Economic Credentialing and Peer Review Considerations with Value Based Performance Organizations

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Overview of Presentation

I. Economic Credentialing
   a. What is economic credentialing?
   b. A review of economic credentialing cases
   c. The status of economic credentialing in the 50 states

II. Value Based Performance Organizations
   a. Medicare and Commercial Accountable Care Organizations
   b. Health system sponsored quality focused organizations
   c. Hybrid value-based performance organizations.

III. Legal Issues Pertaining to Excluding Certain Medical Staff Members
   a. Federal and State Law concerns related to peer review for such exclusion
   b. Antitrust concerns
   c. Other legal concerns related to economic credentialing

IV. What is On The Horizon

V. Conclusion/Questions
I. Economic Credentialing
a. What is Economic Credentialing?
   • There is not a generally accepted definition of “Economic Credentialing”
   • American Medical Association defines it as “the use of economic criteria unrelated to quality of care or professional competence in determining a physician’s qualifications for initial or continuing hospital medical staff membership”

I. Economic Credentialing
a. What is Economic Credentialing? – con’t.
   • American College of Medical Quality defines it as the determination of “…a health care professional’s qualifications based solely on economic factors that are unrelated to the individual’s ability to make standard of care medical review or direct clinical care decisions.”

I. Economic Credentialing
a. What is Economic Credentialing – con’t.
   • Facilities use economic credentialing where permissible to protect their economic interests
   • Medicare, Medicaid and Joint Commission do not specifically prohibit consideration of financial interests in competing hospitals as appropriate criteria in making decisions regarding staff appointments
I. What is Economic Credentialing
b. A review of economic credentialing cases

Cathey v. Baptist Health
(Pulaski County, Arkansas Circuit Court)

- Baptist Health had an Economic Credentialing Policy that prohibited physicians on the medical staff of any Baptist Health hospital from competing with Baptist Health.
- Baptist Health initiated proceedings to remove Dr. Cathey from the Baptist Health Medical Center – Little Rock facility because her husband owned a interest in a competing facility, Arkansas surgical physician hospital.

Cathey sued Baptist Health to stop proceedings.
Case settled but Dr. Cathey’s husband divested himself of the competing hospital interest.

Glusic v. Avera St. Luke’s
649 N.W.2d 916 (S.D. 2002)

- Dr. Glusic applied for medical staff privileges at Avera St. Luke’s and while meeting professional requirements did not meet its economic requirements.
- Trial Court ordered that Dr. Glusic be granted privileges and Avera St. Luke’s did grant him privileges.
- The South Dakota Supreme Court ruled that the Medical Staff Bylaws did not specifically prohibit the use of economic credentialing in its staff determination.
I. What is Economic Credentialing

b. A review of economic credentialing cases – con’t.

Glusic v. Avera St. Luke’s
649 N.W.2d 916 (S.D. 2002)

• Subsequent to the South Dakota Supreme Court decision, Avera St. Luke’s terminated the privileges that had been granted to Dr. Glusic due to the Trial Court’s ruling.
• The Trial Court found that since its earlier decision had been overturned Dr. Glusic should not have been granted privileges
• Dr. Glusic appealed the South Dakota Supreme Court who affirmed the Trial Court’s decision.

I. What is Economic Credentialing

b. A review of economic credentialing cases – con’t.

Mahan v. Avera St. Luke’s
621 N.W.2d 150 (S.D. 2001)

• Hospital administration refused applicants to its medical staff based upon economic criteria.
• Hospital had concerns that physicians in one specialty may compete with physicians of another.
• The Hospital’s concerns pertained to strictly the competition between one hospital and another hospital.

I. What is Economic Credentialing

b. A review of economic credentialing cases – con’t.

Mahan v. Avera St. Luke’s
621 N.W.2d 150 (S.D. 2001)

• The South Dakota Supreme Court ruled that the hospital administration was entitled to use economic criteria in making credentialing decisions.
• While not directly related to the case, the Court questioned whether a medical staff member could open an ambulatory surgery center that competed with the hospital. The Court believed there was sufficient comparison between a physician with staff privileges and those who were employed by the hospital that those physicians would be prohibited from doing so.
I. Economic Credentialing

b. A review of economic credentialing cases – con’t.

