

Physician Peer Review: Ensuring Immunity, Confidentiality and Compliance

Preserving Immunity or Leveraging Exceptions, Shielding Documentation,
Complying With Statutory and JHACO Requirements

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Physician Peer Review: Ensuring Immunity, Confidentiality and Compliance

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Setting the Stage

- Prior to 1986, there was no federal law that provided legal protections to those participating in peer review
- Anti-trust lawsuits were being filed by aggrieved physicians against their reviewers
- Increases in incidents of medical malpractice
Congress' answer:
- Healthcare Quality Improvement Act of 1986 (“HCQIA”) – 42 U.S.C. § 11101 *et seq*

Federal HCQIA

Enacted to address identified national needs:

- Improve quality of care on a national scale
- Restrict the ability of physicians to move across states and institutions without disclosing past performance issues
- Protect the peer review process and its participants
- Incentivize physicians to engage in effective peer review

Federal HCQIA

- Legal Protections
 - Immunity
 - Confidentiality
- Reporting Requirements
 - Medical Malpractice Payments
 - Licensure Actions
 - Professional Review Actions
- Hospital Duty to Query

Professional Review under HCQIA

- “Professional Review Action”
 - Action or recommendation (or decision not to act) of professional review body
 - Taken or made in the conduct of a professional review activity, which is based on the competence or professional conduct of an individual physician
 - Which conduct affects or could adversely affect the health or welfare of a patient or patients
 - And which adversely affects/may adversely affect the physician’s clinical privileges, or membership in a professional society

Professional Review under HCQIA

- A Professional Review Action is not based on professional competence or conduct if it is primarily based on employment; association with a professional society; fees, advertising or competitive acts, or certain other activities
- “Professional Review Activity”
 - An activity of a health care entity with respect to an individual physician’s privileges or membership
 - Granting or denying, placing conditions on, or modifying privileges

Professional Review under HCQIA

- “Professional Review Body”
 - A health care entity
 - A licensed hospital
 - An entity that provides health care services and follows a peer review process for the purpose of furthering quality health care
 - A professional society of physician or other licensed health care practitioners that follows a formal peer review process for the purpose of furthering quality health care

Professional Review under HCQIA

- “Professional Review Body” cont.
 - Governing body of the health care entity
 - Any committee of the health care entity which conducts professional review activity
 - Any committee of the medical staff when assisting the governing body in a professional review activity

Immunity Under HCQIA

- General Rule: If the professional review action meets specified standards, participants will be immune from certain liabilities.
- The HCQIA standards must be met in order for HCQIA immunity to apply
 - Regardless of compliance with applicable state law, bylaws or other internal procedures
- There is a rebuttable presumption that the action meets the Reasonableness Standards
- Not guaranteed, not absolute

Immunity under HCQIA

- Reasonableness Standards: the professional review action must be taken:
 - In the reasonable belief it was in furtherance of quality health care;
 - After a reasonable effort to obtain the facts;
 - After adequate notice and hearing procedures or “such other procedures as are fair to the physician under the circumstances” are afforded; and
 - In the reasonable belief the action was warranted by the facts after compliance with (2) and (3)

Immunity under HCQIA

- Who is protected?
 - The professional review body
 - Any person acting as a member or staff to the body
 - Any person under formal agreement or contract with the body
 - Any person who participates with or assists the body with respect to the action
 - Any person providing information to the body regarding the competence or professional conduct of the physician

Immunity under HCQIA

- Qualified Immunity
 - Must comport with HCQIA definitions and requirements
 - Immunity from damages under state or federal law “with respect to the action”
 - Not from equitable or declaratory relief
 - Not from civil rights claims
 - Not from U.S. or state Attorney General actions
 - Greater protections for individuals who provide information to a professional review body
 - Exception for knowingly providing false information

Peer Review Under State Law

“Except as specifically provided in this part, nothing in this part shall be construed as . . . preempting or overriding any State law which provides incentives, immunities, or protection for those engaged in a professional review action *that is in addition to or greater than* that provided by this part.”

