

LANDMINES AND OTHER SURPRISES: ANTICIPATING AND ADDRESSING UNEXPECTED PROFESSIONAL REVIEW ACTION ISSUES

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Professional review actions are commonly not pleasant for any of parties involved or harmonious as each side addresses the peer review. The process may have a cloud hanging over it such as process is tainted by economic or discrimination concerns, the result of improper bias or simply have arisen out of a clash in personalities amongst the parties that are unrelated to quality of care. The hospital must be concerned with ensuring it follows federal and state legal mandates and medical staff rules to provide a fair hearing while timely acting to ensure patient safety. Likewise, the physician should be concerned of the reasoning for such an action, whether the rights he or she are afforded will be sufficient to defend one self in the process and the implications that a negative peer review finding will have on the practitioner. Finally, those participating in this process, such as the peer review panel and its Fair Hearing Officer, must walk the tightrope between the concerns of the hospital and physician to provide the appropriate review of the matter on a timely basis.

This presentation will consider the primary legal and compliance authorities influencing the professional review action between hospital and physician. These authorities include the Medical Staff Bylaws, Joint Commission Standards related to the Medical Staff, the Health Care Quality Improvement Act and related federal and state laws and the National Practitioner Data Bank reporting requirements. It

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will delve into the different types of professional reviews and procedural rights along with immunity, confidentiality/privilege and compliance concerns. Finally, the presentation will examine when the peer review process may not go as planned and result in unexpected events that must be addressed to ensure that each party's concerns are addressed. These surprises, or to use the term "landmines" to demonstrate their unexpected nature, are events that may be encountered and need to be addressed during the process itself to ensure proper adjudication in the hearing process.

OVERVIEW OF LEGAL AUTHORITIES IMPACTING PROFESSIONAL REVIEW ACTIONS FROM THE HOSPITAL'S PERSPECTIVE

After a physician is granted a professional license to practice medicine by a state authority, it is usually a hospital and its Medical Staff that is the first line of defense in protecting patients from incompetent or disruptive physicians in terms of Medical Staff appointments, reappointments and professional activities while exercising clinical privileges at a hospital.

1. Organization of Hospital Medical Staff

- a. Joint Commission - Medical Staff Organization
- b. Joint Commission - Medical Staff Credentialing
- c. Federal Regulation and State Law Organization of Hospital Medical Staff
- d. Medical Staff Bylaws
- e. Medical Staff Rules and Regulations
- f. Hospital Policy Regarding Medical Staff

a. Joint Commission – Medical Staff Organization

The threshold Joint Commission standard for the organization of a hospital Medical Staff is standard MS.01.01.01, along with its thirty-seven elements of performance. The Joint Commission MS.01.01.01-MS.03.01.03 provides for the organized Medical Staff.

b. Joint Commission – Medical Staff Credentialing

The Joint Commission standard MS.06.01.01-MS.06.01.07 sets forth the credentialing requirements that must be followed by a hospital. Credentialing begins with the Medical Staff Office verifying the completion of the practitioner's application for appointment or reappointment to the Medical Staff. The Medical Staff Office also attempts to verify the voracity/accuracy of the application's content. Once complete, the application for appointment or reappointment usually moves through the credentialing committee, a committee of the hospital Medical Staff that then makes a recommendation to the Medical Executive Committee of the hospital Medical Staff. Joint Commission standard MS.02.01.01 calls for the Medical Executive Committee to review and make a recommendation to the hospital's Governing Board. Under Joint Commission standards, the hospital's Governing Board is the ultimate and final decision maker on appointments and reappointments to the Medical Staff.

c. Federal Regulation and State Law Organization of Hospital Medical Staff

The Centers for Medicare and Medicaid Services, Department of Health and Human Services, require any hospital that wishes to participate in Medicare/Medicaid as a condition of participation to have an organized Medical Staff operating under bylaws approved by the hospital governing body, which is ultimately responsible for the quality of medical care provided to patients by the hospital. 42 CFR 482, subpart C, Basic Hospital Functions, 42 CFR 482.22, Condition of Participation by Medical Staff. Though a survey was not undertaken, many states also have promulgated statutory rules for an organized Medical Staff for a hospital license for a particular state. For example, see Texas Health & Safety § 241.001, *et seq.* and Title 25, Texas Administrative Code chapter 133, subchapter C, Operational Requirement § 133.41(k), which rules and regulations generally track the verbiage of the afore-presented material.

