Legal Update: Legal Developments Affecting Medical Staff Professionals

Session Code: MN04

Date: Monday, October 23

Time: 10:00 a.m. - 11:30 a.m.

Total CE Credits: 1.5

Presenter(s): Michael Callahan, JD
Legal Update: Legal Developments Affecting Medical Staff Professionals

Michael R. Callahan
Katten Muchin Rosenman LLP
312-902-5634 (phone)
michael.callahan@kattenlaw.com

Peer Review Immunity Cases
Alaska Supreme Court Denies Hospital Immunity in Physician Privileges Dispute (Bradner v. Providence Health & Servs., No. S-15933 (Alaska November 25, 2016))

**Background**
- Dr. Bradner was a member of the medical staff at Providence Alaska Medical Center who was required by the Alaska State Medical Board to undergo a psychiatric medical evaluation in October, 2010 after he had contacted an individual in the governor's office and made a threat involving a gun.
- Dr. Bradner timely complied with the State Board's order and after an evaluation by a clinic was found fit to practice medicine.
- Under the hospital's code of conduct and medical staff bylaws, physicians are required to report to the chief of staff or medical staff services department manager "any limitations, restrictions, or conditions of any sort imposed by a State Board... no later than thirty (30) days after a final order has been issued. Physicians who violate the reporting requirement "will be subject to an automatic termination" of hospital privileges.

Dr. Bradner did not inform the hospital of the State Board's order or the results of the evaluation. The fact that this evaluation occurred was not uncovered until 2011 when the hospital's MEC required a fitness for duty evaluation at the same clinic based on Dr. Bradner's disjointed, rambling and confused conduct when appearing before the MEC on an unrelated matter.

Without prior notice or an opportunity to appear before the MEC, the committee voted to recommend termination for failure to report the State Board's order consistent with its policy.

Dr. Bradner was afforded a post termination hearing and appeal which ultimately affirmed the decision to terminate him based on his violation of the policy as well as his dishonesty in explaining the circumstances of his first fitness for duty evaluation.

Dr. Bradner subsequently filed a lawsuit in state court alleging breach of contract, due process violations, defamation and other contract claims as well as injunctive relief and substantial money damages.

The hospital argued that it was immune from civil damages under both Alaska law and HCQIA.

**Decision**
- The trial court ruled in the hospital's favor finding that the policy on self reporting was a condition placed on the physician's license and membership, that due process requirements do not apply to a predetermination hearing for failure to report the violation and finally that the hospital was entitled to HCQIA immunity.
- The Alaska Supreme Court reversed. In so doing, it determined that Dr. Bradner had a constitutional property interest in his medical staff membership and clinical privileges which required a pre rather than a post termination hearing along with prior notice and an opportunity to be heard.
- Although such constitutional rights can be waived, the waiver must be knowingly waived. The court noted that neither the policy nor his reappointment application specifically mentioned waiving due process rights in the event the self reporting policy was violated.
Alaska Supreme Court Denies Hospital Immunity in Physician Privileges Dispute (Bradner v. Providence Health & Servs., No. S-15933 (Alaska November 25, 2016) (con’t))

- Given these failures and the fact that Dr. Bradner did not pose a realistic or recognizable threat to patients by failing to self report, there was no imminent danger evident to support a precautionary or summary suspension which does not require prior notice or a prehearing. Moreover, even if Dr. Bradner had knowingly waived such hearing rights, the HCQIA requirements still must be met in order to achieve immunity.

Lessons Learned
- In order to obtain HCQIA and immunity protections, all requirements set forth under those laws must be met.
- Hospitals typically require waiver of hearing rights in contracts and employment agreements. This court held that under those circumstances there is more of a negotiated arrangement with a knowing waiver as a condition of employment or of obtaining an exclusive contract.
- Although a waiver is legally enforceable, the HCQIA immunities may not apply unless the hospital takes a professional review action and provides the required notice and hearing rights set forth under HCQIA.

Keep in mind that hospitals typically are entitled to immunities under state law and under HCQIA. The basis for obtaining those immunities may be different and loss of immunity under HCQIA does not mean loss of immunity under state law.