42 U.S.C. 11115 (emphasis added)

Peer Review Under State Law

- State peer review statutes generally cover activities similar to those defined in the HCQIA
 - Variation in who is covered
 - Variation in procedural requirements
 - HCQIA = floor; states can offer greater protections
- Malice or bad faith are common exceptions to state statutory immunity
 - “The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice.” Mich. Comp. Laws § 331.531(4)

Privilege and Confidentiality

- State statutes offer varying degrees of protection for documents and information generated in connection with the peer review process
 - “The records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or an institution of higher education in this state that has colleges of osteopathic and human medicine, are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena.” MCL § 333.20175(8)
 - “The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena.” MCL § 333.21515

Privilege and Confidentiality

- Current Events:
- *Krusac v. Covenant Medical Center*, No. 34,286 (N.M. Feb. 19, 2015)
 - “[W]e hold that §§ 20175(8) and 21515 make privileged all records, data, and knowledge collected for or by a peer review committee in furtherance of its statutorily mandated purpose of reducing morbidity and mortality and improving patient care. This includes objective facts gathered contemporaneously with an event contained in an otherwise privileged incident report.”

Krusac v. Covenant Medical Center

- Overturned lower court decision distinguishing between “factual information objectively reporting contemporaneous observations or findings and ‘records, data, and knowledge’ gathered to permit an effective review[.]” See *Harrison v. Munson Healthcare, Inc.*, 304 Mich. App. 1; 851 NW2nd 549 (2014).
- Criticized lower court for its reliance on caselaw from foreign jurisdictions

Privilege and Confidentiality

Current Events:

Yedidag v. Roswell Clinic Corp, No. 34,286 (N.M. Feb. 19, 2015)

- Employed physician participating in peer review of another employed physician
- Reviewing physician terminated for unprofessional conduct in the course of review process
- Reviewing physician filed suit against hospital for utilizing peer review information to justify his termination

Yedidag v. Roswell Clinic Corp.

- NM Review Organization Immunity Act (41-9-1 to 41-9-7 NMSA 1978)
 - “review organization[s] . . . organized to gather and review information relating to the care and treatments of patients for the purposes of:
 - Evaluating and improving the quality of health care services rendered in the area or by a health care provider;
 - Reducing morbidity or mortality;
 - Obtaining and disseminating statistics and information relative to the treatment and prevention of diseases, illnesses and injuries;
 - Developing and publishing guidelines showing the norms of health care services in the area or by health care providers;
 - Developing and publishing guidelines designed to keep within reasonable bounds the cost of health care services;
 - Reviewing the nature, quality or cost of health care services provided to enrollees of health maintenance organizations and nonprofit health care plans;
 - Acting as a professional standards review organization pursuant to 42 U.S.C., Section 1320c-1, et seq.; or
 - Determining whether a health care provider shall be granted authority to provide health care services using the health care provider’s facilities or whether a health care provider’s privileges should be limited, suspended or revoked.” § 41-9-2(E)

Yedidag v. Roswell Clinic Corp.

- **Holding:** § 41-9-5 (A) creates a private cause of action
 - “[a]ll data and information acquired by a peer review organization in the exercise of its duties and functions shall be held in confidence and shall not be disclosed to anyone *except to the extent necessary to carry out one or more of the purposes of the review organization or in a judicial appeal from the action of the review organization.*” § 41-9-5(A) (emphasis added)
 - “Section § 41-9-5(A) expressly guarantees the confidentiality of what ‘transpired’ during peer review meetings.”
 - “Dual regulatory system” provides different avenues for discipline, “albeit not by hospital administrators who are not privy to what transpires during peer review meetings.”
- **Holding:** § 41-9-5(A) is a mandatory rule of law incorporated into physician employment contracts and prevents the hospital from using peer review information for personnel decisions

Yedidag v. Roswell Clinic Corp.

Practical issues impacting the Court's decision:

- Noted flaws in peer review process
 - Peer review information was incomplete and, ultimately, leaked
 - Peer review information was used inappropriately
- Internal competition
 - Competition between peer reviewers (and hospital)
 - History of poor relations between hospital and Dr. Yedidag
- Public policy: upholding peer review integrity
 - Statutory criminal penalties didn't satisfy the Court
 - Fear of retaliation from many sources, including employers, undermines the process
- Respective purposes of medical staff v. administration
 - Conflicting evidence of whether Yedidag's behavior was inappropriate
 - Prior incidents of disruptive conduct outside peer review process

Privilege and Confidentiality

- HCQIA does not address privilege or confidentiality of documents and information generated in connection with the peer review process
- Confidentiality under the HCQIA is limited to information reported to the NPDB

Reporting under HCQIA

- HCQIA requires health care entities to report certain professional review actions . . .
 - Professional review actions that adversely affect the physician's privileges for more than 30 days
 - Acceptance of the surrender of privileges while the physician is under investigation or in return for not conducting an investigation
 - Professional review actions by a professional society that adversely affects the physician's membership in the society
- Permissive reporting for non-physician practitioners

