Sheryl Tatar Dacso, J.D., Dr.P.H.
Robert "Bob" Bennett, Esq.

Physician Privileges: Are You Really Privileged?

INTRODUCTION

The authors are presenting a two-part article on the issue of physician privileges in the State of Texas. While most doctors cling to the belief that as long as they do right and get along with everyone, they will never have a problem with privileges, and peer review will not become an issue. The first part of the article provides the general law in Texas on privileges, and it does not favor physicians. The second part will provide actual case studies, and what can be expected if involved in the peer review process.

STAY AWAY FROM PEER REVIEW

Keeping your privileges and avoiding the peer review process is an invaluable goal for any physician who values his career. However, no matter how hard you try or how careful you are, you may be the target of the peer review system.

Peer review refers to the method by which hospitals and their medical committees evaluate and discipline physicians holding privileges. Peer review is utilized when the medical staff of the hospital finds or perceives problems with the quality of care rendered by a physician.

Common triggers of peer review are disruptive personal and professional conduct, patient and staff complaints, and routine peer reviews. Whatever the source, being targeted for peer review should be taken seriously from the onset since it can result ultimately in loss of your medical license and the end of your medical career.

If the peer review committee finds that a doctor has strayed from the accepted standards of the hospital, it will usually recommend limiting or terminating the physician's privileges. This method of self-evaluation reflects the wide-held belief that the medical community is best qualified to monitor its own members. Physicians who have been the victims of bad faith peer review find this self-policing method is used as a tool ~~used~~ to squeeze out doctors for personal or economic reasons.

REGULATED BY HCQIA

Most states including Texas have adopted the Health Care Quality Improvement Act (HCQIA) in its totality. Congress passed this law to give both hospitals and peer review panels that provide valid due process and participate in good faith peer review legal immunity from lawsuits.

HCQIA created conditional immunity against civil litigation to encourage physicians to identify and discipline other physicians with below standard quality of care or unprofessional conduct. It was meant to give doctors who sit on peer review committees some peace of mind that they will not be sued as long as they are acting in good faith. However, critics of peer review contend that HCQIA has done nothing more than encourage hospitals and peer review committees to bully physicians that threaten the status quo without any fear of liability.

HCQIA states that in order to quality for immunity, the peer review action: 1) must be taken in the reasonable belief that the action was in the furtherance of quality health care; 2) after a reasonable inquiry into the facts of the matter; 3) after adequate notice and hearing procedures are afforded to the physician; and, 4) in the reasonable belief that the action was warranted by the facts known. Many states have gone even further in protecting those involved in peer review from liability.

In Texas, HCQIA was adopted in whole under the Texas Medical Practice Act (TMPA). The TMPA expanded immunity from civil liability to any hospital, person, or professional review body so long as the process was conducted without malice. This means, in Texas, there is no cause of action against any member of a peer review committee unless malice can be shown.

In return for this immunity, the hospital is required to report to the National Practitioner Data Bank (NPDB) any professional review action based on reasons related to professional competence or conduct that adversely affect clinical privileges for a period longer than 30 days.

A hospital must also report any voluntary surrender or restriction of clinical privileges while under investigation or to avoid investigation. Once a doctor's name is on the list of the NPDP, the consequences can be devastating to a practitioner's medical career. Hospital administrators check the data bank before granting privileges and those doctors who have been reported are typically denied privileges. Health insurance groups and malpractice carriers also shy away from doctors who

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have been reported to the data bank. Physicians who have been the victim of bad faith peer review and subsequent data base reporting suffer irreparable harm. A stain on a doctor's record becomes permanent and it's almost impossible to get the records of your case sealed or expunged from the data bank.

When peer review is carried out in good faith and without malice, reporting an incompetent physician is justified and helps further the goal of improving quality of care. However, the peer review system is increasingly used as a device to eliminate competition, silence whistleblowers, and remove physicians that don't "fit in."

The extensive immunity given to peer review participants creates a hotbed for misuse of the system. This kind of peer review abuse destroys the targeted physician's career, and does nothing to improve the quality of care. In fact, peer review abuse can do much damage to patient safety and quality of care by intimidating physicians who are afraid to point out problems in the hospital setting for fear that they will be next to come under peer scrutiny.

WHAT CAN YOU DO?

Any communication concerning peer review or even related to a proceeding should sound a very loud alarm for any doctor unfortunate enough to be the subject of such action. You may think the doctors involved are your friends – but they are not. Retaining legal counsel as soon as possible will best serve a physician that wants to continue to practice medicine.

