

Medical Staff and Peer Review Grab Bag

Health Law Webinar

January 10, 2024

Fredrikson

Where Law and Business Meet®

Agenda

- Governing laws
- Medical staff bylaws tips
- Fair hearings
- Tricky topics – suspensions without hearings, employment versus medical staff approaches
- Peer review protection and confidentiality
- Litigation – common claims and defenses

Governing Law

- Health Care Quality Improvement Act of 1986 (HCQIA)
- Medicare Conditions of Participation
- Accreditation standards
- State peer review statute
- State hospital or facility license statute
- Emergency Medical Treatment and Labor Act (EMTALA)

Governing Law

- Corporate bylaws
- Medical staff bylaws, rules and regulations, policies
- ADA, Title VII, and other anti-discrimination statutes
- Case law
 - Exclusive contracting/economic credentialing
 - Confidentiality/privacy
 - Bylaws as a contract
 - NPDB reporting
 - Immunity and protections

Health Care Quality Improvement Act of 1986 (HCQIA)

- HCQIA provides immunity from civil liability (with a few exceptions) for “professional review bodies” engaged in “professional review actions.”
- A “professional review action” is an action or recommendation of a health care entity:
 - (1) Taken in the course of professional review activity;
 - (2) Based on the professional competence or professional conduct of an individual health care practitioner; and
 - (3) Which adversely affects or may adversely affect the clinical privileges . . . of the health care practitioner

Health Care Quality Improvement Act of 1986 (HCQIA)

- How do you achieve the standards for immunity?
 - Reasonable belief that the action is in the furtherance of quality of healthcare;
 - Reasonable effort to obtain the facts;
 - Adequate notice and hearing procedures; and
 - Reasonable belief that the action was warranted by the facts.
- The professional review action is presumed to meet the standards for immunity unless the presumption is rebutted by a preponderance of the evidence.

National Practitioner Data Bank (NPDB)

- Hospitals and other eligible health care entities must report:
 - Professional review actions that adversely affect a physician's or dentist's privileges for a period of more than 30 days; and
 - Acceptance of a physician's or dentist's surrender or restriction of clinical privileges while under investigation for possible professional incompetence or improper professional conduct, or in return for not conducting such an investigation or not taking a professional review action that otherwise would be required to be reported to the NPDB.
- Consult the NPDB Guidebook frequently.
- Reporters are immune unless the report is knowingly false.

Medical Staff Bylaws

- Who gets an application?
- When is an application complete?
- What are the grounds for a fair hearing?
- When can you suspend privileges before a hearing?

Who Gets an Application?

- Goal is to avoid unnecessary processing time, energy, and dollars. Also want to avoid taking adverse clinical privileges action that need to be reported.
- Threshold eligibility criteria
 - List of minimum qualifications for membership.
 - E.g., eligible to participate in Medicare (i.e., not on the OIG exclusion list); professional liability insurance with certain limits; board certification; unrestricted state license.

Who Gets an Application?

- Less frequently considered threshold eligibility criteria:
 - Outside of the hospital's exclusive contract/closed department
 - Provided materially false or misleading information in pre-application process
 - Felony or certain misdemeanor conviction
 - Applicant received final adverse decision by Credentials Committee or Medical Executive Committee (or resigned while under investigation)
 - Practitioner type not eligible to practice at hospital

Incomplete Applications

- “No application for appointment or reappointment will be accepted for processing until all information and required documentation has been submitted. It will shall be the responsibility of the applicant to submit missing information to the Medical Staff Office within 30 calendar days of the request for such information. Failure to submit requested information will result in the application being automatically withdrawn and returned to the applicant, along with all fees.”

Issue Spotting

- What if a current medical staff member no longer meets criteria?
- Do you allow waivers?
- Do you have the “not entitled to a hearing” language?

Grounds for a Hearing

- Denial of initial appointment to the Medical Staff;
- Denial of reappointment to the Medical Staff;
- Revocation of appointment to the Medical Staff;
- Denial of requested clinical privileges;
- Revocation of clinical privileges;
- Suspension of clinical privileges, except in the case of a “Precautionary Suspension” or “Immediate Suspension” (defined terms in bylaws);
- Mandatory concurring consultation requirement (i.e., the consultant must approve the course of treatment in advance).

