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Managing Peer Review Hearings and Litigation

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Part 2: Program Objectives

- Overview and recommendations regarding hearing procedures.
- Ways to maximize confidentiality and immunity protections under state law, HCQIA and the Patient Safety Act.
- Effective use of hearing officers.
- How to select medical staff hearing representatives and hearing committee members.
- The proper role of legal counsel.

Part 2: Program Objectives (cont'd)

- The appropriate standard of review in hearings.
- The standards applied by courts when reviewing peer review decisions.
- Typical claims and defenses in litigation.
- Settlement strategies.

How Did We Get Here? Takeaways From Part 1

- Collegial intervention was not successful.
- Remedial/corrective action was requested by the designated Medical Staff Officer, Department/Committee Chair or a member of senior management.
- Ad hoc investigation committee was formed and meetings were held with the physician.
- A recommendation was been made and not accepted by the physician.

Takeaways From Part 1: Bylaws Have Been Closely Followed and a Clear Record Has Been Created

- Documentation was created and gathered in a way that preserves available protections under state and federal confidentiality statutes.
- The indicator(s) or other bases on which the cases “fell-out” are clear from the documents.
- Ad hoc committee comprised of non-conflicted, non-competing physicians considered the cases and the physician's responses.
- All written responses of the physician are included in the investigation file.
- The ad hoc committee has prepared a report with findings in support of its recommendation to the MEC.

Managing the Hearing – Fundamental Principles

- Follow your Bylaws and hearing policies.
- Make sure the hearing procedures comply with state law and HCQIA.
- If Bylaws are unclear and conflicting, try to reach resolution with physician/counsel before the hearing begins.
- Make sure your procedures comport with fundamental fairness.
- Think about the ultimate audience, which may be a judge.

Managing the Hearing – Fundamental Principles (cont'd)

- Better to provide the physician with more process/ opportunity to respond than the minimum required by the Bylaws.
- Be transparent. The physician should be given all documentation on which the recommendation was based.
- Choose a well-qualified physician representative to present the cases on behalf of the medical staff.
- Try to settle the matter before the hearing begins.

Prehearing Matters: Resolve As Many Procedural Issues As Possible

- Ensure that hearing procedures are clear; eliminate uncertainty and discretion.
- What documents are admissible (medical records; reviews and responses; outside reviews) – **NEVER** disclose confidential peer review information concerning other physicians.
- What testimony is admissible (practitioners with direct knowledge; reviewers; committee members; experts).
- What reviews and reports are admissible without live testimony (e.g., outside reviews).
- Duration of hearing; right to examine and cross-examine.

Prehearing Matters: Resolve As Many Procedural Issues As Possible (cont'd)

- Number of witnesses and availability
- Adequacy of notice for hearings
- Exchange of information (no formal interrogatories or document requests unless mandated by Bylaws)
- Number of sessions and time allocated to each side
- Witnesses called once or subject to recall

Prehearing Matters: Resolve As Many Procedural Issues As Possible (cont'd)

- Objections to hearing committee members.
- Should *voir dire* be permitted?
- Resolve any Bylaws interpretation disputes.
- Obtain rulings from hearing officer on contested procedural matters.

Hearing Procedures

- Testimony via affidavit (avoid if possible)
- Right to appeal hearing committee's decision; form of appeal; body to hear an appeal
- Permitted attendees
- Hearing transcribed (recommended)
- Make a clear record of admitted documents and hearing officer rulings

Hearing Procedures (cont'd)

- Conduct hearings regarding evidentiary disputes outside the presence of the hearing committee.
- Consider exchanging proposed exhibits beforehand, to avoid disputes regarding admissibility.
- Have the hearing officer and committee confirm the procedures that shall govern.

The Hearing: Maintaining Decorum and a Smooth Hearing

- Sanctions for non-compliance with hearing officer/committee rulings.
- Address the possibility of committee member absence.
- Keep the record well organized.

Maximizing Immunity and Confidentiality Protections

- Know the language of your state and federal (Patient Safety Act) confidentiality laws.
- Hearing procedures should reiterate that evaluative materials are inadmissible in court.
- Confirm this with opposing counsel, the hearing officer and the committee.
- Stamp all materials and transcripts as confidential peer review materials – inadmissible under state law.

