Conducting an Effective Peer Review Investigation

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KILLIAN HEATH & LYMAN
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Christopher C. Eades
Attorney
Hall , Render, Killian,
Heath & Lyman, P.C.
ceades@hallrender.com
(317) 977-1460

Disclosure Statement

The speakers for this program DO NOT have a financial interest/arrangement or affiliation with one or more organizations that could be perceived as a real or apparent conflict of interest in the context of the subject of this presentation.

Agenda

- What we mean by “Corrective Action” and “Fair Hearing”
- Contrasting NPDB Reporting Obligations
- Best Practice for Effective Investigations
- Considerations for Reasonable Action
- Brief Case Study

What Do We Mean by “Corrective Action”?

- Hospital and Medical Staff are required by federal law, state law and accreditation standards to engage in quality review and, when appropriate, take “corrective action”
- Corrective action is not “routine review” but may result from routine review
- Corrective action is a formal process to address clinical and/or behavioral concerns

What Do We Mean by "Fair Hearing"?

- Due Process (right to challenge) extended prior to taking a "professional review action"…**or as otherwise required by the Bylaws**
- Accreditation standards require fair hearing and appeal
- Federal law requires particular hearing rights be afforded in order to achieve Federal Peer Review Immunity
  - Physicians/Dentists vs. AHPs
- Whether or not an action triggers fair hearing rights is similar to, but not the same as, the criteria for reporting an action to the NPDB

When are Hearing Rights Triggered?

- Three types of "action"
  - Administrative Action
  - **Non**-Adverse Corrective Action
  - Adverse Corrective Action
- Health Care Quality Improvement Act:
  - A "professional review action" means an "action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, **which is based on the competence or professional conduct of an individual physician** (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which **affects (or may affect) adversely** the [membership or clinical privileges] of the physician…." (emphasis added)
  - Unlike NPDB reporting obligations, there is no minimum time requirement

When are Hearing Rights Triggered?

- Health Care Quality Improvement Act:
  - "**Adversely affecting**" generally **includes**:
    - reducing, restricting, suspending, revoking, denying or failing to renew clinical privileges or membership…"
    - non-routine proctoring requirements and/or prospective review
    - requiring additional education or training before a practitioner is permitted to exercise a privilege(s)
    - Other actions that effectively restrict membership or privileges
  - "**Adversely affecting**" generally does **not** include:
    - administrative actions
    - lapse of temporary privileges
    - Routine review (OPPE, FPPE for new/additional privileges, etc.)

When are Hearing Rights Triggered?

- Limited Exception made for Summary Suspensions
  - A summary suspension is not a “final action”
  - A summary suspension is a temporary remedy when there is a determination that the failure to take immediate action may result in imminent danger to the wellbeing of patients or other individuals
  - A summary suspension that is in place for fourteen (14) days or less does not require that hearing rights be extended
  - A summary suspension longer than fourteen (14) days does require hearing rights

When are actions reportable to NPDB?

- Adverse Actions of a duration longer than 30 days
  - Per NPDB, 30 days related to completion of action (not notice)
  - Example: Proctoring
- Resignation of Membership or Clinical Privilege(s) during or to avoid an investigation
  - What is an investigation?
  - FPPE vs. investigation?
- Common exceptions:
  - Initial applicant withdrawals
  - Temporary Privileges/Locum Providers

Federal Peer Review Immunity

- The elements for Federal Immunity should be your guide:
  - Action taken in furtherance of quality of care
  - **Reasonable Investigation**
  - Reasonable Action (based upon reasonable investigation)
  - Due Process ("Fair Hearing") when recommendation is for Adverse Action
- Most mistakes we see related to the Investigative Process

Investigative Process

Best Practices and Lessons Learned

Best Practices / Lessons Learned

- ***Make clear distinctions between Medical Staff and Human Resources processes when both are potentially involved*.**
  - Is this an employed provider?
  - Consider the risks/benefits of each process (when there is an option)
  - Consider need to maintain peer review confidentiality
  - When investigating, avoid comingling the processes
    - Be careful regarding joint interviews where Medical Staff representatives and Human Resources staff are both present and jointly conducting interviews and investigation.
    - **Avoid** documents that are drafted and signed by both the Medical Staff and Human Resources.