In Louisiana, Chapter 11 part 2, LSA-R.S. 40:2100, *et seq.* deals with Hospital licensing by the Louisiana Department of Health. In purpose set forth in the statute, LSA-R.S. 40:2101 is to:

Provide for the protection of the public health through the development, establishment, and enforcement of

standards for the care of individuals in hospitals; and for the construction, maintenance and operation of hospitals which, in light of advancing knowledge, will promote safe and adequate treatment of such individuals in hospitals; and for regulating the operation and maintenance of hospitals in Louisiana.

Effective July 1, 1960, no one shall establish, conduct or maintain a hospital in the state of Louisiana without a license from the Louisiana Department of Health.

Enacted in 1986, LSA-R.S. 40:2114 calls for the organization of medical and dental staff of hospitals. In pertinent part, this statute states:

- A. Each hospital shall have a single, organized medical and dental staff. Medical and dental staff membership shall include doctors of medicine or osteopathy who are currently licensed to practice medicine or osteopathy by the Louisiana State Board of Medical Examiners and dentists licensed to practice dentistry by the Louisiana State Board of Dentistry.

- C. No individual shall be automatically entitled to membership on the medical and dental staff or to exercise any clinical privilege solely on the basis of his license to practice in any state, his membership in any professional organization, his certification by any clinical examining board, or his clinical privileges or staff membership at any other hospital without meeting the reasonable criteria for membership established by the governing body of the respective hospital.

- E. A hospital shall establish rules, regulations and procedures setting forth the nature, extent and type of staff membership and clinical privileges, as well as the limitations placed by the hospital

on such staff membership and clinical privileges for all health care providers practicing therein.

d. Medical Staff Bylaws

Most states recognize the Medical Staff Bylaws of a particular hospital is a contract between the hospital and its Medical Staff members. For example, see Granger v. Christus Health Central Louisiana, et al, 144 So.3d 736 (LA 2013), wherein the Louisiana Supreme Court held:

In promulgating the Bylaws and accepting the applications of the physicians who sought membership in their Medical Staff pursuant to those Bylaws, Cabrini obviously intended to be bound by the provisions set forth therein. We conclude that the offer and acceptance between Cabrini and Dr. Granger, via the exchange of written correspondence relative to the application for and the granting of Medical Staff membership, viewed along with the commencement of Dr. Granger's practice at Cabrini, established a contractual relationship between Cabrini and Dr. Granger. Further, the parties clearly intended that the Bylaws would govern their relationship. *Id.* at 762.

This gives rise to breach of contract claims by and between Medical Staff members and the hospital. For authority splits among the nation's courts on the question of whether or not bylaws form a contractual relationship between a hospital and a physician staff member, see footnote 27 to *Granger, supra*, 144 So.3d pg. 760. Caution: that list was compiled in 2013 and may no longer be entirely accurate.

Consequently, the relationship between a member of the Medical Staff and the Medical Staff shall be controlled by the Medical Staff Bylaws adopted in accordance with rules cited herein including any corrective action, adverse recommendations on clinical privileges and the rights of due process, both under the Joint Commission and the Health Care Quality Improvement Act, 42 USC § 11101 *et seq.* ("HCQIA").

2. OPPE AND FPPE

The hospital Governing Board as well as the committee members of the Medical Staff committees which review and make recommendations on an application for appointment or reappointment must ensure the continuing competence of practitioners for the privileges that are granted in order to protect the health and safety of its patient population. This may be accomplished through Ongoing Professional Practice Evaluations (OPPE) and Focused Professional Practice Evaluations (FPPE) along with professional practice evaluation, also known as the peer review process. By virtue of the Medical Staff membership, all members fall under the Ongoing Professional Practice Evaluation, which monitors and analyzes quality and appropriateness of services provided by the Medical Staff members. Requirements of performance for OPPE include medical/clinical knowledge, medical/clinical skills, clinical judgment, interpersonal skills, communication skills and professionalism.

3. Review of Conduct

The hospital must review a Medical Staff member's conduct whenever it appears that 1) the activities or professional conduct of a Medical Staff member jeopardizes the safety or best interest of a patient and the quality of care of treatment or services to a patient, visitor or employee; 2) the conduct presents issues of competence, character, judgment, ethics, stability of personality, including disruptive behavior or the inability to work cooperatively with others in the care and service of patients, adequate physical or mental health, moral characters are qualifications to be a member of the Medical Staff; or, 3) the conduct violates the Medical Staff Bylaws rules and regulations including any code of conduct or conduct that is disruptive to the functions of the hospital. The review initiation may occur through OPPE, FPPE or a written request with appropriate, supportable documentation of an activity or conduct that is alleged, presented to the President of the Medical Staff. The matter is then advanced to the Medical Executive Committee for review and discussion, which may lead to no further action or determination that an investigation needs to be conducted. Regardless of which action the Medical Executive Committee takes the affected practitioner [Medical Staff member] shall be notified in writing that an investigation has commenced and the underlying reason for the investigation.

