A Tale of Two Peer Review Proceedings: Process Makes Perfect

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A Tale of Two Peer Review Proceedings – Process Makes Perfect

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Summary of Basis for Due Process Rights

Basic Concept – 9th Grade Civics
5th and 14th Amendments
No deprivation of property or rights without due process of law

In the Medical Staff Context – HCQIA
Health Care Quality Improvement Act of 1986
Provides immunity for those involved in a professional review action
To qualify for such immunity, must provide the physician with due process

Summary of Basis for Due Process Rights

HCQIA Requirements – Professional Review Action
Must Be Taken:
• In the reasonable belief that the action was in furtherance of quality health care;
• After a reasonable effort to Obtain the facts of the matter;
• After adequate notice and hearing procedures afforded to the physician or other such procedures that are fair to the physician; and
• In the reasonable belief that the action was warranted by the facts known after the reasonable effort to obtain the facts and adequate notice and hearing procedures have been afforded to the physician.
(These standards are presumed to be satisfied unless rebutted by a preponderance of the evidence showing the action was arbitrary, unreasonable, and capricious.)
Summary of Basis for Due Process Rights

Joint Commission – MS.01.01.01
Requires the medical staff bylaws to contain a fair hearing and appeal process, including:
- Process for scheduling/conducting hearings and appeals
- Composition of fair hearing committee

Summary of Basis for Due Process Rights

Typical Fair Hearing Requirements
- Definition of adverse action
- Notice requirements
- Time/manner to request hearing
- Time within which hearing must be held
- Selection/composition of hearing panel
- Hearing procedural parameters (evidentiary standards, right to cross-examine, record of hearing, etc.)
- Procedures for deliberation/reporting/review
- Appellate review rights and procedures

Setting the Scene – Factual Scenario for Each of Two Peer Review Matters

A. Conduct Giving Rise to Issue

B. Initial Report
Setting the Scene: 
Dr. X

General Surgeon
Long history of standard of care concerns
Long history of peer review “benefit of the doubt”
Bad outcome triggers action

Setting the Scene: 
Dr. Y

General Surgeon
No history of peer review/risk management issues (in fact, no risk management file)
Years after Dr. Y’s recruitment to the hospital, new director of surgery recruited from out of town

Response to Report

A. Initial Review
B. Investigation
C. Committee Review
D. Standard of Care Determination
Response to Report:
Dr. X

Despite emotionally charged environment, medical staff and administration responded by methodically following the process laid out in Risk Management Plan and Medical Staff Bylaws:
- Incident report
- Risk management review and report
- Physician Peer Review Committee review and standard of care determination
- Careful documentation of interviews
- Retain copies of all deliberations and records reviewed by committee
- Summary suspension

Response to Report:
Dr. Y

No risk management issue
No peer review complaint
Instituted by new director of surgery
- Reviewed all records of particular type of surgery
- Identified cases that caused him concern
- Sent incomplete records to anonymous outside reviewers
- Outside reviewers’ reports unclear

Formed ad hoc department “peer review” committee
- Not part of process defined by bylaws
- Reached conclusions:
  - Without reviewing records
  - Only reviewed external/anonymous reports
  - Before meeting with Dr. Y

Response to Report:
Dr. Y (cont’d)

In later meeting with Dr. Y, provides literature and information supporting care
Information not shared with outside reviewers
Recommend revocation to Peer Review Committee
Administration requests that Dr. Y voluntarily refrain from performing procedure at issue during peer review process
Dr. Y agrees
Medical Staff Committee
Consideration

A. Committee Deliberations/Meeting with Practitioner
B. Standard of Care Determination
C. Corrective Action Recommendation
D. Notice to Practitioner

Medical Staff Committee
Consideration: Dr. X

Peer Review Committee invited physician to appear before committee
Initial standard of care determination
Case sent to outside third-party reviewer
In the meantime, third-party review results received regarding prior incidents
Recommendation: revocation of privileges
Formal notice (per Medical Staff Bylaws/Fair Hearing Plan requirements)

Medical Staff Committee
Consideration: Dr. Y

Peer Review Committee
Met with Dr. Y
Reviewed some of the records for the cases at issue
Identified material errors with reports from outside reviewers
Unanimously recommended against revocation

Credentials Committee
New issue raised
Administration suspended privileges based on new issue despite voluntary refrain
Met with Dr. Y
Recommended against revocation
Medical Staff Committee
Consideration: Dr. Y (cont’d)

Medical Executive Committee (MEC)
- Does not provide notice
- Dr. Y does not attend
- Discussed new issue
- Members of lower committees changed vote (based on new issue)
- Recommended revocation and continuation of suspension

Fair Hearing

A. Notice to Practitioner
B. Hearing Panel Composition
C. Hearing Officer/Panel (selection)
D. Record of Hearing
E. Experts
F. Rules of Evidence (or not)

Fair Hearing: Dr. X

- Hearing scheduled and notice given within timeframes established in Fair Hearing Plan
- Hearing Panel: Two board-certified general surgeons and one board-certified family practice
- Hearing Officer: seasoned trial attorney
- Court Reporter
- Reports of outside third-party reviewer
- Very few evidentiary objections to physician’s evidence or testimony
- Hearing Panel found solid factual basis for revocation
- MEC issued final recommendation of revocation
- Board held appellate review hearing and affirmed revocation
**Fair Hearing:**

**Dr. Y**

**Notice to Practitioner**
- Does not include suspension
- Does not include new issue

**Hearing Panel Composition**
- Nationally known specialist
- Local physician
- Retired judge

**Hearing Officer Panel (selection)**
- Hospital initially names retired former general counsel as hearing officer
- Dr. Y objects; another attorney appointed

**Fair Hearing:**

**Dr. Y (cont'd)**

**Record of Hearing**
- Court reporters

**Experts**
- Hospital only offers anonymous outside reports
- Dr. Y's expert's testimony not given (ruled irrelevant by hearing officer)

**Rules of Evidence**
- Not followed

**Unanimously determines that MEC recommendation was arbitrary and capricious**

**Reporting to National Practitioner Data Bank**

A. What Is Reportable?

B. When Reportable?

C. Content of Report?
Reporting to NPDB:
Dr. X

Reported summary suspension (after 30 days)
Reported final action of Board

Reporting to NPDB:
Dr. Y

Hospital initially reported suspension
Hospital counsel and administration had earlier communicated that suspension was not reportable
Reported before 30 days
Reported before giving any due process on suspension
Report amended to report revocation
(despite Fair Hearing Panel’s unanimous determination that MEC’s recommendation was arbitrary and capricious, hospital board adopted MEC’s recommendation)

Debriefing

A. Lessons Learned
B. Alternative Approaches
C. Questions/Discussion