Best Practices / Lessons Learned

- ***When circumstances permit, <u>before</u> embarking on a "formal investigation" consider the following:***
  - Consider any employment/contractual implications (above)
  - Review the relevant process(es)
    - What notices are required?
    - What time deadlines are required?
      - Direct quote from a Complaint: "Action is supposed to be taken within 14 days to avoid a reportable event to State licensing bodies and the National Practitioner Data Bank. (NPDB). All recommendations and actions are to be held in abeyance until the matter is adjudicated per the Bylaws."
  - Consider actual or potential conflicts of interest
  - Consider any overlapping committee roles
    - (Example: MEC members who also serve as Board members)
  - Consider what should/should not be communicated to other committees (subject to confidentiality requirements)

Best Practices / Lessons Learned

- ***Identify what initial documents and witnesses should be part of the investigative process.***
  - It is critical to build an investigative file.
  - The records from interviews, case reviews, and committee discussion should ultimately form the basis for a final report.
  - Consider prior related “reviews” or “investigations” that can be incorporated in order to avoid duplication of effort
    - Example: FPPE preceding Formal Investigation
  - Appoint an appropriate point-person to assist in driving the investigation forward

Best Practices / Lessons Learned

- ***Consider the need and/or value of external peer review.***
  - Potential to avoid allegations of bias and/or alleged conflict of interest
  - Be deliberate in selecting the external reviewer
    - Qualifications/CV
    - Availability/Means of Interacting/Potential Role (include testimony?)
    - Considerations for External Review Agreements
  - Be deliberate in what issues/questions are provided to the external reviewer (and manner of delivery)
  - Be clear on what is required in terms of deliverable
  - As applicable, share the results of the external review with the subject provider and request a response
  - Contemplate the need for further review by the external reviewer

Best Practices / Lessons Learned

- ***Obtain written responses to specific cases and events as often as possible*.**
  - During a committee's investigation, make specific written request for written responses.
  - Providers frequently do not consider these requests legitimate, or they are viewed as a nuisance request by non-expert committee members.
  - Excerpt from written response to MEC: "I will also recommend to involve Dr. [non-MEC member] in future in these discussions instead of me explaining all the basic details of interventional cardiology to peer review committee."
  - Excerpt from a provider: "I am writing this letter for the possibility of forgiveness for my errors which were not intended to harm anyone."

Best Practices / Lessons Learned

- ***Consider what Bylaws, Rules and Regulations, Policies and/or Procedures have been violated*.**
  - During a committee's investigation, make specific written request for written responses.
  - Providers frequently do not consider these requests legitimate, or they are viewed as a nuisance request by non-expert committee members.
  - Excerpt from written response to MEC: "I will also recommend to involve Dr. [non-MEC member] in future in these discussions instead of me explaining all the basic details of interventional cardiology to peer review committee."
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Best Practices / Lessons Learned

- ***Get reports and meeting minutes into <u>FINAL</u> form.***
  - Spreadsheets identifying case reviews, meeting presentations, meeting minutes and committee reports typically begin as drafts.
  - Strive to have final versions marked as part of the investigation materials.
  - Be truthful/accurate, but also deliberate, regarding content of meeting minutes in relation to peer review immunity
  - Consider consultation with your in-house counsel in relation to the form of the meeting minutes/requisite written notices and communications

Reasonable Action

Best Practices and Lessons Learned

Considerations for Taking "Reasonable Action"

- Consider need for summary suspension/restriction at outset of investigation or any time thereafter
- Mistakes are frequently made with summary suspension
  - Is appropriate mechanism to take professional review action prior to hearing
  - May trigger accelerated hearing process (after 14 days per HCQIA)
  - Timing and record is critical
  - "Recommendations" for final actions are **NOT** summary actions
  - Be careful with how you process/address the “voluntary non-exercise” of clinical privileges

Considerations for Taking "Reasonable Action"

- Action should correlate with degree of concern
- Is action intended to discipline, rehabilitate or both?
  - Be very clear on this point
  - The earlier the intervention, the greater the chance to rehabilitate
- Has prior action been taken?
- When taking lessor action, consider the potential for future action
  - "Last Chance Agreements" vs. "Final Warning"
- Action should be consistent with prior similar cases/practitioners (discrimination not subject to immunity)

Case Study

- Independent Orthopedic Surgeon is observed on multiple occasions over past three months acting in an “unusual” manner.
  - Has seemed “confused” during a few recent cases
    - Unusual intraoperative pauses/asked for incorrect surgical instrument
    - Longer surgery times in these cases than usual
  - Forgot a patient’s name last week
- There have been two significant clinical events reported in the past two months.
  - 78-year-old patient death following elective hip replacement
  - Loose hardware following hip replacement
- OR Manager relays above information to the Department Chair.
- Department Chair promptly reports these concerns to MEC at its next meeting.
- **What should MEC do?**

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- Department Chair promptly reports these concerns to MEC at its next meeting.
- **What should MEC do?**
- **What if Surgeon is employed by the Hospital? Should this alter MEC’s approach?**

MEDICAL STAFF SEMINAR 2025

Questions?

Contact Us

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