4. Suspension

a. Summary

Under the Medical Staff Bylaws, a Medical Staff member's privileges may be suspended summarily. This may be accomplished by the division director, president of the Medical Staff, the president/CEO of the hospital or designee, or any combination thereof. Summary suspension occurs before the benefit of a hearing or personal appearance before a Medical Staff committee if the action is taken to protect the life of any patient or to reduce the likelihood of imminent danger to the health or safety of any individual. The hospital governing board using the same standard of patient safety or imminent danger to any individual also has the power to summarily suspend a Medical Staff member if the other empowered individuals failed to do so. Once the summary suspension is imposed, the affected Medical Staff member must be given oral and written notice of the summary suspension, along with notice to the corresponding division director, president of the Medical Staff, president/CEO of the hospital, hospital Governing Board, and the Medical Executive Committee at its next regularly scheduled meeting. The notice of the summary suspension to the Medical Executive Committee shall constitute a request for corrective action under the Medical Staff Bylaws, as well as documented in the Medical Staff member's credentialing and privileges file. Because the summary suspension is strictly to curtail the clinical privileges of the affected Medical Staff practitioner, he is entitled to a Fair Hearing under the Medical Staff Bylaws as required by the HCQIA.

b. Automatic

Automatic suspension comes for different reasons than a summary suspension and many times does not provide the procedural due process rights of a Fair Hearing. Automatic suspension occurs if the Medical Staff member's professional license to practice medicine is revoked, stayed, restricted, suspended, or placed on probation by the issuing board of the state, regardless of the reason. Further, should a Medical Staff member's license expire, he will be automatically suspended from all clinical privileges at the hospital until the license is renewed and provided to the Medical Staff for reinstatement. Exclusion from Medicare/Medicaid, or any other federally funded health care program and the automatic suspension shall remain in place until the exclusion has been removed. Failure to comply with the regulations and policies established for the completion

of medical records usually results in the automatic suspension of the affected Medical Staff member's privileges to admit patients and to schedule procedures. Should the medical records deficiency last longer than a specified amount of time, the inaction by the physician may be deemed as a voluntary resignation from the Medical Staff membership and privileges. Failure to maintain an appropriate amount of a professional liability insurance policy, the Medical Staff member's membership and privileges will be automatically suspended and remain so until professional liability coverage has been secured. Again, after the passage of a certain amount of time, if the professional liability coverage is not reinstated, it will be deemed a voluntary resignation by the affected Medical Staff member from the Medical Staff membership. Failure to pay Medical Staff membership dues will serve as an automatic suspension and after the passage of a certain period of time may be deemed an automatic voluntary resignation from the Medical Staff. Criminal conviction, plea of guilty or plea of *nolo contendere* will be grounds for an automatic suspension of hospital Medical Staff privileges and membership. Depending upon the Medical Staff Bylaws, this may occur immediately upon the time of conviction, plea of guilty or plea of *nolo contendere* regardless of any post trial motion or appeal.

5. Procedural Rights in the Medical Staff Bylaws and the Health Care Quality Improvement Act

Peer review of a Medical Staff member generally falls under one of two categories: incompetent clinical skills and judgment or poor interpersonal skills, also known as disruptive behavior. The Medical Staff Bylaws should include the mechanism for the review of a staff member's conduct and the procedural protections for the staff member should the potential for adverse action in clinical privileges arise. Additionally, the HCQIA will provide guidance for the procedural aspects of any review of the adverse recommendation on a staff member's clinical privileges. If the Medical Staff Bylaws are in conflict or silent on a particular issue, then the HCQIA will prevail and be controlling.

If the peer review process substantially complies with the Medical Staff Bylaws and HCQIA, then the immunity protections of the HCQIA will be available to those participating in the process. To be compliant with the HCQIA, the peer review (professional review action) process must be undertaken:

- reasonable belief that the action was in the furtherance of quality health care;

- after a reasonable effort to obtain the facts of the member;
- after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and
- with the reasonable belief that the action was warranted by the facts known after such reasonable efforts to obtain facts and after meeting the above third bullet point requirements. See, 42 USC § 11112.