Maximizing Immunity and Confidentiality Protections (cont'd)

- Which materials may be reviewed by the hospital board or the appeals committee, versus a court; court reviews all materials to determine compliance with Bylaws and fundamental fairness but not to evaluate the cases or the hearing committee's judgment regarding them.
- Two separate records: (i) substantive hearing record, and (ii) administrative record for evidentiary and procedural disputes.

Hearing Officers

- Process in Bylaws for selecting hearing officer.
- Consider someone with arbitration experience – AHLA panel; JAMS; AAA.
- Bylaws should clearly set forth duties and powers; confirm them with opposing counsel.
- Have opposing counsel and the physician confirm the appointment of the hearing officer. Bylaws generally allow the physician to raise objections to the hearing officer, but not to veto the appointment.

Hearing Officers (cont'd)

Should have power to rule on:

- Admissibility of evidence
- Challenges to composition of hearing committee(?)
- Order of evidence and witnesses
- Disputes regarding confidentiality/peer review protections
- Proper scope of expert testimony
- Any other matter typically within the province of a trial court judge
- *Sanctions*

Hearing Officer's Authority to Issue Sanctions

- Terminate a witness examination/cross-examination.
- Waiver of certain hearing rights based on repeated failure to meet deadlines for disruptive behavior.
- Hearing officer's authority to issue sanctions should be clearly set forth in the Bylaws.
- Consider a mechanism to allow the committee, rather than the hearing officer, to issue sanctions.
- Make a record of proceedings with the hearing officer outside the presence of the committee.

Selection of Medical Staff Representative and Hearing Committee

Representative

- Medical staff representative should be a well-qualified physician who is actively involved in the investigation, and is in the same specialty or is otherwise knowledgeable about the subject matter.
- Should not be a competitor or have a personal conflict.

Committee Members

- Not the individuals who participated in the cases or the review thereof
- Not the individuals who served on investigative committees or quality committees
- Not competitors of the physician
- Not partners of the physician

Selection of Hearing Committee

- Try to confirm that members have no current plans to leave the hospital.
- Mechanism for disclosing conflicts of interest.
- Allow objections to members based only on actual conflicts/grounds (no peremptory strikes).
- Confirm availability and schedule for duration of hearing.
- Confirm the method for replacing members.

Proper Role of Legal Counsel

- Ensure that Bylaws and procedures are followed.
- Not to substitute counsel's judgment for that of the reviewers or the hearing committee.
- Should counsel conduct direct and cross-examinations of witnesses?
- You are an advocate for getting to the truth and conforming to the Bylaws and fair procedures.
- No *ex parte* contact with committee or hearing officer.

Committee Review And Applicable Standard

- Clear instructions to committee based on Bylaws.
- Confirm that Bylaws conform to any state law requirements for the review of peer review recommendations.
- Simpler is better, e.g., is the peer review recommendation reasonable based on the evidence presented?
- Alternative standards of review (preponderance of the evidence; substantial evidence; clear and convincing; arbitrary or capricious).
- Confirm the standard of review with the committee at the outset.
- Confirm the standard with opposing counsel.

The Committee's Decision

- The decision should contain the specific findings on which it is based.
- The hearing committee can affirm, modify or reject the recommendations of the investigation committee.
- The hearing officer is not a decision-maker, but can assist the committee in drafting its decision subject to final review and approval by the committee.
- The decision should be issued within the timeframe required under the Bylaws.
- Appeal of the committee decision to another committee or the board?
- If appeal is permitted, make sure it is available to both sides.
- Composition of appeal committee and standard of review.

Standards Applied By Courts When The Decision is Challenged

- Variations in state law.
- Consider that physician may bring action in federal court, where state law confidentiality statutes will not apply to federal claims.
- Primary focus: compliance with Bylaws.
- Secondary focus: traditional notions of fairness/due process.
- Better to have Bylaws comport with traditional notions of fairness; avoid strained, or facially questionable or one-sided procedures.

Court Review

- Emphasize the court's limited role.
- Consider motion to dismiss all claims except those based on substantial compliance with Bylaws/fairness (peer review materials generally inadmissible (consider variations in state law)).
- Quickly answer claims not subject to dismissal.
- Stick to limited discovery allowed under law (information reflecting compliance with Bylaws and fairness in procedures).

