
HALL
RENDER
KILLIAN HEATH & LYMAN
Peer Review Investigations
MEDICAL STAFF
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HALL RENDER
KILLIAN HEATH & LYMAN
HEALTH CARE UNINTERRUPTED

Presenter Info

Christopher C. Eades
Shareholder
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
- Case Study #1
- Considerations for effective investigations
- Case Study #2
- Related Discussion

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

Case Study #1

"Dealing with Dr. Nice"

Witness: Chief of Staff

- Dr. Nice is a general surgeon.
- On staff at Community Hospital for 25 years.
- By all accounts, Dr. Nice is an exceptional technician.
- **But** "everybody knows" Dr. Nice is as mean as they come.
  - Regular yelling, cursing, intimidation, belittling/bullying behavior
  - Nursing staff deliberately work to avoid his cases
  - Well known that multiple nurses have quit over the years as a result
  - Multiple anecdotal prior "collegial interventions" by CMOs and medical staff leaders.

Dr. Nice (continued)

- Despite this history, there is little documentation in the file.
  - File does, however, contains five separate written complaints (dated 2004, 2006, 2010, 2014, and 2020).
  - Placed on FPPE in 2020 (after yelling at nurse in OR)
  - FPPE involved 6 weeks of monitoring; no complaints noted during this period.
- Dr. Nice has been recredentialed every two years over past 25 years. He was last recredentialed effective **August 1, 2024**. In each instances, he is "checked" as "competent" with respect to "professionalism."
- On **September 8, 2024**, nurse calls Dr. Nice at 2 AM about one of his patients; inquires regarding permission/order for pain medication.
- **According to nurse, Dr. Nice erupts in response to call – screaming and swearing at nurse and calling nurse "stupid."**

Dr. Nice (continued)

- Nurse reportedly in tears after incident.
- Nurse enters ERS report describing incident; expresses cannot work in this type of **"hostile work environment."**
- ERS report forwarded to CMO the following day (**September 9**); CMO communicates to Chief of the following week.
- Matter is then made part of MEC's regular agenda on **October 10.**
- Minutes reflect:
  - Regular meeting commences 7 am
  - All voting members present, along with invited guests (CFO and Radiology Director)
  - Consent agenda items addressed
  - "Peer Review Matter re Dr. Nice" discussed 7:20 am to 7:30 am
    - Chief of Staff provides verbal report to MEC regarding recent incident.
    - MEC determines "enough is enough"
    - Unanimously recommends the revocation of Dr. Nice's membership and clinical privileges.
  - Financial report then provided by Chief Financial Officer
  - Radiology Director provides update regarding new equipment purchases
  - Regular meeting concludes at 8:05 am

Dr. Nice (continued)

- On **October 24**, MEC (by Chief of Staff) sends Notice of Adverse Action, which states (in part):

  Dr. Nice,

  Please be advised that the MEC has voted unanimously to revoke your membership and clinical privileges at Community Hospital. The MEC has learned that on or about October 8, 2024, you engaged in unprofessional conduct (as defined in the Professional Conduct Policy) directed toward the nursing staff. This behavior was reportedly in response to a telephone call placed to you by the nurse regarding one of your patients. The MEC will not tolerate this type of behavior. You have a right to request a hearing in relation to this recommendation as set forth in the Medical Staff Bylaws……

- Dr. Nice requests a fair hearing, as well as a copy of the Medical Staff Bylaws and Professional Conduct Policy

Dr. Nice (continued)

- Medical Staff Bylaws:
  - Require that all clinically privileged providers behavior appropriately
  - Permit a summary suspension to be utilized when there is “imminent risk of harm or immediate danger to individual(s) at the Hospital.”
  - Require, as part of the corrective action process, that subject practitioners be notified of a pending investigation and be provided with an opportunity to respond to the alleged concerns in a manner to be determined by the MEC.
  - When action is recommended, require that a Notice of Action be provided that identifies the general basis for the recommendation.
- Professional Conduct Policy:
  - Clearly defines yelling and belittling communications to constitute unprofessional behavior
  - Otherwise, policy anticipates:
    - Phone call for first violation
    - In-person meeting for second violation
    - In-person meeting and letter to file for third violation
    - Letter with final warning for fourth violation
    - Request for corrective action for fifth violation
    - If no incidents occur within 12 months of a single violation, the violation shall be expunged from the Practitioner’s file

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)

Case Study #2

- 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?
- What if Surgeon was employed by the Hospital? Should this alter MEC’s approach?

Questions?

Contact Us

For more information on these topics visit hallrender.com.

Christopher C. Eades

ceades@hallrender.com

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