

GETTING PRACTICAL WITH **MEDICAL STAFF**

GOVERNANCE, CREDENTIALING & PEER REVIEW

National Practitioner Data Bank

National Practitioner Data Bank

Adverse Clinical Privileging Actions and Guidebook Updates

Presented by
Christopher C. Eades, Esq.
Hall, Render, Killian, Heath & Lyman, P.C.



Overview

- Reluctance to Report
- NPDB in the News
- Obligation to Report (a brief review)
 - Final Adverse Clinical Privileging Actions
 - Surrender of Clinical Privileges
- NPDB Guidebook Updates



National Practitioner Data Bank

- In addition to immunity for professional review activities, HCQIA also created the "National Practitioner Data Bank" (NPDB)
 - **A central repository of actions against a physician's clinical privileges, medical malpractice and licensure actions**
 - **Objective: To ensure information regarding the physician's history regardless of where he/she relocates**
- Hospitals must query the NPDB prior to granting or renewing a physician's clinical privileges as part of the credentialing process
- Hospitals must also report various professional review actions to the NPDB with a copy to state licensing boards
- **Immunity available for factually accurate reporting**



Reluctance to Report

- Despite increased emphasis on quality/outcomes, organizations remain reluctant to report
- Why?
 - Human Nature
 - Perception of NPDB Reports
 - Fear of Litigation
 - Cost of Litigation
 - Human Nature
- NPDB reporting continues to have a disproportionate effect on quality review/corrective action



NPDB in the News

- "A Surgeon So Bad It Was Criminal"
(www.propublica.org)
- NPDB Attestation Requirement
 - Every two years when renewing
 - "Attesting Official" who can attest on behalf of organization
- Negligent Credentialing/Negligent Misrepresentation
 - Separation/Settlement Agreements
 - NPDB may = legal duty



What Is Reportable?

- Medical Malpractice Payments
- Adverse Actions
 - Licensure actions
 - **Clinical privilege actions**
 - Professional society membership
- Medicare and Medicaid Exclusions
 - Mandatory for all practitioners
- DEA Actions
 - Mandatory for all practitioners
- Health care fraud convictions
- Other actions/determinations potentially bearing on competency



Focus: Clinical Privilege Actions

- Includes Medical Staff Membership
- Two buckets:
 - **Professional review actions** that adversely affect a physician's or dentist's clinical privileges for a period of more than 30 days
 - Accepting a **surrender or restriction of clinical privileges** while under investigation for possible incompetence or improper professional conduct or in return for not conducting an investigation

*Fact and scenario specific



Professional Review Actions

- A professional review action is:
 - Based on professional competence or professional conduct
 - That adversely affects, or could adversely affect, the health or welfare of a patient
- Typically include: Denials, restrictions, revocations, reductions, summary suspensions, non-routine proctoring requirements, etc.
- Typically do not include:
 - Withdrawal of initial application prior to final action
 - Administrative actions



Professional Review Actions

- A professional review action is:
 - Based on professional competence or professional conduct
 - That adversely affects, or could adversely affect, the health or welfare of a patient
- Typically include: Denials, restrictions, revocations, reductions, summary suspensions, non-routine proctoring requirements, etc.
- **GUIDEBOOK UPDATE: Proctoring**
 - "If, for a period lasting more than 30 days, the physician or dentist cannot perform certain procedures **without proctor approval or without the proctor being present and watching** the physician or dentist, the action constitutes a restriction of clinical privileges and must be reported." (Emphasis added)



Professional Review Actions

- Other common circumstances/questions:
 - Multiple Adverse Actions
 - Temporary Clinical Privileges
 - Residents and Interns
 - Drug/Alcohol Treatment
 - Summary Suspensions



Professional Review Actions

- **GUIDEBOOK UPDATE: Length of Restriction**

- The NPDB has consistently interpreted "adversely affects" to mean the impact of the restriction, not the manner in which the restriction is written
- If a physician's or dentist's privileges are adversely affected for longer than 30 days, the restriction must be reported, regardless of how the health care entity writes the restriction
- **Walker v. Memorial Health System of East Texas (E.D. Texas)**
 - "[W]hether a proctoring sanction is reportable should be established by the terms of the sanction at the time it is delivered, not by whether, in fact, it takes more than 30 days to satisfy the requirement."