The original trigger of peer review may at first seem trivial but the likelihood of a "domino effect" is very real possibility and the consequences of disciplinary actions can be devastating. Because of this, doctors should try to end a disciplinary proceeding as quickly as possible with an early proactive approach. But doing so on your own can be devastating. The physician should be very familiar with the most current version of the medical staff bylaws in order to know what lies ahead. The bylaws set out the rights and duties of both the hospital and the physician throughout the course of the peer review process. Peer review disciplinary actions may take the form of corrective actions, judicial review hearings, and appellate reviews.

CORRECTIVE ACTION

Corrective action is the lowest form of disciplinary action a physician will encounter in the hospital setting. Corrective action usually arises when a member of a committee or a medical staff officer perceives a problem with a physician's quality of care or professional conduct.

At this level the doctor is entitled to an interview with the committee and should use this opportunity to deny the charges or explain his side of the story. The interview is the doctor's best chance to diffuse the situation before it gets out of control. Corrective action is often the tip of the iceberg and the beginning of a very long and stressful battle to save your medical career. Although the physician is not entitled to have an attorney present at the interview, it is wise to consult a lawyer as soon as you know that an investigation is underway. A qualified attorney will inform the physician what to expect during this difficult process and will thoroughly prepare him for the interview. Sometimes the outcome of the corrective action process may result in nothing more than a letter of reprimand or the requirement of continuing medical education.

If the outcome results in the reduction, suspension, or termination of medical privileges, the targeted physician will receive notice advising him of the reason for the adverse recommendation, the right to a "Fairness" hearing under the bylaws, and the potential for NPDB reporting. If necessary the issue then moves on to the judicial review hearing.

FAIRNESS HEARING - IT MAY NOT BE FAIR

After receiving notice of an adverse recommendation, the physician is entitled to request a hearing to challenge the recommendation. The physician has a certain amount of time within which he must make his request for a hearing (usually 30 days). The request must be in writing and should be addressed to the specified person in the bylaws (usually the Medical Director).

The physician must be present at the hearing unless there is good cause and prior approval has been granted. The medical staff bylaws should be consulted regularly during this phase to make certain that all procedures are followed. A failure to meet deadlines and other requirements will result in the waiver of the physician's right to a hearing.

The hearing is the physician's chance to question witnesses and present documents to the panel. The bylaws will inform the targeted physician when to expect notice of the time, place, and date of the hearing, who can and can not be a member of the hearing panel, and whether the physician has a right to have an attorney present. Most hospital bylaws allow the presence of an attorney at the hearing but limit the extent to which an attorney may participate. It is highly recommended that the physician seek legal advice regardless of any limitations the bylaws may place on legal counsel at the hearing. If the hearing panel makes an adverse recommendation, the physician may appeal to the members of the Board of Trustees to challenge the hearing decision.

APPEAL AND THE TO THE COURTS

The physician must submit a written request as specified in the bylaws in order to trigger appellate rights. Many of the same rules and regulations that apply to the judicial review hearing also apply at the appellate phase.

The appeals panel will review all relevant evidence to determine if the judicial review panel's decision was supported by reasonable evidence and was not arbitrary or capricious. The appellate body must affirm the hearing panel's decision as long as it was reasonable. Reversal of the hearing panel's decision on appeal most often occurs when the appellate body finds that the hearing panel overreacted. However, the deck is stacked against the physician from the outset and the chances that a physician will succeed on appeal are very small.

Only after the physician has exhausted all administrative remedies can he look to the courts for help. To prevail, a physician must overcome the hurdles set out by HCQIA as well as the additional Texas malice requirement. This makes it extremely difficult for doctors to recover for bad faith peer review, but not impossible.

The next issue will discuss actual cases and the most recent Poliner case in Dallas where a jury returned a verdict of nearly $400 million based in part on the abuse of the peer review process. **DT**

Research provided by Bennett Law Firm Legal Clerk Natalie Fowler

***Bob Bennett** is a former prosecutor who represents doctors and other health professionals before the Texas State Board of Medical Examiners. He also helps doctors with privilege hearings, recertification, managed care exclusions, and investigations by state and federal law enforcement agencies. He can be reached at Lancaster Center, 515 Louisiana, Suite 200, Houston, Texas 77002; Phone (713) 225-6000; Fax (713) 225-6001.*

***Sheryl Dacso, Dr.P.H., J.D.** is an attorney who focuses her practice on health law business transactional and regulatory compliance matters for individual, group and institutional healthcare clients. She can be reached at 1827 Norfolk, Houston, Texas 77098; Phone (713) 522-4100; Fax (713) 522-5667.*

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