

# GETTING PRACTICAL WITH **MEDICAL STAFF**

**GOVERNANCE, CREDENTIALING & PEER REVIEW**

Implementing an Effective  
Corrective Action Process

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# Implementing an Effective Corrective Action Process

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# Overview

- Understanding "Corrective Action" v. "Peer Review"
- Understanding the purpose of Corrective Action
- Overview of the Legal Framework impacting the implementation of Corrective Action
- Best practices for choosing an effective Corrective Action



# 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
- "Corrective Action" vs. "FPPE"



# 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
- Indiana state law requires hearing and appeal
- 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?

- 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 clinical privileges, or membership in a professional society, of the physician" (emphasis added)



# 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 (Federal Peer Review Immunity and as provide by Bylaws)
  - 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





# Medical Staff Bylaws – A Roadmap to Immunity

- Medical Staff Bylaws (and related processes) are written intentionally to comply with the legal and accreditation requirements
- These processes provide a "road map" intended to assist the Medical Staff to:
  - ensure legal compliance;
  - lead to more consistent results; and
  - satisfy the requirements for peer review confidentiality and immunity



# Federal Peer Review Immunity

- Remember the elements for Federal Immunity:
  - 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



# Considerations for a "Reasonable Investigation"

- **Before** you embark on investigation:
  - Conduct "preliminary review" (potential impact for NPDB)
  - Consider/remind members of regarding confidentiality and consequences of violating
  - Review bylaws/process and discuss requirements for compliance and immunity
  - Address any concerns regarding conflict of interest/bias
  - Is this an employed practitioner? Should administration and/or Human Resources be involved? Will this matter be addressed through employment? Has it previously been addressed through employment?



# Considerations for a "Reasonable Investigation"

- Then proceed with investigation...
  - Consider nature of concern: isolated event, trend or both – outline and conduct investigation accordingly
  - Actually review relevant documents/history
  - Meet with relevant individual witnesses and promptly record relevant recollections/testimony
  - Consider what bylaws, policies, rules, etc. have been violated
  - Consider Bylaws requirement for **Notice of Investigation**
    - Carefully consider scope of investigation
    - Permit the practitioner a meaningful opportunity to respond



# Considerations for a "Reasonable Investigation"

- Consider need for external peer review
  - The Bylaws should contemplate a process for external peer review
  - Clarify parameters for engaging external review
  - Consider qualifications and practice of external reviewer
  - Consider any potential bias or conflict of interest
  - Consider general availability/accessibility of reviewer



# Considerations for a "Reasonable Investigation"

- Consider need for external peer review (cont.)
  - Consider sample size for review – with input from external peer reviewer
  - Carefully consider the issues/questions to be addressed by the external reviewer
  - Establish whether you may need the external peer reviewer to testify or otherwise further participate in the peer review process



# Considerations for a "Reasonable Investigation"

- Consider relative advantages/disadvantages of internal vs. external review
  - Availability of necessary expertise
  - Time commitment for review
  - Concerns with bias or "rubber-stamping"
  - Importance of hospital-specific knowledge or processes
  - Inability to reach consensus



# Considerations for a "Reasonable Investigation"

- Once you have reviewed documents/met with witnesses, then conduct a meaningful meeting with subject practitioner and document accordingly
- Provide sufficient notice of concerns/issues (multiple communications may be required)
- Consider requesting written response from practitioner
- Consider need to conduct further investigation (potential for additional external review) depending on practitioner response
- Peer Review Record should demonstrate a clear attempt to determine relevant facts





# 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



# 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)



# Fair Hearing Process: Required Elements for HCQIA Immunity

**\*\*\*Requirements for Federal Peer Review Immunity or as otherwise required by the Bylaws**

- **Notice of proposed action:**
  - That a professional review action has been proposed to be taken against the physician
  - Reasons for the proposed action
  - That the physician has the right to request a hearing on the proposed action
  - Any time limit (of not less than 30 days) within which to request such a hearing
  - A summary of the rights in the hearing



# Required Hearing Elements

- **Notice of Hearing** (if timely requested by practitioner) stating:
  - The place, time and date of the hearing, which date shall not be less than 30 days after the date of the notice; and
  - a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body
- Hearing must be held before an arbitrator, hearing officer or panel of individuals appointed by the entity and that are not in direct economic competition with the physician involved



# Required Hearing Elements

- Hearing may be forfeited if the physician fails, without good cause, to appear
- In the hearing, the physician involved has the right:
  - To representation by an attorney or other person of the physician's choice
  - To have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof
  - To call, examine and cross-examine witnesses



# Required Hearing Elements

- To present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law
- To submit a written statement at the close of the hearing
- Upon completion of the hearing, the physician involved has the right:
  - To receive the written recommendation of the arbitrator, officer or panel, including a statement of the basis for the recommendations
  - To receive a written decision of the health care entity



# Required Hearing Elements

- In addition to initial hearing right, accreditation standards and most state laws (including Indiana) require right to appeal to Governing Board
- Governing Board takes Final Action after right to appeal is exhausted
- Appeal should focus on process compliance and availability of evidence to support recommendation



# Fair Hearing Process: Additional Considerations

- Distinguish potential "conflict of interest" from "direct economic competition"
- Outline mechanism for Hearing Committee nomination and opportunity/timeframe for objection
- Consider/address practitioner refusal to accept service
- Consider when attorneys (outside of hearing process) are/are not permitted to participate





# Fair Hearing Process: Additional Considerations

- Outline simple framework for the exchange of relevant information (specifically relied upon) prior to fair hearing
  - Do not give access to "all" hospital documentation, etc.
  - Is not intended to be "discovery" as in general litigation
- Establish a "standard of review" for fair hearing and appeal
- Establish a "burden of proof" for fair hearing and appeal



# And Remember – You Must Follow Your Medical Staff Bylaws!

- Fair Hearing Processes will be closely scrutinized
- Failure to follow your Bylaws may lead to "injunctive relief" and/or claims for breach of contract; may support a finding against application of immunity
- Ensure requisite timeframes are flexible and realistic
- Err on side of more "due process" than required
- Err on the side of avoiding long term process arguments/concerns



# Failing to Take Appropriate Corrective Action – The Risks

- Poor quality of care and risk to patient safety
- Missed opportunity to rehabilitate
- Litigation:
  - with subject practitioner
  - Negligent credentialing and medical malpractice claims
  - False Claims/Reimbursement Risk
  - Hostile Work Environment/Bullying Claims



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