Surrender of Clinical Privileges

- Investigations are generally not reported to the NPDB
- But, a voluntary or involuntary surrender, restriction or failure to renew clinical privileges while under investigation or in return for not conducting an investigation is reportable
- So what is an "investigation"?



Investigations

- NPDB interprets the word "investigation" expansively.
- NPDB "may look at a health care entity's bylaws and other documents for assistance in determining whether an investigation has started or is ongoing, but it retains the ultimate authority to determine whether an investigation exists."
- "An investigation begins as soon as the health care entity begins an inquiry and does not end until the health care entity's decision-making authority takes a final action or makes a decision to not further pursue the matter."



Investigations

- "A routine, formal peer review process under which a health care entity evaluates, against clearly defined measures, the privilege-specific competence of all practitioners is not considered an investigation for the purposes of reporting to the NPDB. However, if a formal, targeted process is used when issues related to a specific practitioner's professional competence or conduct are identified, this is considered an investigation for the purposes of reporting to the NPDB."



Investigations

- "A health care entity....should have evidence of an ongoing investigation at the time of surrender, or evidence of a plea bargain. The reporting entity should be able to produce evidence that an investigation was initiated prior to the surrender of clinical privileges by a practitioner."
- "Examples of acceptable evidence may include minutes or excerpts from committee meetings, orders from hospital officials directing an investigation, or notices to practitioners of an investigation (although there is no requirement that the health care practitioner be notified or be aware of the investigation)."



Investigations

- Guidelines for investigations:
 - The term "investigation" is not controlled by how that term may be defined in a health care entity's bylaws or policies and procedures
 - 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 or general review of cases is not an investigation
 - A routine review of a particular practitioner is not an investigation



Investigations

- Case study #1:
 - Concern expressed regarding physician's surgical skills – that physician takes too long to perform surgeries
 - Conflicting reports
 - FPPE initiated to determine existence and/or extent of concern
 - FPPE includes requirement that all of the physician's surgeries over the next 60 days be monitored/observed by another surgeon
 - Is this reportable to the NPDB?



Investigations

- What does all of this mean?
 - Remains important to identify intent and process in the Medical Staff Bylaws and any related policies
 - Ensure these processes line up with the more traditional corrective action process
 - Be deliberate regarding what "standard criteria" is used for "routine review"
 - Be deliberate in terminology used in communications to practitioner, as well as in minutes and other pertinent internal documentation
 - Do not forget to identify when investigations come to an end



Non-Exercise of Clinical Privileges

- Case study #2:
 - Significant concern expressed regarding physician's performance due to potential impairment
 - Potential summary suspension implicated
 - Physician is approached regarding concern and volunteers not to exercise his/her clinical privileges while the matter is investigated
 - Investigation lasts longer than 30 days
 - Is the non-exercise of clinical privileges reportable to the NPDB?



NPDB Guidebook Update – Q/A

- Is an agreement not to exercise privileges during an investigation, without actually surrendering the privileges, a resignation while under investigation that is reportable?



NPDB Guidebook Update – Q/A

- Yes, the agreement not to exercise privileges is reportable if other reportability conditions are met...An agreement not to exercise privileges is a restriction of privileges. Any restriction of privileges while under investigation, temporary or otherwise, is considered a resignation and must be reported



Non-Exercise of Clinical Privileges

- Case study #3:
 - Significant professional conduct issues are identified during the recredentialing process
 - Physician vehemently disputes these concerns
 - MEC investigates and recommends non-renewal due to a longstanding pattern of poor behavior (there is no summary suspension)
 - Notice of hearing rights is sent to physician
 - Physician timely requests a hearing
 - Physician's membership and clinical privileges lapse prior to final outcome of the hearing process
 - Is this lapse reportable to the NPDB?



NPDB Guidebook Update – Q/A

- Is a report required when clinical privileges lapse at the end of a two-year appointment because there has been a recommendation by the Medical Executive Committee that the physician not be reappointed, but the physician's current two-year appointment ends before a hearing can be held and final action taken by the hospital's governing body?