Review your medical staff bylaws and other policies to determine whether physicians can be automatically terminated without the right to a prior hearing. Is such action permitted under state law? If the bylaws and policies are clear that hearing rights for violating administrative requirements, i.e., paying dues, completing medical records, are expressly waived by the physician, you may be able to preserve your HCQIA and state immunity protections. Otherwise, consider rewriting your bylaws/policies.

Peer Review Protection Cases
South Dakota Supreme Court Upholds Its State’s Peer Review Statute (Novotny v. Sacred Heart Health Services, Nos. 27615, 27626, 27631 (S.D. October 26, 2016))

**Background**
- Plaintiffs brought suit against various physicians and hospitals alleging negligence, fraud, deceit, bad faith peer review and negligent credentialing.
- During discovery, defendants asserted that some of the materials requested were privileged under the state’s peer review statute which covers “proceedings, records, reports, statements, minutes, or any other data whatsoever, of any [peer review] committee....”
- Plaintiffs argued that the statute should be ruled unconstitutional unless there is a “crime/fraud exception” which would allow discovery when such claims are made.
- The trial court determined that such an exception should exist and therefore ordered the production of some peer review materials without an in camera review.

**Decision**
- The South Dakota Supreme Court determined, contrary to the trial court’s decision, that the peer review statute not only protects “deliberative” information but it also protects objective facts, records, data and similar information including recommendations, consideration of recommendations, actions with regard to recommendations and implementation of actions consistent with the language of the statute.
- Information, however, obtained from independent sources unrelated to the peer review process would be subject to discovery and admissibility into evidence. In addition, information that is not generated by or at the request of a recognized peer review committee also is not protected.
- In response to the plaintiff’s argument and the trial court’s decision that the peer review statute is unconstitutional unless there is a “crime/fraud exception”, the Supreme Court determined that the plaintiff had access to and acknowledged that there were other sources of information available to attempt to prove their various claims including those involving fraud, deceit and bad faith peer review. Therefore the privilege did not “destroy plaintiff’s ability to bring their causes of action”. The court further noted that the proper body to include such an exception is best left to the legislature and should not be created through the judiciary.

**Lessons Learned**
- It is important to understand what information, discussion, deliberations and other information is and is not protected under the your state and federal peer review statutes and to develop policies, bylaws and procedures to maximize these protections.
- Information for which you are seeking protection should be referenced in bylaws and policies and should be requested by or developed by a recognized and identified peer review committee as defined under the statutes.
- One question to consider when defending these discovery disputes is whether a plaintiff does have access to other information to prove the various claims other than information which is protected under a peer review statute. Keep in mind that all states do not follow this rational and instead, the non-discoverability and non-admissibility of such evidence often times leads to dismissal of the litigation.
Court Rules That Confidential Information Does Not Equal Privileged Information as Applied to Credentials Files (Klaine v. Southern Illinois Hospital Services (Il. Sup. Ct., January 22, 2016)

- **Background**
  - Plaintiff in this case filed a medical malpractice action against a physician and hospital under a theory of negligent credentialing. Although the hospital produced over 1,700 pages of documents in response to a discovery request, it refused to provide other documents arguing that they were protected under the Illinois Medical Studies Act, which is the peer review privilege statute, as well as the Healthcare Professional Credentials Data Collection Act which mandates the use of specific application and reappointment forms to be submitted to hospitals and managed care organizations.
  - The trial court ordered the production of various groups of documents but the hospital contested one group which consisted of the defendant physician’s three applications for staff privileges along with a second group which contained a list of surgical procedures performed by the physician.
  - The appellate court affirmed the lower court ruling although it determined that certain external peer review reports and any patient identifying information were to be redacted from the documents.

Decision

- The Supreme Court held that although information collected under the Data Collection Act is to be treated as "confidential" there is nothing in this statute which further states that this information is "privileged" and therefore non-discoverable and inadmissible into evidence under the Medical Studies Act.
- In determining that the application materials were not privileged from discovery the court noted that information in the application which were "the only materials which by statute the hospital was required to consider in determining whether to credential and privilege the doctor would be highly relevant to the cause of action. In fact, we fail to see how a cause of action for negligent credentialing could proceed if we were to deny plaintiffs access to this information."
- For the same reason, the court ruled that although HCQIA provides that Data Bank reports are confidential, neither the Act nor federal regulations provide that the information submitted to the Data Bank is privileged and therefore not discoverable or admissible into evidence especially "in instances where, as here, a lawsuit has been filed against the hospital and the hospital has knowledge of information regarding the physician’s competence is at issue."

