would need to be referred to the appropriate committee (usually the MEC) as a request for corrective action.


CORRECTIVE ACTION
• Required by Federal Law, State Law, and Accreditation Standards
• Potential for Non-Adverse and/or Adverse Corrective Action
• Potential for NPDB Reports
FOCUSED PROFESSIONAL PRACTICE EVALUATION ("FPPE")
• Accreditation Requirement
• Potential for Non-Adverse Action and/or Request for Adverse Action
•Review of Professional Conduct Concerns
•Review of Clinical Competence and/or Performance Concerns
•All in furtherance of patient safety and the quality of patient care
•May require Medical Staff Action
PROFESSIONAL CONDUCT PROCESS
• Legal/Accreditation Requirement
• May trigger need for FPPE and/or Corrective Action Process

Resident Disputes and Terminations

- ACGME
  - The Sponsoring Institution must have a policy that provides residents/fellows with due process relating to the following actions regardless of when the action is taken during the appointment period: suspension, non-renewal, non-promotion; or dismissal. Institutional Requirements, 2025, Section 4.4.b.
    - Appeal Rights – due process - stated in the policy.
    - Clear and simple rules and rights recommended.
- Termination of Employment.
  - No right of appeal exists for employees.
  - Need to coordinate the employment termination with the resident's exercise of due process rights.

Residents are generally not members of the medical staff

- Here “residents” refers to all levels of learners: residents, interns and fellows
- The Medical Staff due process does not apply to actions against residents while they are in training. Medical staff due process likely applies to residents who moonlight, since moonlighting is not GME training
- The residents are subject to the policies and procedures of the Sponsoring Institution who is responsible for the GME program
- In many settings, the Sponsoring institution is not the organization that is the teaching hospital.

GME Due Process

- The Sponsoring Institution needs to have a policy on due process rights
  - The ACGME's requirements are stated generally, so the simpler the process the better
  - The Sponsoring institution appeal process is along side but different than the resident's employment. Often time, the resident is employed by an entity that is not the teaching hospital and not the entity that holds the ACGME Sponsoring Institution status
- Termination of Employment.
  - No right of appeal exists for employees, but appeal rights do exist for residents under the ACGME requirements
  - When a resident is suspended, non-renewed, non-promoted or dismissed, the employment status needs to be in effect put on hold pending completion of the GME due process
  - If, for example, the decision to terminate the resident from the program is upheld, then the end of employment can occur, in the same manner as any other terminated employee, i.e. continuation of benefits under COBRA and possible future employment litigation

Due Process for Termination

- A due process is required, but there is nothing like HCQIA that applies
- There is also nothing like the potential federal immunity under HCQIA that applies to residents
- Keep the process fair but simple. No need to allow the terminated resident to be represented by counsel (recommend you do not allow counsel), but allowing another physician to assist (but not speak) during the hearing is common
- Smaller hearing panels can be more manageable, and there is no requirement to have another resident as a member of the panel – recommend against it
- Keep the hearing limited in time (3 hours or less), and make sure someone has clear authority to keep the proceedings on track. May be a member of the panel or just an officiating person
- The appeal committee could be a recommendation to the DIO or CEO, for that person to make the final decision. No further appeals after that
- The CCC (Clinical Competency Committee) should also be kept well away from the due process setting

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Questions?

For more information on these topics visit hallrender.com.

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