Not Grounds for a Hearing (1)

- Issuance of a letter of guidance, counsel, warning, or reprimand;
- Imposition of conditions, monitoring, or a general consultation requirement (i.e., the individual must obtain a consult but need not get prior approval for the treatment);
- Termination of temporary privileges;
- Automatic relinquishment of appointment or privileges;
- Imposition of a requirement for additional training or continuing education;

Not Grounds for a Hearing (2)

- Determination that an application is incomplete;
- Determination that an application will not be processed due to a misstatement or omission; or
- Determination of ineligibility based on a failure to meet threshold criteria, a lack of need or resources, or because of an exclusive contract.
- Precautionary Suspension (defined term)
- Immediate Suspension (defined term)

Preparing for the Hearing

- Review the bylaws and any other governing documents.
- Work with counsel to ensure procedure is followed; also allows for application of attorney-client privilege.
- If the bylaws are silent on an issue, try to reach agreement regarding the procedural steps and timing.
- Double-check to make sure: (i) notice has been provided; (ii) no conflicts of interest; (iii) witnesses know when to appear.

Conducting the Hearing

- The hearing is the opportunity to hear from witnesses and gain information necessary to make a decision
- Counsel can assist in maintaining process during the hearing and provide legal and procedural advice after the hearing
- It is possible to control the process related to the hearing and thereby eliminate any potential future procedural challenges regarding the hearing and the ultimate decision

Precautionary and Immediate Suspensions

- Consider HCQIA and state law.
- Under HCQIA, “adequate notice and hearing procedures” are not required
 - In the case of a suspension or restriction of clinical privileges, for a period of no longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or
 - Where failure to immediately suspend or restrict clinical privileges, subject to subsequent notice and hearing, may result in an imminent danger to the health of any individual.

Employment vs. Medical Staff Action

- For employed practitioners on the medical staff, the lines between employment actions and medical staff actions can get fuzzy.
- Anticipate these interactions in the bylaws (e.g., consider bylaws provisions that terminate medical staff membership upon termination of employment).
- Be deliberate about which pathway the hospital is using to avoid confusion later.

Peer Review Under State Law

- Primary purpose is to improve the quality and safety of care by protecting and encouraging practitioner participation in quality improvement activities.
- Scope of protected activities depends on state law:
 - Type of facility
 - Type of activity
 - Procedural requirements
- Two components:
 - Immunity (state law, see also HCQIA)
 - Privilege/confidentiality (state law)

Peer Review Confidentiality

- Nearly all states plus D.C. protect the confidentiality of the peer review process.
- Exceptions (vary by state):
 - Practitioners seeking information about their own practice, typically to challenge a peer review action or assert an employment claim.
 - Use in federal court.
 - Waiver by the participants in the peer review process.

Litigation Considerations—Common Claims

- Antitrust
- Defamation
- Breach of contract
- Discrimination (in employment, or under some states' law, in contracting)
- Due process (against public hospitals)
- Note that HCQIA itself is NOT a cause of action and a violation of HCQIA is not a cognizable claim.

Litigation Considerations—Common Defenses

- Failure to exhaust administrative remedies:
 - Under the bylaws.
 - Under the NPBD administrative appeal process.
- Immunity:
 - Courts have repeatedly granted immunity under HCQIA and state law and do not generally second-guess the medical staff's medical judgment.
 - However, noncompliance with the bylaws or other “procedural irregularities” may jeopardize immunity.
 - HCQIA immunity does not protect against civil rights claims and does not immunize against claims for injunctive relief.
 - Immunity is often an issue of fact meaning that it cannot be resolved early in the proceedings.

Presenters



Katie Ilten

Attorney

612.492.7428

kilten@fredlaw.com



Pari McGarraugh

Attorney

612.492.7480

pmcgarraugh@fredlaw.com



Nicole Moen

Attorney

612.492.7320

nmoen@fredlaw.com

Thank you!



Where Law and Business Meet®