Lessons Learned

- Do your statutes make peer review information privileged from discovery or only confidential?
- If other courts rule that a plaintiff has access to Data Bank reports how might that affect your credentialing and privilege decisions?
- Do you really pay attention to these reports?
- Should you now request additional information from the physicians or hospital based on these reports?
Illinois Appellate Court Applies Peer Review Protection Under the Medical Studies Act (EID v. Loyola University Medical Center (No. 1-14-3967, (Ill. App. Ct. December 2, 2016))

Background
- Parents of a minor child brought suit against the hospital alleging negligent treatment of their daughter involving a pacemaker replacement surgical procedure who subsequently died. In addition, the family sued Loyola for reckless infliction of emotional distress based on allegations that the hospital failed to remove certain medical tubes from the body before ceremonial washing and burial which were not discovered until the ceremony was to begin.
- Upon removal of the tubes, a significant amount of blood issued from the child's mouth allegedly causing severe emotional distress.
- Based on the family's complaint to the hospital, a member of its Medical Care Evaluation and Analysis Committee authorized an investigation into the circumstances of this event as authorized and required under the medical staff bylaws.
- The parents challenged the hospital's assertion that 13 pages of documents relating to this review were privileged and confidential under the Medical Studies Act and therefore not subject to discovery.

Decision
- The trial court ruled in the hospital's favor and the family appealed.
- The Appellate Court held that the evidence established that:
  - The Committee was a peer review committee under the Act.
  - The Chair properly exercised his right to initiate an investigation on behalf of the risk manager as its "designee" as permitted under the Act.
  - Consequently, the documents generated by the risk manager along with the nature and content of the internal peer review process and disclosures made are privileged and not subject to discovery.

Lesson Learned
- As previously stated, it is important that you understand not only the actual language of the statute but also any applicable case law which interprets the statute.

In this case, the plaintiff was relying on a previous Illinois Supreme Court decision which arguably would have made the information discoverable because the statute focused on peer review committee work product and not the discussions or work product of a committee "designee". The Medical Studies Act was amended to include this reference.

It is also very important to have medical staff bylaws, policies and procedures which specifically describe your process if not actually defined terms such as "peer review" and "peer review committee" which track the language of your state statute as well as the federal Patient Safety Act if hospital is participating in a PSO. Such documentation will help to maximize your privilege protections.

Background
- This was a medical malpractice action against the hospital in which plaintiff sought the production of “any and all incident reports, investigation reports, sentinel event reports, cause analysis reports, Joint Commission reports, Medicare reports, Medicaid reports, peer review reports and reports of any nature” related to the deceased patient.
- The hospital refused to produce the documents arguing that they were privileged and not subject to discovery under the federal Patient Safety and Quality Improvement Act (“PSQIA”).
- In response to the plaintiff’s motion to compel, the trial court held that only those documents which were “collected, maintained, or developed for the sole purpose of disclosure to a patient safety organization (“PSO”)” were protected from discovery.

In response to the plaintiff’s motion to compel, the trial court ruled that:
- “The hospital shall produce any and all said material requested by Plaintiff, except for those specific documents certified by the hospital as having been collected, maintained or developed for the sole purpose of disclosure to a PSO pursuant to the Act. Specific documents collected, maintained or developed for any other purpose beyond PSO disclosure, such as compliance with the requirements of Kentucky statutes, are not privileged under the Act and must be produced.”

Case was then appealed to the Kentucky Supreme Court.

Decision
- In noting that the PSO Guidance issued by HHS, AHRQ and the OCR embraced the position that “original provider records” not only include medical records but also records which are required to be provided to a federal, state or other governmental entity for health oversite requirements do not qualify as privileged patient safety work product, the Supreme Court upheld that portion of the trial court’s decision. In doing so, it made no reference to the so-called “sole purpose” standard.

Lessons Learned
- For hospitals and providers participating in patient safety organizations the case law interpretation as to the scope and privilege protections is very much in flux.

Documentation within hospital policies regarding what information is or is not privileged under the PSQIA is critical in order to maximize privilege protections when confronted with discovery requests.