Murphy v. Baptist Health
373 S.W.3d 269 (Ark. 2010)

• This case is the key case in this area
• Baptist Health maintained an economic credentialing policy that prohibited physicians from holding interests in competing hospitals
• The case focused on how this case impacted the patient-physician relationship
• “The heart of this case is the patient-physician relationship. The relationship is entitled to special protection.”
• Arkansas Supreme Court ruled that the hospital economic credentialing policy tortiously interfered with the physicians’ existing and prospective business relationship

I. Economic Credentialing

b. A review of economic credentialing cases – con’t.

Cases dealing with Managed Care

Higgins v. Baptist St. Anthony’s
(Potter County, Texas District Court)

• A managed care network moved to deselect physicians from the network’s panel who were invested in a surgical hospital that competed with a hospital owned by the parent of the managed care network.
• The parent company urged the managed care network to deselect any physicians who were investors in the surgical hospital.
• Prior to trial, the parties settled the case

I. Economic Credentialing

b. A review of economic credentialing cases – con’t.

Cases dealing with Managed Care

Higgins v. Baptist St. Anthony’s
(Potter County, Texas District Court)

• Pursuant to the settlement, the parent company purchased a majority interest in the surgical hospital.
• The parent company also agreed not to discriminate against other physicians who were investors in the surgical hospital.
I. Economic Credentialing

b. A review of economic credentialing cases – con’t.

Cases dealing with Managed Care

Potvin v. Metropolitan Life Ins. Co.
997 P.2d 1153 (Cal. 2000)

- Physician sued Managed Care Organization who terminated him from participating in its provider networks
- The provider agreement contained a “without cause” termination provision
- The Court ruled that irrespective of the “without cause” termination provisions, physician still maintained common law rights to a fair procedure to contest the termination
- The decision allows for a hearing process where economic credentialing may be exposed as a reason for a deselection.

I. Economic Credentialing

b. A review of economic credentialing cases – con’t.

Managed Care Organizations use of Tier Ratings may be one method of disguising economic credentialing

- Many within the industry believe these Tier Ratings are not a reliable indicator to judge physicians and their delivery of healthcare
- A criticism of Tier Ratings is that physicians ranked in the upper Tier of one rating may not be similarly ranked within other Tier Ratings within the marketplace

I. Economic Credentialing

c. The status of economic credentialing in the 50 states

- No established law or rule concerning economic credentialing that applies to each state
- Must consider Medical Staff Bylaws and State Statutes
- Medical Staff Bylaws may allow for economic credentialing
- State statutes may expressly allow for economic credentialing or restrict its use.
  - California
  - Florida
  - New York
  - Texas
  - Indiana
  - Kansas
  - Tennessee
I. Economic Credentialing

c. The status of economic credentialing in the 50 states

California:
Cal.Welf. & Inst.Code § 14087.28
- A hospital contracting with the Medi-Cal program pursuant to this chapter shall not deny medical staff membership or clinical privileges for reasons other than a physician’s individual qualifications as determined by professional and ethical criteria, uniformly applied to all medical staff applicants and members. Determination of medical staff membership or clinical privileges shall not be made upon the basis of any of the following:

I. Economic Credentialing

c. The status of economic credentialing in the 50 states — Con’t

Florida:
Fla. Stat. § 395.0191
- Nothing herein shall restrict in any way the authority of the medical staff of a licensed facility to review for approval or disapproval all applications for appointment and reappointment to all categories of staff and to make recommendations on each applicant to the governing board, including the delineation of privileges to be granted in each case. In making such recommendations and in the delineation of privileges, each applicant shall be considered individually pursuant to criteria for a doctor licensed under chapter 458, chapter 459, chapter 461, or chapter 466, or for an advanced registered nurse practitioner licensed and certified under part I of chapter 464, or for a psychologist licensed under chapter 490, as applicable.
I. Economic Credentialing

c. The status of economic credentialing in the 50 states

Florida – con’t.
Fla. Stat. § 395.0191

The applicant's eligibility for staff membership or clinical privileges shall be determined by the applicant’s background, experience, health, training, and demonstrated competency; the applicant’s adherence to applicable professional ethics; the applicant’s reputation; and the applicant’s ability to work with others and by such other elements as determined by the governing board, consistent with this part.