Court Review (cont'd)

- Be forthcoming with discovery directed to process/compliance with Bylaws and fairness.
- *Pick your battles* regarding discovery.

Typical Claims and Defenses

- Violation of Bylaws/Breach of Contract
- Violations of Due Process
- Violations of Fundamental Fairness
- Tortious Interference
- Antitrust (group boycott, monopoly)
- Willful and wanton misconduct (to avoid immunity protections from money damages – check state law)

Typical Claims and Defenses (cont'd)

- Discrimination (age, race, sex, religion, ADA)
- Infliction of emotional distress
- Defamation
- Fraud/Conspiracy
- Interference with physician/patient relationship
- RICO

Relief Typically Sought

- TRO/injunction to prevent reporting to NPDB/reporting to other institutions
- TRO/injunction granting reinstatement and new hearing or portion thereof
- Money damages (willful and wanton conduct)

Typical Allegations

- Bias among the reviewers, i.e., competitors
- Bias among the witnesses
- Failure to follow review procedures
- Piling on old and thin cases

Typical Allegations (cont'd)

- Pre-judging cases without benefit of the physician's responses; *fait accompli*
- Inadequate time for physician to respond
- Failure to give proper notice of hearings or remedial actions
- Prejudice/discrimination

Defenses

- State and HCQIA immunities
- Medical Studies Act and other privileges (Patient Safety Act) to exclude evidence/inquiry regarding the peer review and substance of the committee's decision
- Rule of Non-Review and similar state doctrines for substance of decision
- Bylaws – immunity provisions/agreements not to sue
- Factual defenses for summary judgment: Bylaws and statutes were followed (use documents and affidavits)

Defenses (cont'd)

- Hospital fiduciary obligations
- Hospital accreditation and regulatory obligations/ malpractice considerations
- Courts have ruled that independent physicians are not employees under Title VII.

Defenses (cont'd)

- In most jurisdictions, medical staff leaders and committees that make recommendations subject to final review by the board are deemed to be agents of the hospital, and therefore cannot conspire for anti-trust purposes.
- State immunity protections: most states provide that peer review participants are immune from individual civil liability unless they engage in conduct in bad faith or with actual malice, or which is willful and wanton.

Defenses (cont'd)

- HCQIA protections do not apply in discrimination claims.
- HCQIA protections were initially applied only in federal proceedings, but most states have adopted them.
- Many states have confidentiality protections for peer review activities, which often results in the dismissal of state court claims based on a lack of proof – this applies only to state law claims, not federal claims.
- Patient Safety Organizations: To Participate or Not – That is the Question

Defenses (cont'd)

- Patient Safety Act/Patient Safety Organization: provides broad confidentiality and privilege protections for peer review activities, in both state and federal proceedings.
- The majority of state and federal cases based on peer review activities are disposed of via motions to dismiss or for summary judgment.
- Hospital insurance policies will provide defense and indemnity for peer review participants.

Settlement Strategies

- Mentoring (not reportable).
- Agreed language for report to NPDB/responses to inquiries (differentiate behavioral issues from clinical ones).
- Potential settlement where court finds procedural defects in the hospital's hearing and remands the matter for further proceedings at the hospital.

Settlement Strategies (cont'd)

- Negotiate the language of the NPDB report (differentiate behavioral reasons from clinical ones).
- Negotiate the language for responses to inquiries.

Now What?

- Review power point slides, materials and recommendations and consider revising your bylaws, rules, regulations and policies.
- Consult with your legal counsel (internal and external) before finalizing any recommended changes and before taking actions that may require a report.
- Share webinar replay link and materials with others within your organization.
- Work towards a “just culture” approach to peer review practices and investigations.

Now What? (cont'd)

- Consider conducting a Peer Review Audit.
- Purpose of the Audit is to review the medical staff bylaws, rules, regulations and related policies to determine compliance with or violation of Medicare Conditions of Participation, applicable accreditation standards, HCQIA and relevant state and federal laws.
 - Audit Report identifies conflicting, ambiguous and inconsistent bylaws provisions.
 - Audit Report also provides recommendations for best and alternative practices for consideration.
 - Audit Report contains example bylaw provisions related to best practice recommendations.