- MSPs must educate themselves as to what information they are creating or maintaining is or is not PSWP and should work with risk management, in-house counsel and medical staff leaders in identifying privileged information and as well as to comply with required record reporting obligations.

Florida Supreme Court Holds PSQIA Does Not Preempt State Rights to Access Incident Reports (Charles v. Southern Baptist Hospital Florida, Inc., No. SC15-2180 (Florida January 31, 2017) (On Appeal to U.S. Supreme Court)

- Background
  - This is another medical malpractice dispute in which the hospital contested a discovery request to produce adverse medical incident reports which it had collected within its patient safety evaluation system (PSES) for reporting to a PSO and therefore were considered privileged and not subject to discovery.
  - Because Florida does not have any effective peer review privilege statute, most hospitals in this state participate in one or more PSOs.
  - Florida also has a constitutional amendment known as Amendment 7 which essentially allows patients and others broad access to any and all reports and information relating to incident reports, patient safety evaluations, risk management information and other similar data.
  - Hospital argued that the PSQIA preempted Amendment 7 and therefore the requested information should be considered privileged.

- Decision
  - Although the hospital had established that it had met its requirement that certain mandated reporting requirements, the Court determined that Amendment 7, which was approved by Florida voters in 2004, overrode and essentially preempted the PSQIA despite clear language to the contrary in the Act.
Florida Supreme Court Holds PSQIA Does Not Preempt State Rights to Access Incident Reports (Charles v. Southern Baptist Hospital Florida, Inc., No. SC15-2180 (Florida January 31, 2017) (On Appeal to U.S. Supreme Court) (con’t)

- The decision has been appealed to the U.S. Supreme Court and has attracted amicus support from the AHA, the AMA, The Joint Commission, the FAH and 60 other PSOs and healthcare systems around the country.
- A decision on whether the court will grant the petition for certiorari will be made on September 25th.

Lessons Learned
- Same lessons learned as was described in the Clouse case.


Background
- Case involves a claim by a medical resident against the hospital that it violated federal, state and local law regarding involving sexual harassment and creation of a hostile work environment.
- During discovery the plaintiff sought access to ten specific documents which included emails between and among physicians who supervised and evaluated the plaintiff and his performance during the residency program, hospital preceptor evaluations and other similar assessments.
- The hospital argued that the information requested was protected under the New York peer review and quality assurance privilege statutes, HCQIA, the PSQIA and a separate common law privilege.

Decision
- The federal district court held, consistent with most other federal decisions, that a state peer review privilege does not apply in federal discrimination cases. In other words, a state privilege cannot be used to preempt a federal claim be it one of discrimination, antitrust or other similar lawsuits.
- HCQIA is not a privilege statute but instead is an immunity statute.
- HCQIA specifically states that the immunity protections under this statute do not apply in discrimination cases.
- The court also held that the PSQIA does not apply to medical peer review materials because a prior U.S. Supreme Court that was decided before the PSQIA was passed and determined that there is no federal peer review privilege.
- This decision is contrary to the holding of another federal district court, Tinal v. Norton, where a court recognized that the PSQIA privilege protections apply in all federal proceedings including a matter in which a hospital employee filed suit arguing that the hospital was in violation of the Americans With Disabilities Act.
U.S. Court in New York Says No Peer Review Privilege for Documents in Physician Discrimination Action (Morshead v. St. Barnabus Hospital, No. 16 Civ. 2862 (S.D.N.Y. Feb 10, 2017) (con’t))

- Lessons Learned
  - The decision is quite sparse in terms of a true analysis of the PSQIA and whether the hospital had taken deliberate steps of including peer review within its PSES.
  - As previously stated for all peer review disputes, documentation, documentation, documentation is extremely important regarding the materials you were seeking to create and protect and must be handled consistent with state and federal law.
  - It is important to understand, as stated in the court’s decision, that state peer review statutes cannot be used to preempt a federal discrimination or other federal claim.
  - Because most hospitals are now employing physicians, physicians are filing their lawsuits in federal court because the HCQIA immunity protections do not apply. Therefore, a hospital should consider participation in the PSO if it does not already do so.

