

GETTING PRACTICAL WITH **MEDICAL STAFF**

GOVERNANCE, CREDENTIALING & PEER REVIEW

Implementing an Effective Corrective Action Process

Implementing an Effective Corrective Action Process

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Overview

- Understanding corrective action v. normal 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 is broader than "adverse/professional review actions"



What Do We Mean by "Corrective Action"?

Medicare Conditions of Participation:

The hospital must have an organized medical staff that operates under bylaws approved by the governing body and which is responsible for the quality of medical care provided to patients by the hospital



What Do We Mean by "Corrective Action"?

Joint Commission:

The organized medical staff, pursuant to the medical staff bylaws, is required to **"evaluate[] and act[] on the reported concerns regarding a privileged practitioner's clinical practice and/or competence"**



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?

- 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 (**which should be defined/incorporated into bylaws**)
 - Lapse of temporary privileges
 - Routine review (OPPE, FPPE for new/additional privileges, etc.)
 - *****But may be state specific (e.g., Illinois)**



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 14 days or less does not require that hearing rights be extended
 - A summary suspension longer than 14 days does require hearing rights



Medical Staff Bylaws – A Road Map 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



Considerations for a "Reasonable Investigation"

- **Before** you embark on investigation:
 - Conduct "preliminary review" (potential impact for NPDB)
 - Consider obligations of confidentiality and consequences of violating
 - Review process and discuss requirements for compliance and immunity
 - Address any obvious 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?
 - Map out your plan for the investigation based upon the nature of the concern(s): isolated event, trend, both, other?



Considerations for a "Reasonable Investigation"

- Then proceed with investigation...
 - Consider bylaws requirement for notice of investigation
 - Carefully consider scope of investigation
 - Actually review relevant documents/history
 - Meet with relevant individual witnesses and promptly record relevant recollections/testimony
 - Signed statements and/or affidavits are preferred
 - Consider what bylaws, policies, rules, etc., have been violated
- Remember you can always afford more due process/fairness than is required by the bylaws



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"

- Actions should be driven by patient safety/quality of care
- 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

- ***Comply with your bylaws process – but do more (when required) for peer review immunity**
- **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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Please visit the Hall Render's blog at <http://blogs.hallrender.com> for more information on topics related to health care law.

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