NPDB Guidebook Update – Q/A

- **Yes. A non-renewal while under investigation is reportable to the NPDB. In this scenario, the investigation is ongoing at the time the renewal lapses; therefore, the non-renewal is reportable as a resignation of privileges while under investigation. The practitioner's awareness that an investigation is being conducted is not a requirement for filing a report with the NPDB.**



NPDB Guidebook Update – Q/A

- Is a leave of absence while under investigation considered to be a resignation of privileges that is reportable?



NPDB Guidebook Update – Q/A

- ...To the extent a leave of absence restricts a practitioner's ability to exercise privileges, it is considered a surrender that is reportable. If a practitioner can take a leave of absence without affecting his or her privileges and his or her privileges remain intact during the leave of absence, the leave of absence is not reportable to the NPDB.



NPDB Guidebook Update – Q/A

- When does the review of an application for reappointment become an investigation if the physician resigns before final action is taken on the reappointment application? For example, if a physician discloses on an application for reappointment that she has been a defendant in three malpractice cases during the last two years and the credentials committee requests additional information about the cases, has an ongoing "routine review" become an "investigation"?



NPDB Guidebook Update – Q/A

- It depends...if all practitioners are automatically or routinely asked for additional information when they are defendants in a certain number of malpractice cases, this type of request probably would not be considered an investigation...
- However, if officials at the reappointing hospital had specific concerns about this practitioner's competence based on the number or severity of the medical malpractice cases, then the inquiry appears to deviate from routine review and be focused on a particular practitioner and concerns competence and conduct issues. In this situation, the activity may be seen as an investigation, and, if so, the resignation would be reportable.



NPDB Guidebook Update – Q/A

- Is a resignation while subject to a "quality improvement plan" a resignation while under investigation? A quality improvement plan might include a limit on the number of patients a physician can have in a hospital at a time or a requirement that all surgical cases be discussed with the physician's department chair in advance of surgery.



NPDB Guidebook Update – Q/A

- Imposition of a quality improvement plan raises two issues with respect to reportability.
- First, a quality improvement plan may restrict a practitioner's clinical privileges. If so, and if the restriction is the result of a professional review action, concerns the practitioner's professional competence or conduct and is in place longer than 30 days, the plan may be reportable.
- Second, if...the quality improvement plan is focused on one practitioner for competency concerns and...such plans typically lead to a professional review action...then a resignation while under the plan would be reportable.



NPDB Guidebook Update – Q/A

- Is the requirement that a surgeon operate only with a qualified first assistant a restriction of privileges?



NPDB Guidebook Update – Q/A

- It depends. If all new surgeons are required to operate with a qualified first assistant, such as when the surgeons first receive privileges at a hospital, imposition of this requirement would not be a restriction of privileges that is reportable. However, if the requirement is imposed on one specific surgeon, is a professional review action about professional competence and conduct and runs more than 30 days, the action would be reportable as a restriction of clinical privileges.



NPDB Guidebook Update – Q/A

- How should a hospital report to the NPDB when an adverse clinical privileges action it took against a practitioner is changed by court order?



NPDB Guidebook Update – Q/A

- ...[T]he hospital should report the initial adverse action; the hospital should then report the judicial decision as either a revision or a void.
- For example, if a hospital revoked clinical privileges and a judicial appeal resulted in the court modifying the discipline to suspension of clinical privileges for six months, the hospital would be required to report both its initial revocation (as an Initial Report) and the court-ordered revision to suspension (as a Revision-to-Action Report). If the court overturned the hospital's decision, the hospital should void the Initial Report.



Final Thoughts...

- Consider the increasing risk related to reporting failures
 - Which lawsuit would you prefer to defend?
- Consider language in Bylaws/Policies to clarify process and reduce risk
- Recognize reporting obligations before you initiate an investigation or take adverse action
- Be careful with separation/settlement agreements
 - NPDB reports are not "consideration"



GETTING PRACTICAL WITH **MEDICAL STAFF**

GOVERNANCE, CREDENTIALING & PEER REVIEW



Please visit the Hall Render Blog at blogs.hallrender.com for more information on topics related to health care law.

Christopher C. Eades
317.977.1460
ceades@hallrender.com

HEALTH LAW
IS OUR BUSINESS.
Learn more at hallrender.com.

**HALL
RENDER**
KILLIAN HEATH & LYMAN