Data Bank Developments


- Background
  - Based on quality of care concerns, the hospital’s board of trustees approved a proctoring requirement for “mandatory concurring proctoring under the supervision of a surgical proctor [with Dr. Walker’s next] five bowel surgery cases”.
  - The board, however, did not specify a time limit for completing the proctoring.
  - After 30 days Dr. Walker’s privileges were reported to the Data Bank which the hospital claimed was required under HCQIA.
  - Dr. Walker filed suit requesting that a preliminary injunction be imposed mandating that the Data Bank report be voided.
  - Upon receipt of the hospital’s Data Bank report, the Texas Medical Board initiated a formal review of Dr. Walker’s conduct.
Texas Court Orders Hospital to Void National Practitioner Data Bank Report (Walker v. Memorial Health System of East Texas (E.D. Texas 2017) No. 2:2017) (con’t)

- The parties agreed that the issue was whether the proctoring requirement handed down by the board was “for a period of longer than 30 days” as set forth under HCQIA and the NPDB Guidebook at E-37.
- The court agreed with Dr. Walker’s argument that the board decision did not set forth any specific time frame. Stated differently, the board did not require that the proctoring obligation remain in effect for longer than 30 days and in fact, completion of the five bowel surgical procedures could have been performed in less than 30 days.
- As stated by the court:
  - “Whether the proctoring sanction is reportable should be established by the terms of the sanction as it is delivered, not whether, in fact, it takes more than 30 days to satisfy the requirement. To find otherwise would lead to absurd results.”
- Based on this determination the court ordered the hospital to submit a Void Report to the Data Bank.

Texas Court Orders Hospital to Void National Practitioner Data Bank Report (Walker v. Memorial Health System of East Texas (E.D. Texas 2017) No. 2:2017) (con’t)

- The court’s decision was probably motivated in part by some of the following comments:
  - An adverse report to the Data Bank that a physician has substandard and inadequate skills, is intrinsically harmful to the physician’s practice, professional reputation, and livelihood.
  - The presence of an adverse report carries an indelible stigma that diminishes a physician’s reputation and calls into question his ability to render competent medical services.
  - An erroneously filed report announcing to all interested parties that a physician has been sanctioned, suspended, or lacks the adequate skills to practice medicine carries with it the potential for immediately and irreversibly harm that physician and his practice.
  - This stigma and reputational harm poses a substantial threat to a physician’s ability to gain or maintain employment to support his practice. Insurance companies that will be made aware of the adverse report will likely increase a physician’s insurance premiums or drop him from coverage altogether.

Texas Court Orders Hospital to Void National Practitioner Data Bank Report (Walker v. Memorial Health System of East Texas (E.D. Texas 2017) No. 2:2017) (con’t)

- Lessons Learned
  - Where possible, and in recognizing the hospital’s need to protect patients, the imposition of any adverse action which limits or restricts a physician’s privileges, such as mandatory consultations requiring prior approval or mandatory proctoring which requires that a proctor be present and treatment services are being provided, should be limited to 30 days or less in order to avoid a Data Bank report.
  - If patient care interests require that a restriction be greater than 30 days, recognizing the reporting implications, the decision should so specify in order to avoid ambiguity and potential litigation.
  - If no timeframe is identified but the parties agree that the mandatory proctoring of an identified number of cases could have been performed within 30 days based on the physician’s past volumes but, for whatever reason it exceed 30 days, the proctoring decision should not be reported.
The NPDB-May Insights

- Is it Reportable?
  - A preferred provider organization (PPO) investigated a member physician after receiving quality of care complaints from several plan participants. The physician was unaware of the investigation, but during the investigation, he relinquished his panel membership for personal reasons. Is this reportable?
  - [Polling Question]
    - Yes
    - No
    - It Depends

- Yes.
  - A healthcare entity must report a physician's surrender of panel membership (a form of clinical privileges) while under investigation.
  - The reporting entity should be able to produce evidence that an investigation was initiated prior to the surrender.
  - Any termination of the physician's contract with the PPO must be reported separately to the NPDB if the action meets the definition of an "other adjudicated action or decision".

