Peer Review 101: Understanding the Legal Fundamentals of Peer Review

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Presenter(s): Brian Betner, JD
Overview

- Why the confusion around “peer review”
- What we mean by “peer review”
- Significance of “peer review”
  - Legal significance of peer review
  - Peer review immunity
  - Peer review confidentiality/privilege
- Potential effects of failed peer review and future challenges
- Fostering effective peer review
If nothing else, remember:
1) Peer review confidentiality is formulaic – it's not about whether it “feels” quality-related or confidential
2) It starts and ends with a bona fide review committee
3) Once privileged, think how information will be used
4) Think about whether it actually needs to be privileged
5) It's not a problem until it's a problem – make your basic QA/PI process and activities a habit so that your less likely to have questions or slip-ups down the road
6) Provider QA/PI programs will take on greater significance

Peer Review – Why the Confusion?
• Who likes criticism or giving criticism? We avoid what we don’t enjoy
• Traditional mindset or understanding around limited solutions
• Lack of education/internal expertise
• But she’s the Department Chairperson!

What We Mean By “Peer Review”
• AMA: “The foremost objective of the medical peer review process is the promotion of the highest quality of medical care as well as patient safety.”
• When done right, an invaluable part our health care delivery system
• The devil is in the details - state laws define the pertinent aspects and technical requirements for peer review
  – Purpose of peer review (permitted subject matter)
  – Scope of peer review (provider types?)
  – Who is a peer reviewer (authority or composition requirement)
  – Procedure for peer review (credentialing, corrective action, etc.)
  – What aspects of peer review are confidential and when not
  – Under what circumstances is immunity available
Must we Perform Peer Review?

- Quality assurance, performance improvement, patient safety …
- It’s required:
  - Medicare Conditions of Participation
  - Accrediting organization Elements of Performance (e.g., The JC, HFAP and DNV)
  - State Hospital Licensure Laws and Regulations
  - Health Care Quality Improvement Act of 1986*
  - State Professional Licensure Laws and Rules
  - State Case Law?
  - Medical Staff Bylaws, rules and regulations and related policies
  - Commercial insurance or managed care obligations

Legislative Purpose of Peer Review

- Remember: It’s about confidentiality and immunity
- Peer review is meant to promote thorough and candid review and, in doing so, improve “quality of care”
- Quality of care extends to:
  - Review of qualifications (i.e., credentialing)
  - Complaints and concerns regarding competency and professional conduct (disruptive behavior)
- In most states, both “credentialing” and “quality review” may be “peer review”

Peer Review Immunity

- Would you scrutinize a colleague if there was unreasonable personal risk?
  - “Immunity” is intended to promote effective peer review
- Immunity takes two general forms:
  - Immunity against civil monetary damages
  - Absolute immunity
- Immunity is not a given, you must earn it!
- State statutes generally afford immunity where peer review is conducted in good faith, which is often presumed
- State immunity does not necessarily preclude “judicial review” or “injunctive relief”
- Federal immunity is afforded by the Health Care Quality Improvement Act (HCQIA)
Federal Immunity – HCQIA

- HCQIA provides immunity from civil damages where four requirements are met
- Requirements:
  - "Professional review action" taken by "professional review body" in furtherance of quality of care
  - Reasonable investigation of matter
  - Action taken is reasonable in light of investigation
  - Notice and Hearing Rights are extended to affected practitioner

Federal Immunity – HCQIA (cont.)

- **Professional review body** means a health care entity and the governing body or any committee of a health care entity that conducts professional review activity and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity
- **Professional review activity** means an activity:
  - To determine whether the physician may have clinical privileges with respect to, or membership in, the entity
  - To determine the scope or conditions of such privileges or membership
  - To change or modify such privileges or membership

Federal Immunity – HCQIA (cont.)

