



The Most Common Medical Staff Problems and
Issues and How to Handle Them

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Becker's Hospital Review Annual Meeting
May 18, 2012

McGuireWoods



Topics

1. Immunity
2. Privilege/Confidentiality
3. Reporting Obligations
4. Disruptive Physicians
5. Authorization and Releases
6. Practical Advice

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1. Immunity Issues

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Immunity - HCQIA

- Designed to promote meaningful peer review by eliminating threat of liability
 - Immunity provided if peer review conducted in good faith and in accordance with specified procedures
 - Established National Practitioner Data Bank and related reporting requirements
 - Compliance with HCQIA is optional
- 42 USC § 11111

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Immunity - HCQIA

Standards for Professional Review Action

1. In the reasonable belief that the action was in the furtherance of quality health care
2. After a reasonable effort to obtain the facts of the matter
3. After adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances
4. In the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3)

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in [42 USC § 11111(a)] unless the presumption is rebutted by a preponderance of the evidence

42 USC § 11112

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HCQIA Immunity-Who is Immune?

- "Professional Review Body"
- Any person acting as a member or staff to the Professional Review Body
- Any person under contract or other formal agreement with the Professional Review Body
- Any person who participates with or assists the Professional Review Body
- Person (whether as a witness or otherwise) providing information to a Professional Review Body regarding the competence or professional conduct of a physician unless such information is false and the person providing it knew that such information was false

42 USC § 11111

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HCQIA Attorneys' Fees

- When defendant "substantially prevails" and has met the HCQIA procedural standards
- Court "shall" order plaintiff to pay defendant's reasonable costs and fees
- If the claim, or the plaintiff's conduct during litigation, was "frivolous, unreasonable, without foundation, or in bad faith"

42 USC § 11113

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Immunity Under State Law (Tennessee)

All . . . physicians, surgeons, registered nurses, hospital administrators and employees, members of boards of directors or trustees of any publicly supported or privately supported . . . provider of health care, any person acting as a staff member of a medical review committee, any person under a contract or other formal agreement with a medical review committee, any person who participates with or assists a medical review committee with respect to its functions, or any other individual appointed to any committee . . . is immune from liability to any patient, individual or organization for furnishing information, data, reports or records to any such committee or for damages resulting from any decision, opinions, actions and proceedings rendered, entered or acted upon by such committees undertaken or performed within the scope or function of the duties of such committees, if made or taken in good faith and without malice and on the basis of facts reasonably known or reasonably believed to exist.

Tennessee Code Ann. § 63-6-219(d)

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Immunity Under State Law (Tennessee)

"Medical review committee" or "peer review committee" means any committee . . . of any licensed health care institution, or the medical staff thereof, . . . the function of which, or one (1) of the functions of which, is to evaluate and improve the quality of health care rendered by providers of health care service, to provide intervention, support, or rehabilitative referrals or services, or to determine that health care services rendered were professionally indicated, or were performed in compliance with the applicable standard of care, or that the cost of health care rendered was considered reasonable by the providers of professional health care services in the area.

Tennessee Code Ann. § 63-16-219(c)

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Other Sources of Immunity and/or Indemnification

- Medical Staff Bylaws
- Medical Staff Application Forms
- Center-Physician Contracts
- Insurance Policies

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Immunity – Additional Thoughts

Poliner v. Texas Health Systems,
No. 3:00-CV-1007-P, 2006 U.S. Dist. LEXIS
13125 (N.D. Tex. Mar. 27, 2006),
rev'd, 537 F.3d 368 (5th Cir. 2008),
cert. denied, 129 S. Ct. 1002 (2009)

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2. Privilege/Confidentiality

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Privilege and Confidentiality Under Federal Law

There is no privilege under HCQIA

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Privilege and Confidentiality Under State Law (Pennsylvania)

The proceedings and records of a review committee shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action against a professional health care provider arising out of the matters which are the subject of evaluation and review by such committee and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions or other actions of such committee or any members thereof

63 P.S. § 425.4

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Privilege and Confidentiality Under State Law (Pennsylvania)

"Review Organization" means any committee engaging in peer review . . . to gather and review information relating to the care and treatment of patients for the purposes of (i) evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care. It shall also mean any hospital board, committee or individual reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto

63 P.S. § 425.2

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Privilege and Confidentiality Under State Law (Indiana)

[T]he governing board ... may disclose the final action taken with regard to a professional health care provider without violating the provisions of this section. Upon approval by the health care facility's governing body, the peer review committee of a health care facility ... may submit or disclose to the agency ... Peer review committee records [and] Determinations by the peer review committee ... Information and materials may be submitted or disclosed to the agency under this subsection without violating this section or waiving the confidentiality and privilege attached to the communications, proceedings, records, determinations, or deliberations of the peer review committee.

Indiana Code 34-30-15-1

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Privilege – Additional Thoughts

HCA Health Services of Virginia, Inc. v. Levin,
260 Va. 215, 530 S.E.2d 417 (2000)

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3. Reporting Obligations

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Reporting Obligations – Federal Law

Required Reporting to the Board of Medical Examiners:

When a health care entity takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days

When a health care entity accepts the surrender of clinical privileges of a physician while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or in return for not conducting such an investigation or proceeding

42 U.S.C. § 11133

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Reporting Requirements – State Law (Michigan)

A health facility or agency that employs, contracts with, or grants privileges to a health professional licensed or registered under Article 15 shall report the following to the department not more than 30 days after it occurs:

- Disciplinary action taken by the health facility or agency against a health professional licensed or registered under Article 15 based on the licensee's or registrant's professional competence, disciplinary action that results in a change of employment status, or disciplinary action based on conduct that adversely affects the licensee's or registrant's clinical privileges for a period of more than 15 days. As used in this subdivision, "adversely affects" means the reduction, restriction, suspension, revocation, denial, or failure to renew the clinical privileges of a licensee or registrant by a health facility or agency
- Restriction or acceptance of the surrender of the clinical privileges of a licensee or registrant under either of the following circumstances: the licensee or registrant is under investigation by the health facility or agency or there is an agreement in which the health facility or agency agrees not to conduct an investigation into the licensee's or registrant's alleged professional incompetence or improper professional conduct
- A case in which a health professional resigns or terminates a contract or whose contract is not renewed instead of the health facility taking disciplinary action against the health professional

MCL § 333.20175(5)

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Reporting Obligations – Additional Thoughts

Kadlec Medical Center v. Lakeview Anesthesia Associates, No. 04-997, 2005 U.S. Dist. LEXIS 9204 (E.D. La. May 19, 2005), *rev'd* 527 F.3d 412 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 631 (2008)

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4. Disruptive Physicians

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Disruptive Physicians

Leal v. Secretary of HHS,
620 F.3d 1280 (11th Cir. 2010)

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5. Authorization and Releases

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Authorization and Releases

- Review all authorizations and releases carefully
- Develop standard practices for responding

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6. Practical Advice

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Practical Advice

- Be Proactive
- Periodically Review and Revise Bylaws
- Follow Bylaws
- Understand State and Federal Law
- Involve Legal Counsel at Beginning of the Process

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QUESTIONS

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