The NPDB-July Insights

- Is it reportable?
  - A healthcare entity terminates a physician's contract for causes relating to poor patient care, which in turn resulted in the loss of the practitioner's network participation. Should this be reported to the NPDB using one or two reports?
  - [Polling Question]
    - Yes
    - No
    - It Depends
The NPDB-July Insights (con’t)

- It depends.
  - The loss of the practitioner’s network participation that resulted from the termination of the contract for reasons relating to professional competence or professional conduct must be reported only if it is considered to be a professional review action by the healthcare entity.
  - The termination of the practitioner’s contract with the healthcare entity, in itself, does not meet Data Bank reporting criteria for a clinical privileges action.
  - However, if the contract termination meets the requirements of an “other adjudicated action or decision” the contract termination should be reported separately to the Data Bank.
- Lessons Learned
  - Physician agreements/contracts should specifically identify whether a termination of membership or clinical privileges does or does not trigger hearing rights or some other adjudicated action that would be considered a professional review action.
  - If a hearing or other adjudicated action is waived by the physician and is set forth within the agreement, the decision to terminate is not reportable.
  - A negotiated waiver of hearing rights may or may not impact a hospital’s eligibility to claim immunity protections under HCQIA depending on the jurisdiction and whether courts in that state recognize medical staff membership or network participation as a constitutional property right.

The NPDB-August Insights

- Is it reportable?
  - Must a hospital or other healthcare entity report adverse actions concerning the clinical privileges of medical and dental residents and interns?

  [Polling Question]
  - Yes
  - No
  - It Depends
The NPDB—August Insights (con’t)

- It depends.
  - The action is not reportable if it was taken within the scope of the training program. Since residents and interns are trainees in graduate health professions education programs, they are not granted clinical privileges per se but are authorized by the sponsoring institution to perform clinical duties and responsibilities within the context of their graduate education program.
  - However, a resident or intern may practice outside the scope of the formal graduate education program such as moonlighting in the intensive care unit or the emergency department. Termination or retractions of clinical privileges actions related to practice occurring outside the scope of a formal graduate education program must be reported.

Peer Review Damages Cases

- Background
  - Physician assistant whose request for clinical privileges at the hospital was unanimously recommended by the Credential Committee but denied by the Board brought a lawsuit claiming due process violation of state and federal law as well as state and federal antitrust laws.

- Decision
  - Court ruled that because the plaintiff adequately pled a due process claim alleging a property interest in his PA License and clinical privileges at the hospital that the hospital’s decision not to provide a hearing was a violation of due process.
  - Plaintiff, however, failed to identify which two or more persons or businesses conspired against him as required under the Sherman Act. Moreover, he did not indicate how they intended to harm or restrain competition or if it was any specific or actually injury to competition.
  - His other federal and state claims also failed.

U.S. Court in Idaho Tosses Antitrust Claims Based on Medical Staff Privileges Denial (Biondo vs. Kootenai Hospital district)

- Background
  - Physician assistant whose request for clinical privileges at the hospital was unanimously recommended by the Credential Committee but denied by the Board brought a lawsuit claiming due process violation of state and federal law as well as state and federal antitrust laws.

- Decision
  - Court ruled that because the plaintiff adequately pled a due process claim alleging a property interest in his PA License and clinical privileges at the hospital that the hospital’s decision not to provide a hearing was a violation of due process.
  - Plaintiff, however, failed to identify which two or more persons or businesses conspired against him as required under the Sherman Act. Moreover, he did not indicate how they intended to harm or restrain competition or if it was any specific or actually injury to competition.
  - His other federal and state claims also failed.
U.S. Court in Idaho Tosses Antitrust Claims Based on Medical Staff Privileges Denial (Biondo vs. Kootenai Hospital district) (17-CD-00039-BLW (D. Idaho May 18, 2017) (con’t)

» Lessons Learned
- As a general rule, initial applicants do not have any state or federal constitutional rights to medical staff membership or clinical privileges and therefore the rule of “non-review” generally applies. Where there such rights exist, depend upon the laws of your state and therefore you need to consult with legal counsel.
- Where no such constitutional or other state rights exist, the denial of an application of the denial of the initial appointment shall not trigger hearing rights unless the denial results in a report to the Data Bank. Under these circumstances, out of fairness to the physician, hearing should be provided.
- By providing a hearing, the hospital will be entitled to access HCQIA immunities unless a federal discrimination claim is filed.
- Whether the applicant is or is not provided hearing rights should be specifically set forth in the bylaws.
- Your pre application and application forms should contain an absolute waiver of liability as to limit or prevent such legal claims upon denial.