- Objective standard in light of the "totality of circumstances"
- Bad faith irrelevant – as long as the four factors are met
- Bylaws compliance is important, but not the sole factor – substantial compliance
- Presumption in favor of peer review committee
- Great example: Poliner v. Texas Health Systems
Peer Review Confidentiality

- Would you be more open about your professional opinion if you knew it would be confidential?
  - Like immunity, confidentiality is intended to promote effective peer review
- Generally prohibits disclosure to 3rd parties and admissibility in court
- Privilege typically extends to communications to, records and determinations of peer review committees
- Generally includes committees and personnel of committees
- Confidentiality is NOT an option
- Breach of confidentiality may lead to sanction and loss of immunity

Exceptions to Confidentiality

- Like the requirement of confidentiality, permitted uses/exceptions are dictated by state law
- Exceptions may/may not include:
  - Physician review of peer review file
  - Original source documents
  - Peer review committee to peer review committee
  - Adverse event reporting
  - Government investigation
  - Internal business usage (e.g., employment decisions, etc.)
Shhhhh...........
Many QA/PI and peer review programs just “get by”

The Peer Review Reality – It’s Challenges

- Technically, it’s technical
  - Scrutiny is very much elemental
- Culture
- Distrust/Punitive history/So called “sham” peer review
- Lack of expertise and training
- Perceived or actual conflicts of interest
- Sentinel event or nothing
- Inconsistent approaches
- Increased time demands on physician leadership
- Refusal to refer to or obtain consults from the problematic provider
- And so on...
Implications of Failed Peer Review

- Failure to achieve the purpose of peer review
  - Increased risk of harm to patients
  - Increased risk of harm to colleagues and other hospital personnel
  - Missed opportunities to rehabilitate

- Financial implications
  - Decreased reimbursement
  - Loss of business
  - Cost of litigation

Implications of Failed Peer Review (cont.)

- Litigation with third parties
  - Negligent credentialing
    - "A hospital has a direct and independent responsibility to its patients, over and above the physicians and surgeons practicing therein, to take responsible steps to (1) ensure that its medical staff is qualified for the privileges granted and/or (2) to evaluate the care provided."

- Litigation with third parties (cont.)
  - Workplace harassment
  - Disruptive physicians
  - Compliance/False Claims/Qui Tam
      - Concerns regarding surgeon’s high complication rate allegedly ignored
      - Allegedly led to patient harm and wrongful termination of complainant
Implications of Failed Peer Review (cont.)

- Litigation with third parties (cont.)
  - Medical malpractice
  - Incident reports
  - Disclosures creating “admissions”
  - Disclosures defining “standard of care”
  - Disclosures satisfying requirement of “expert testimony”
  - Negligent failure to disclose

- Litigation with subject physician
- Not all errors can be corrected
  - Wrongful disclosures leading to damaged professional reputation (defamation per se)
  - Breach of contract
    - Medical staff bylaws may be deemed a contract
  - Tortious interference with prospective business
  - Antitrust risk
  - Emotional distress claims

Peer Review of Tomorrow

- What is your peer review “win?”
- Hospitals tend to focus on a broad concept of “standard of care” - not exactly medical malpractice but not what tomorrow will require.
- Model the direct benefits of improved quality: $$$, patient retention, etc.
- Align your QA/PI/peer review process around:
  - Your organization’s quality strategy
  - Payer-mandated goals and incentives
  - A “lift all boats” mentality – it will pay dividends!
- Peer review should be and can be about PI and not just “firefighting”
Culture Eats Strategy for Lunch

- Quality/peer review projects are typically well intentioned and based on sound principles
- Many of quality projects are doomed before they begin because of culture or unwillingness to change or be transparent
- Identify and support physician quality champions
- Know what you are getting into before proposing something that may be perceived as radical

Consider: Risk Management

- Litigation risk/cost related to enforcement of higher standards and expectations
  - Is everyone held to the same standard or billboard effect?
- Malpractice risk/cost related to shift in standard of care, etc.
  - E.g., prevalence of evidence-based measures and processes
- Negligent credentialing
  - Does your process consider the current view of negligent credentialing in your state?

Consider: Risk Management (cont.)

- Political/business risk for “forcing” change
  - Are there consequences to upsetting the high admitter’s apple cart?
- Compliance risks associated with increased quality scrutiny
  - Quality is inching closer and closer to becoming a Condition of Payment
- Moral obligation?
  - Do we find a solution or “damn the torpedoes” with regards to dealing with competency and behavior issues?
Fostering Effective Peer Review

- Peer review education
- Formal process for review
- Peer review documentation
- Using HCQIA as a guide

Peer Review Education

- Include a substantive PI program – don’t assume provider competency
- Peer reviewers should understand the goal, rules, and significance of the process before they engage the process
- Understand the process outlined in the Medical Staff Bylaws and the significance of complying with that process
  - Bylaws may likely be deemed a binding contract
  - A failure to strictly adhere to policy or justify not doing so will almost always be a source of dispute
  - Judicial review

Peer Review Education (cont.)