New York:

N.Y. Publ. Health Law § 2801-b

§ 2801-b. Improper practices in hospital staff appointments and extension of professional privileges prohibited.

It shall be an improper practice for the governing body of a hospital to refuse to act upon an application for staff membership or professional privileges or to deny or withhold from a physician, podiatrist, optometrist, dentist or licensed midwife staff membership or professional privileges in a hospital, or to exclude or expel a physician, podiatrist, optometrist, dentist or licensed midwife from staff membership in a hospital or curtail, terminate or diminish in any way a physician’s, podiatrist’s, optometrist’s, dentist’s or licensed midwife’s professional privileges in a hospital, without stating the reasons therefor, or if the reasons stated are unrelated to standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant.
I. Economic Credentialing

c. The status of economic credentialing in the 50 states

Texas


• A hospital, by contract or otherwise, may not refuse or fail to grant or renew staff privileges, or condition staff privileges, based in whole or in part on the fact that the physician or a partner, associate, or employee of the physician is providing medical or health care services at a different hospital or hospital system.

Texas – Con’t

• A hospital may not contract to limit a physician’s participation or staff privileges or the participation or staff privileges of a partner, associate, or employee of the physician at a different hospital or hospital system.

Indiana

Ind. Code §16-21-2-5

Hospital governing board; responsibilities

Sec. 5. The governing board of the hospital is the supreme authority in the hospital and is responsible for the following:

• The management, operation, and control of the hospital
• The appointment, reappointment, and assignment of privileges to members of the medical staff, with the advice and recommendations of the medical staff, consistent with the individual training, experience, and other qualifications of the medical staff.
I. Economic Credentialing

c. The status of economic credentialing in the 50 states

Indiana – Con’t.

• Establishing requirements for appointments to and continued service on the hospital’s medical staff, consistent with the appointee’s individual training, experience, and other qualifications, including the following requirements:
  ➢ Proof that a medical staff member has qualified as a health care provider under IC 16-18-2-163(a).
  ➢ The performance of patient care and related duties in a manner that is not disruptive to the delivery of quality medical care in the hospital setting.

I. Economic Credentialing

c. The status of economic credentialing in the 50 states

Indiana – Con’t.

➢ Standards of quality medical care that recognizes the efficient and effective utilization of hospital resources, developed by the medical staff.

I. Economic Credentialing

c. The status of economic credentialing in the 50 states

Kansas

No rule or regulation shall be made by the licensing agency which would discriminate against any practitioner of the healing arts who is licensed to practice medicine and surgery in this state. Boards of trustees or directors of facilities licensed pursuant to the provisions of this act shall have the right, in accordance with law, to select the professional staff members of such facilities and to select and employ interns, nurses and other personnel, and no rules and regulations or standards of the licensing agency shall be valid which, if enforced, would interfere in such selection or employment.
I. Economic Credentialing

C. The status of economic credentialing in the 50 states

Kansas – Con’t.

In the selection of professional staff members, no hospital licensed under K.S.A. 65-425(b) et seq. shall discriminate against any practitioner of the healing arts who is licensed to practice medicine and surgery in this state for reasons based solely upon the practitioner’s branch of the healing arts or the school or health care facility in which the practitioner received medical school or postgraduate training.

Tennessee


Employing entities shall not require, by contract or policy, that as a condition or consequence of employment, written or otherwise, employed physicians relinquish medical staff privileges, or the rights related to medical staff privileges, upon the commencement of, upon any event during the pendency of, or at the termination or conclusion of, the employment relationship. In any event, nothing in this section shall be construed as affecting or negating the ability of an employing hospital to revoke or suspend a physician’s staff privileges in accordance with the procedures set forth in the medical staff bylaws. Hospitals shall not substitute physician employment contracts for medical staff privileges.

Nonemployed and employed physicians holding staff privileges at a hospital that is an employing entity, or hospitals on which employed physicians hold staff privileges that are affiliates of employing entities, shall enjoy the same privileges, rights and protections with respect to medical staff membership.
I. Economic Credentialing

c. The status of economic credentialing in the 50 states

Tennessee – Con’t.