Illinois Appellate Court Rules that Hospital Failed to Follow its Bylaws and Fair Hearing Requirement and Therefore Orders New Fair Hearing (Murphy v. Advocate Health and Hospital Corp. 2017 II. App. (4th No. 160513)

» Background
- The plaintiff in this lawsuit is a cardiologist who was summarily suspended at the hospital initially based on a vague reference to a “quality concern.”
- On the same day the letter was sent to the physician, the MEC was convened to determine whether to affirm, lift, expunge or modify the suspension as required under Illinois law.
- During the discussion, the Committee focused its attention on a particular patient who was treated by Dr. Murphy and died of cardio genetic shock. In addition, the Committee referenced additional cases that had been reviewed the previous year and a couple which were still working through the peer review process. There also were eight incidents reports that were provided to the Committee.
- The MEC decided to lift the suspension on the condition that the physician agree not to exercise privileges until the matter could be further investigated.

Illinois Appellate Court Rules that Hospital Failed to Follow its Bylaws and Fair Hearing Requirement and Therefore Orders New Fair Hearing (Murphy v. Advocate Health and Hospital Corp. 2017 II. App. (4th No. 160513) (con’t)

- Although the physician actually agreed to the request, after retaining legal counsel, he took the position that the hospital failed to follow its bylaws and state law because he was never provided any documentation to support the determination that his continued practice presented an immediate danger to the public which is the standard for imposing a summary suspension under Illinois law.
- Upon being informed of his intention to exercise privileges, the MEC met yet again and concluded that his practice indeed imposed an immediate danger to patients based on ten criteria which included “four peer review cases and 10 other reports of inadequate” documentation.
- The physician thereafter requested and obtained a hearing pursuant to the medical staff bylaws.
- The basic dispute during the hearing was whether the hospital provided to the physician all of the information which became the subject of the MEC’s summary suspension because they only gave him two of the four peer review cases and two of the 10 Midas reports in advance of the hearing. Moreover, none of these reports provided patient names or included the medical records on which the reports were based.
Illinois Appellate Court Rules that Hospital Failed to Follow its Bylaws and Fair Hearing Requirement and Therefore Orders New Fair Hearing (Murphy v. Advocate Health and Hospital Corp. 2017 II. App. (4th No. 160513) (con't))

- Despite the physician's objections that none of these records should therefore be relied on by the hearing committee as a basis to support the summary suspension and instead, the hearing should focus on the single patient case, the hearing officer allowed testimony regarding all of these cases and reports.
- The hearing committee ultimately supported the summary suspension recommendation which was further upheld by the hospital's governing council.
- The physician filed suit. The trial court refused the physician's request for injunctive relief but agreed to enjoin the hospital from reporting to the Data Bank. The physician appealed.

Decision
- The Appellate Court recognized long-standing principles of Illinois law whereby the scope of its jurisdiction is limited to a determination as to whether the hospital followed its bylaws and whether the proceedings were fair. Courts do not typically substitute their judgments for that of the medical staff and the hospital particularly when it involves allegations of substandard care, disruptive behavior and other actions which can adversely affect patients.

And while Illinois courts recognize that physicians do not have any specific constitutional due process rights, they are entitled to "basic protections including notice and a fair hearing."

After reviewing the evidence as a whole, including the hearing transcripts, it agreed that the hospital failed to provide all of the relevant reports on which the MEC based its decision. In addition, the lack of specificity in the reports made it "merely impossible to glean information sufficient to mount a defense against the claim that the 10 Midas reports could collectively support a finding sufficient to establish that the physician presented imminent danger to patients and the public."

In finding that the hospital failed to comply with its disclosure obligations, it concluded that the physician was denied a fair hearing and therefore ordered that the matter be remanded back to the hospital so that a fair hearing could be conducted.

Lessons Learned
- The Murphy decision represents one of the rare occasions in which a court of appeals reversed an adverse peer decision made by a hospital.

The most important requirement is that the medical staff bylaws and a fair hearing process must comply the state and federal law and must be fair in order to avoid judicial intervention.

When imposing disciplinary action the notice and basis of a decision must be established at the time the decision is made and must identify any and all cases, reports and other relevant information.