- Understand that confidentiality and immunity are not a given and recognize what must be accomplished to achieve immunity
- Understand the importance of confidentiality and the need to comply
- Understand the value, and potential effect, of documentation
Formal Process for Review

• The Medical Staff Bylaws should outline a formal and sufficiently detailed process for credentialing and quality review/corrective action:
  – Bylaws provide a road map and lead to more consistent results
  – Bylaws, if appropriately followed, should give rise to immunity
  – Bylaws should be consistent with relevant hospital policies
  – Professional conduct policies
  – Do your Bylaws or policies permit flexible approaches, e.g., ad hoc committees, etc.
• Ensure your governance structure (leadership, committees, etc.) is designed around active PI rather than just “fall out” approach

Formal Process for Review (cont.)

• Peer review/Investigation/Corrective Action/Hearing procedures should:
  – Clearly outline a multi-tiered review (favored per HCQIA)
    • Issue/complaint
    • Summary suspension/preliminary review or investigation
    • Formal investigation
    • Recommendation
    • Does recommendation trigger fair hearing?
      – If no, take action (may send to Board)
      – If yes, provide fair hearing, appeal, final Board action

Formal Process for Review (cont.)

• Peer review/Investigation/Corrective Action/Hearing procedures should:
  – Be consistent with state and federal law
  – Provide realistic guidelines – with flexibility
  – Identify what notices should be sent and by whom
  – Identify manner of serving peer review notices
  – Address physician failure to accept notice delivery
FPPE and OPPE

- Are FPPE and OPPE (or your equivalent) deliberately integrated into your "peer review" programs?
- All too often FPPE and OPPE are viewed as “administrative” programs or policies and not properly implemented as a bona fide peer review process
- Same issues applies to hospital or organizational quality programs that run “parallel” to medical staff quality programs

Peer Review Documentation

- As with general litigation, solid peer review documentation can be critical
  - All pertinent incidents/events should be documented for purposes of review/trending – particularly where required by the bylaws
    - Emails and electronic transmissions
    - Documents should be drafted with the understanding that they may ultimately be presented at a hearing
    - Are minutes reviewed for accuracy and completeness prior to adoption?
    - Documents should obviously be legible, dated and signed

Peer Review Documentation (cont.)

- Documentation should be appropriately designated as “Confidential Peer Review” and stored in a central and secure location
- Peer Review Committee Minutes should be carefully drafted
  - Physician may be entitled to access
  - Minutes typically used as evidence at hearing
Peer Review Documentation (cont.)

- Peer Review Notices should also be carefully drafted
  - Notice of Adverse Recommendation
    - Required to establish immunity
    - Establishes the basis for the action/recommendation
  - Notice of Hearing
    - Required to establish immunity
    - Further evidence of good faith

Sharing Recommendations

- Is it expressly permitted or prohibited?
- Information Sharing/Confidentiality Agreement or Policy that specifies:
  - Goals, purpose and use
    - For the committee’s benefit?
    - Protocol on what and to whom information will be shared
- Acknowledgement, consent and release by providers
  - Either standalone, in Bylaws, appointment application, etc.
- Ensure any information shared is bona fide “data” and not information specific to a patient’s care and treatment

General Takeaways

- Understand the legal significance and meaning of “peer review”
- Build your quality review processes around a legitimate peer review function and committee
- Understand not only the benefit but also the obligations of peer review confidentiality
- Understand that peer review immunity and confidentiality are not givens
General Takeaways (cont.)

- Know the process before you begin the process
- Make sure your bylaws and policies are consistent
- Understand that quality is now an expectation
- Align your QA/PV/peer review process with substantive quality goals that advance the organization (and make
- Recognize where peer review collides with other obligations and functions (e.g., employment)

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Brian C. Betner, Esq.
betner@hallrender.com