Employment of a physician shall not affect any other physician’s medical staff privileges. Physicians who hold membership on medical staffs at a hospital which is an employing entity, or a hospital on which employed physicians hold staff privileges that are affiliates of employing entities, shall be provided with the rights and protections, including rights of self-governance, afforded by the applicable state licensing board, and, when accredited, the accrediting entity or agency.

II. Value Based Performance Organizations

a. Medicare and Commercial Accountable Care Organizations

• Accountable Care Organizations, or ACOs, are organized arrangements linking entities by contract to a fully integrated system

• ACOs may use Ongoing Professional Practice Evaluations (“OPPE”) standards promulgated by The Joint Commission for the ongoing credentialing of a hospital’s medical staff for the ACO’s credentialing of its physicians

b. Medicare and Commercial Accountable Care Organizations – con’t.

• Medicare ACO’s include the following:
  - Pioneer ACO Model
  - Advanced Payment ACO Model
  - Medicare Shared Savings ACO Model
  - ACO Investment Model
  - Next Generation ACO Model

• A combination of quality and saving initiatives resulting in shared savings that result in economic impact
II. Value Based Performance Organization

a. Medicare and Commercial Accountable Care Organizations – con’t.

Commercial ACOs

• Private commercial payors use a similar structure as the Medicare ACOs to coordinate care and align quality and saving incentives
  ➢ Create structural relationships through contractual arrangements with providers to align incentives
  ➢ In some instances providers are purchased rather than affiliating through contractual arrangements

II. Value Based Performance Organization

b. Health system sponsored quality focused organization

• Type of organizational structure similar to Commercial ACOs
• Focus on those providers who have medical staff privileges or located within the health system’s relevant marketplace
• Serves two purposes:
  ➢ Creating a network that focuses on quality
  ➢ Incentivizes the providers to support the health system
c. Hybrid value-based performance organization

New Payment Models:

- Pay for Performance
- Bundled Payments
- Capitation
- Other hybrid models

II. Value Based Performance Organization

c. Hybrid value-based performance organization – con’t.

Hybrid models emphasize targeted quality efforts to increase economic success:

- Identify focus areas for quality
- Determine what steps should be taken to improve the focus areas
- Create and implement an operational process to improve quality
- Identify successes and failures
- Implement on a wider basis to achieve economic success

II. Value Based Performance Organization

c. Hybrid value-based performance organization – con’t.

Different types of groups utilized in hybrid initiatives:

- Health systems
- Governmental and Commercial Payers
- Certification and Quality Groups
- Professional Societies
- Governmental and Institutional Agencies and Organizations
- Other economic and quality institutions
III. Legal Issue Pertaining to Excluding Certain Medical Staff Members

a. Federal and State Law Concerns Related to Peer Review for Such Exclusion
   • Health Care Quality Improvement Act of 1986 (42 U.S.C. 11101 et seq) promotes peer review by granting confidentiality and immunity protections
   • Each state has their own immunity and privilege rights
   • However, each one of these areas continue to be litigated raising questions and creating uncertainty on how these rules apply which creates uncertainty

b. Antitrust Concerns
   • Federal and State Antitrust and Anti-Competitive laws
     ᶜ Section 1 of the Sherman Act (15 U.S.C. §1) - Restraint of trade prohibition
     ᶜ Section 2 of the Sherman Act (15 U.S.C. §2) - Monopoly or attempt to monopolize
     ᶜ Section 5 of the Federal Trade Commission (15 U.S.C. §45) – Unfair or deceptive acts or practices in or affecting competition
     ᶜ State antitrust laws

c. Other legal concerns related to economic credentialing
   • Any Willing Provider Statutes
   • Breach of contract based upon Medical Staff Bylaws in those states that recognize it as a contract
   • Breach of Fiduciary Duty on a theory of breach of the public trust
   • Liability of weighing Quality vs. Profit
   • Anti-Kickback laws
IV.  What is on the Horizon?

- New Credentialing Models
- Credentialing across multiple providers or entities
- Expansion of Hybrid Delivery Models
- Restrictions due to Court Decisions
- Expansion through Quality Initiatives

V.  Conclusion

- Final Thoughts
- Questions