legal talk

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Physician Privileges: Lesson to be Learned

INTRODUCTION

This is the second part of a two-part article on the issue of physician privileges in the State of Texas, first part of which was published in May (last month's column dealt with late-breaking information on tax reform). In the first article, the authors explained the various forms of peer review disciplinary actions, including corrective actions, fairness hearings, and appellate review. It should be noted that only after the physician has exhausted all administrative remedies can he look to the legal courts for help.

This process also includes the right to demand a mediation prior to the Fairness Hearing. Because federal and state law make it extremely difficult to prevail in a court of law, the best course of action a physician can take is to diffuse the situation as early as possible in the peer review setting. If this proves to be futile, the hurdles set out by federal and state law to recover for bad faith peer review are not insurmountable.

In this article, the authors present two recent Texas cases. The first case involves a doctor who went through the peer review process and survived with her career intact. The second case is the recent Dallas case where a jury returned a verdict of nearly $400 million based in part on bad faith peer review. To respect the privacy of parties involved, details have been changed or omitted.

DR. KIM: THE CALM BEFORE THE STORM

Most doctors do not ever know that they are in the midst of an active peer review investigation, and probably have been for months, until the dreaded letter of a peer review committee is waiting in their mailbox. In an attempt to seem cooperative and put the matter behind them, many doctors try to resolve the issue themselves and do not seek legal representation until the investigation is well underway and the deck is substantially stacked against them. Statements are initially made that are later regretted.

Take the story of ophthalmologist Dr. Kim. Dr. Kim was a young Texas surgeon who opened up a solo practice near a hospital in Lubbock where she held surgical privileges. Over the course of a six month period, Dr. Kim performed six cataract surgeries that required an additional procedure be performed as a result of complications. These complications were due in large part to broken equipment and poor hospital staff. The procedure in question never posed a threat to patient vision or life and in no way strayed from acceptable standards of care (this was backed up by many qualified experts in the field of ophthalmology). Unbeknownst to Dr. Kim, the hospital was keeping track of her rate of complication and an investigation of her quality of care quickly ensued.

As is usually the case in bad faith peer review, the investigation was spearheaded by one of Dr. Kim's economic competitors at the hospital who would benefit by eliminating his competition. This competitor was the only ophthalmologist included on the investigatory committee.

Upon receiving a letter from a hospital quality management committee, Dr. Kim was put on notice that she was being investigated and her attendance at a quality management meeting was requested. Without counsel and without preparation, Dr. Kim attended the meeting in an attempt to be cooperative and quickly resolve the matter. While being tape recorded, she was questioned and asked to present her side of the story.

She explained to the committee that (1) there was outdated equipment in the operating room; (2) in three of the six cases under review, vital pieces of equipment needed to perform the surgery broke in the middle of the procedure and were not repaired; (3) in one of the six cases under review a scrub nurse failed to tell the surgeon that she was unfamiliar with the instrumentation and could not use it properly; and (4) in one of the six cases under review a patient went into active seizures while the surgeon was operating.

These explanations fell upon deaf ears at the meeting and Dr. Kim's surgical privileges were summarily suspended. Soon after, the Medical Executive Committee recommended that Dr. Kim's surgical privileges be terminated and advised her of her right to request a fair hearing. At this point Dr. Kim realized she was in trouble.

An adverse action that affects privileges for longer than thirty days, such as summary suspension or termination of surgical privileges, is reportable to the National Practitioner Data Bank (NPDB). Faced with the possi-

bility of a report and the resulting career ruin, Dr. Kim finally sought legal representation.

With aggressive legal counsel on her side, the hospital finally agreed to first try and resolve the matter through mediation before resorting to a "Fairness" hearing. Mediation is always a good alternative for a physician facing privilege disputes as the term "fair hearing" is quite deceptive and far from "fair" for the doctor under review. The "fair hearing" setting is heavily slanted in the hospital's favor: It is conducted on its playing field (usually held at the hospital where privileges are at issue), using the hospital's set of rules (which usually do not allow for active participation of the physician's attorney), and with the hospital's doctors as the referees (to be judge and jury).

Luckily, Dr. Kim's story has a somewhat happy ending. Although she was put through the ringer for several stressful months, the mediation was successful. The matter was resolved in a way that allowed her to keep her privileges and avoid a negative report to the NPDB.

Lessons to be learned from Dr. Kim's case are those of awareness: Do not think that members of the medical committee are your friends and just want to hear the truth of the matter and your side of the story. Once initiated, the peer review process has a tornado effect and can quickly destroy you. As soon as you are aware that you are under review or being investigated, call an attorney with peer review experience. Do not be fooled, even at this early phase of the peer review process as the clouds are gathering and the storm is brewing. Experienced legal counsel can help physicians who are the victim of bad faith peer review weather the storm and emerge with their careers intact.

THE POLINER CASE: A RAINBOW APPEARS

The Poliner case has generated intense interest with all those involved in peer review. Cardiologist Lawrence Poliner, M.D. held privileges at Presbyterian Hospital of Dallas and claimed that after he opened up a solo practice in the area, he was seen as a competitive threat. As a result, he claimed that his catheterization laboratory privileges were summarily suspended after a review of one case.

Dr. Poliner also claimed that he lost his privileges without being given any opportunity to defend himself. He alleged that this was done in an attempt to eliminate competition by a peer review committee composed primarily of physicians who were in direct economic competition with him. Dr. Poliner claimed that although his privileges were reinstated by a risk review committee, he was blackballed by the hospital and its staff. He was not included in emergency department call and other physicians stopped referring patients to him, practically ending his medical practice. The hospital denied these charges of bad faith peer review and denied Dr. Poliner's request to expunge the adverse action from his record.

In 2004, Dr. Poliner persuaded a Dallas federal court jury that the Presbyterian Hospital of Dallas and three of its physicians defamed him, violated his contract, and inflicted emotional distress as a result of bad faith peer review. The jury concluded that Dr. Poliner was in fact a victim of malicious peer review tactics and that his privileges should not have been taken away. The jury returned a verdict that awarded Dr. Poliner $366 million from the hospital, the hospital's chair of internal medicine, the head of the cardiac catheterization lab, and the hospital's chief of cardiology.

Since the Poliner verdict, there has been much speculation that this type of verdict will have a chilling effect on the willingness of physician's to take part in the peer review process and result in poor quality of care for the public. Others think physicians will continue to abuse the peer review system for personal and economic reasons. Hopefully, this verdict will send a clear message that bad faith peer review will no longer be tolerated as the method of choice to settle personal conflicts within the medical community and that those who abuse the system will be held accountable. DT

Research provided by Bennett Law Firm Legal Clerk Natalie Fowler

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