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Medical Staff Governance, Credentialing and Peer Review

Implementing an Effective Corrective Action Process



MEDICAL STAFF SEMINAR 2021

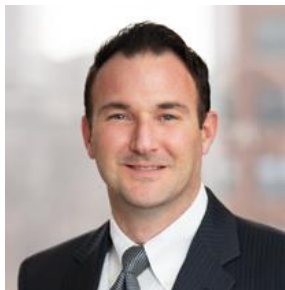
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Overview

- Understanding corrective action v. other types of “peer review”
- Understanding the purpose of corrective action
- Mock cross examination
- 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

What Do We Mean by “Corrective Action”?

- **Medicare Conditions of Participation:**

- The Hospital, through the organized medical staff, is “responsible and accountable for ensuring....that an ongoing program for quality improvement and patient safety, including the reduction of medical errors, is defined, implemented, and maintained”

- **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)
 - 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 (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

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

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

MOCK CROSS-EXAMINATION

“Dealing with Dr. Nice”

Witness: CMO

Facts:

- Dr. Nice is an orthopedic surgeon
- On staff at Betner Community Hospital for 30 years
- Recredentialed each 2 years without incident
- Last recredentialed February 2021
- By all accounts, Dr. Nice is an exceptional clinician
- **But** - Dr. Nice has a “reputation” for yelling, cursing, intimidation, belittling/bullying behavior
- Given reputation, nursing staff deliberately work to avoid his cases
- Multiple anecdotal prior “collegial interventions” by CMOs and medical staff leaders

- Despite this history, there is little documentation in the file
 - File does, however, contain 6 separate written complaints regarding loud/demeaning behavior (dated 1998, 2001, 2004, 2010, 2012, 2015). However, no documentation is provided regarding any response to the complaints
 - Placed on FPPE in 2015 (12 weeks of monitoring; no complaints noted)
- In September 2021, Hospital receives multiple complaints (from various sources) that Dr. Nice is posting on social media that COVID-19 vaccines are “dangerous, untested and should be avoided at all cost.” CEO verbally requests that Dr. Nice refrain from such postings

- In November 2021, Hospital elects to mandate COVID-19 vaccination (or exemption) for all members of medical staff
 - CEO unilaterally imposes requirement through a new “COVID-19 Vaccine Policy” (with no medical staff vote or change made to Medical Staff Bylaws/Vaccine Policy)
 - Hospital states it is imposing requirements “due to CMS vaccine requirement”
 - However, CMS requirement subsequently “stayed” by courts; Hospital maintains requirement
- On December 1 (which is 5 days before the vaccination/exemption deadline), Dr. Nice confronts Hospital CEO
- In a loud and demeaning tone (in front of multiple witnesses in the administrative suite):
 - Dr. Nice criticizes the vaccination requirement; and
 - While still yelling at CEO, criticizes CEO’s performance at the Hospital in process

- CEO immediately communicates incident to CMO
- CEO and CMO (per bylaws) summarily suspend Dr. Nice, and then convene an “emergency” special meeting of MEC
 - Bylaws permit any two members of MEC to impose a summary suspension when there is “imminent risk to patient safety.” (CEO and CMO are ex officio, non-voting members of MEC)
- MEC receives report and determines “enough is enough”; summarily suspends Dr. Nice and recommends revocation of his membership and clinical privileges
- MEC sends Dr. Nice a “Notice of Adverse Action”

- The Notice of Adverse Action states:

“Please be advised the MEC has recommended the revocation of your medical staff membership and Clinical Privileges at Hospital. The MEC has also elected to continue your summary suspension.

The MEC reached these recommendations given your failure to comply with COVID 19 vaccine policy/requirement, as well as conduct toward the CEO on December 1, as witnessed by multiple individuals.

Your behavior was in violation of the standards for appropriate behavior set forth in the Medical Staff's Professional Conduct Policy. You have 30 days to request a fair hearing.”

- Dr. Nice timely requests a hearing

- Note: Per the Professional Conduct Policy
 - Immediate action may be taken in the event of an “egregious violation that jeopardizes patient safety.”
 - Otherwise, policy anticipates:
 - Phone call discussion for 1st violation
 - In-person meeting for 2nd violation
 - Written letter and in-person meeting for 3rd violation
 - Written final warning for 4th violation
 - Potential for “request for corrective action” for 5th violation

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

- Hearing process should track Medical Staff Bylaws unless greater rights are extended to ensure HCQIA compliance
- Certain hearing related notices and documentation are required by Bylaws and applicable law (vet closely with legal)
 - Notice of Investigation
 - Notices of Proposed Action
 - Notice of Hearing
- Hearing must include meaningful right to legal counsel, right to present evidence and right to cross-examination
- Appeal focus is on process compliance and/or availability of evidence to support recommendation

Questions?



Contact Us

For more information on these topics visit hallrender.com.

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