Reporting under HCQIA

- Reports of professional review actions must be submitted to:
 - National Practitioner Data Bank (“NPDB”)
 - Applicable State Board of Medical Examiners
- NPDB (45 CFR Part 60)
 - Information clearinghouse established pursuant to HCQIA to collect and release information relating to professional competence and conduct of physicians, dentists and other healthcare practitioners
 - Expanded by subsequent laws to include certain state licensure actions and final adverse actions by state and federal agencies and health plans

NPDB Guidebook

2015 NPDB Guidebook

- Significantly expanded and replaced 2001 Guidebook
- Incorporates changes resulting from merger of NPDB and Healthcare Integrity and Protection Data Bank
- Useful resources:
 - Tables
 - Examples
 - Q & A

Bylaws

- Establish the Peer Review Process
- Identify Peer Review Agents
- Ensure Fairness
- Consistent with Other Constituent Documents

Bylaws

- Define
 - Peer Review Activity
 - Peer Review Actors

Bylaws

- Establish the Peer Review Process
 - Routine
 - Investigative

Bylaws

- Initiation of Peer Review Process
 - Medical Executive Committee
 - Chief Medical Officer
 - Chief of Staff
 - Individual Complainants
 - Staff Complaints

Bylaws

- Conduct of Investigation
 - Internal v. External
 - Role of Hospital Staff
 - Physician Committee
 - Participation by Parties
 - Ensuring all Relevant Documentation

Bylaws

- Prosecution Decision
 - Who Makes Decision
 - Physician Committee v. Medical Executive Committee
 - Outside Parties
 - Conflicts of Interest
 - Party Participation
 - Attorneys
 - Witnesses
 - Standard of Proof

Bylaws

- Hearing
 - Appointment of Hearing Committee
 - Members of Hearing Committee
 - Hearing Officer
 - Hearing Schedule

Bylaws

- Hearing
 - Hearing Date/Schedule
 - Attorneys
 - Witnesses/Evidence
 - Role of Outside Consultants
 - Standard of Proof

Bylaws

- Internal Appeal
 - Appeal Authority
 - Trial v. Argument
 - Standard on Appeal
 - New Evidence/Record

Bylaws

- External Appeal
 - Judicial/Non-Judicial

Bylaws

- Establish Fairness
 - Conflicts of Interest
 - Economic/Non-Economic
 - Discrimination
 - Protected Classes – Race, Religion, National Origin, Age, Disability, Sex, Genetic, Veterans Status
 - Whistleblowers
 - Fundamental Fairness

Bylaws

- Consistent with Other Constituent Documents
 - Charter/Articles of Incorporation
 - Corporation Bylaws
 - Tax-Exempt Mission
 - Legislative Enactment
 - General Law

Bylaws

- Approved by All Constituent Groups
 - Board of Trustees
 - Board of Directors
 - Medical Executive Committee
 - Medical Staff
 - Any Other Required Constituent Group

Bylaws

- Amendments
 - Beware of Policy
 - Medical Staff Bylaw amendments
 - Resolutions

Antitrust Concerns

North Carolina State Board of Dental Examiners v. Federal Trade Commission, 574 U.S. _____ (Feb. 25, 2015).

- Because a controlling number of the Board’s decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke the state action immunity only if it was subject to active supervision by the State.

Antitrust Concerns

North Carolina State Board of Dental Examiners v. Federal Trade Commission, 574 U.S. _____ (Feb. 25, 2015).

- When a State empowers a group of active market participants to decide who can participate in its markets and on what terms, the need for supervision is manifest.

Antitrust Concerns

FTC v. Phoebe Putney Health System, Inc., 133 S. Ct. 1003 (2013).

- State action immunity is disfavored.
- Governmental Entity status does not automatically bestow state action immunity.

Pitfalls and Practical Tips

- Immunity is neither guaranteed nor absolute
 - The 5 “Ws” matter, to varying degrees
- Make no assumptions
 - Not all information may be protected
- An ever-changing landscape
 - State-to-state variation
 - Fluctuations in judicial interpretation

Pitfalls and Practical Tips

- Documentation
 - Implement written procedures
 - follow them
 - re-examine them as caselaw shifts
 - Delegate and document who performs a peer review function
 - Document compliance efforts
 - Marking documents as peer review material can help, but is not a guarantee of protection

THANK YOU