Once the decision is made, it is improper and unfair to add additional cases or reasons to support the decision after the fact.

In order to adequately prepare for a hearing, a physician is entitled to any and all information on which the decision was based. The information must be specific enough, including patients’ names and cases, minutes, reports, outside reviews and all other reviews and all other data which must be provided in advance.

If judges believe that a physician was treated unfairly, they would look for ways to overturn the decision as was the situation in Murphy.
Florida Appellate Court Says that Two Year Statute of Limitation Period Applies to Defamation Claims Based on NPDB Reports (Ashraf v. Adventist Health System, No. 5015-2415 (Fla. Dist. Ct. App., July 1, 2016))

- **Background**
  - Plaintiff was a cardiologist in the Cardiology Department of a Florida hospital between 2006 and 2008.
  - In 2008 the hospital permanently revoked his privileges and reported him to the NPDB as required by law.
  - In October 2014, after being denied employment from several hospitals that received the NPDB report, the physician sued the hospital for defamation alleging that the report contained false and defamatory material.
  - The trial court dismissed the complaint finding that the two year statute of limitations for defamation begins to run when the Data Bank report was first issued. The fact that the report was not received by other hospitals until after this timeframe did not mean that there was a new “publication date” which would allow for an additional two years within which to file suit once the other hospitals received the report.

- **Decision**
  - The Appellate Court affirmed the dismissal, even though it noted that other jurisdictions did not always rely on this “single publication rule.”
  - In other words, the plaintiff was required to file his lawsuit within two years after he first received the adverse action report to the NPDB.

- **Lesson Learned**
  - Although hearing committees typically render detailed findings of fact and citations to the administrative record to support an adverse decision, there is no requirement that all of this detail be included in a Data Bank report.
  - The Data Bank only requires that there be enough information to adequately inform other hospitals which are querying the Data Bank so that they have a general understanding as to the basis of the adverse decision.
  - The reports should be factual but need not include all of the gory details.

- Keep in mind too that a physician receiving the report has the opportunity to present his or her own response and/or renditions as to the basis of the decision.
- Data Bank will not entertain any type of appeal based on the substance of the determination but will only consider arguments that the report is not factually accurate.
Jury Awards Surgeon More than $1 Million Dollars in Sham Peer Review Case
(Miller v. Herron) (South Dakota, May, 2017)

**Background**
- Plaintiff was a contract physician with the hospital where she worked at its clinic.
- Pursuant to her agreement, she was entitled to hearing rights under the bylaws.
- It was alleged that the chairman of the board requested that physicians review the outcomes in some of her cases based on an adverse result which occurred involving one of his friends.
- This review apparently did not find any violations of standards of care or other related problems.
- Not satisfied with this result, the chair requested that they continue to review her cases.
- Again, the physicians did not find any problems of significance.
- Contrary to the bylaws, the physician was never allowed to be part of the process in order to defend herself against any claims. Under pressure, she agreed to voluntarily reduce her privileges.

Based on the voluntary reduction, the clinic reported her to the Data Bank. In the subsequent lawsuit against the hospital, the physician alleged that the clinic intentionally falsified an alleged complication with one of her patients. A second Data Bank report was made based on the falsified complication.

Because of the reports, the physician has been unable to find employment as a general surgeon and currently is employed as a wound care physician.

After hearing testimony in addition to expert witnesses, the jury awarded the physician over $1 million dollars based on its breach of the bylaws and its contract with the physician but declined to rule that the clinic defamed her in reporting to the Data Bank.

The hospital currently has filed a motion seeking a reduction in the damages or in the alternative, a new trial.

**Lessons Learned**
- As was true in the Murphy case discussed above, it is critical that the hospital follow its medical staff bylaws and that the proceedings are fair.
- Hospitals and medical staffs should always involve physicians in the peer process when concerns about their substandard care or disruptive behavior are identified.
- The whole spirit of just culture and collegial intervention supports an effort to address issues at the earliest possible stage so that problems are ameliorated before patients are actually put at risk.
- The failure to allow the physician to participate in the peer review process and review of her cases in order for her to provide an explanation should any problems had been identified was fundamentally unfair and in violation of the bylaws thereby supporting the jury’s verdict.
Questions?