Further, under the HCQIA, specifically 42 USC § 11112(b), sets forth the adequate notice and hearing requirements as called for above, including Notice of Proposed Action, Notice of Hearing, and Conduct of Hearing and Notice.

A professional review action (peer review) “shall be presumed to have met the” standards necessary for the immunity under 42 USC § 11111(a), unless the affected physician rebuts the presumption by a preponderance of the evidence.

Once the investigation into the affected practitioner’s conduct has been completed, the matter is then turned over to the appropriate Medical Staff Committee for review and action. If the decision adversely affects the clinical privileges of the practitioner that recommendation will advance up the Medical Staff Committee chain until it comes to the Medical Executive Committee. At every level, the reviewing committee has three action options: take no further action, affirm the adverse recommendation as posed, or modify/adopt its own recommendation.

The Medical Executive Committee shall conduct its review of the recommendation and the information that was the foundation for the recommendation. The Medical Executive Committee may meet or designate a subcommittee of the Medical Executive Committee members to meet with the affected practitioner to review/discuss the recommendation and the foundation for same seeking any explanation from the Medical Staff members.

If the recommendation of the Medical Executive Committee to the hospital’s Governing Board is adverse to the applying physician for initial appointment for either poor clinical skills and judgment or for interpersonal skills or disruptive

behavior then the HCQIA requires due process for the affected practitioner including the right to a Fair Hearing whose panel shall be made up of Medical Staff members of the hospital, usually as set forth in the Medical Staff Bylaws. The Medical Executive Committee itself may conduct the investigation or assign this task to an appropriate Medical Staff officer, committee or division director. Usually, during any investigation, the affected Medical Staff member will be afforded an opportunity to meet with the investigating committee, officer or division director conducting the investigation to discuss the matter. Once the investigation has concluded, the findings are forwarded to the Medical Executive Committee for further review and action. Depending on the investigation recommendations, if the Medical Executive Committee concludes the internal review supports an adverse recommendation of the affected practitioner's clinical privileges, or if the internal review is equivocal but the consensus of the Medical Executive Committee is an adverse recommendation, the Medical Executive Committee should recommend the matter(s) be sent for an outside review by a physician practicing in the same specialty as the affected practitioner. To ensure due process fairness, the outside reviewer should be selected by a third-party that has no interest in the outcome of either the outside review or the peer review process.

This may easily be accomplished through an outside peer review organization that has physicians around the country review medical charts and render an opinion regarding the affected practitioner's clinical skills and judgment or behavior. The outside organization will select the reviewer independent of the hospital or its Medical Executive Committee to maintain fairness for the affected practitioner. At this point, the outside organization needs to know if the reviewer is simply conducting a review or will the reviewer be a potential witness during the peer review process (Fair Hearing).

Also, it is best, due to economic conflict, not to use an internal reviewer opinion (who is of the same specialty as the affected practitioner) as a basis for an adverse recommendation by the Medical Executive Committee. The HCQIA is replete with admonitions not to allow Medical Staff members that compete in the same specialty as the affected practitioner, in order to remove any suggestion this action taken was only to remove competitive practitioners from the Medical Staff.

Further, it is recommended to send not just the medical chart(s) under scrutiny up to this point but also other medical charts, which are not in question, to achieve a balanced opinion. Once the decision is made to have an outside review,

the affected practitioner should be notified, in writing, about it. However, at this point, the affected practitioner does not need to know the identity of the outside peer review organization nor the reviewer.

Depending on the number of medical charts under review, this may take several weeks before a report becomes available from the outside reviewer to the Medical Executive Committee.

Once the report becomes available, the Medical Executive Committee will review a copy along with the curriculum vitae of the outside reviewer; but the reviewer's identity is still unknown to the Medical Executive Committee and the affected practitioner at this point. The affected practitioner will receive a copy of the outside reviewer's report prior to the next Medical Executive Committee meeting when the report will be discussed, along with all information previously gathered internally. Regardless of the opinion of the outside reviewer, the affected practitioner exercised good or poor clinical skills or judgment, or his disruptive behavior caused other practitioners to act improperly, then the matter returns to the Medical Executive Committee for further review and action. The Medical Executive Committee may ask the affected practitioner to appear to discuss the outside reviewer's opinions and conclusions and obtain his position. Thereafter, the Medical Executive Committee will decide on a course of action. Again, the Medical Executive Committee may adopt the recommendations of the outside reviewer, adopt the recommendations it received earlier from the internal investigation, reject totally or modify the recommendations.

If the Medical Executive Committee recommendation to the Governing Board is adverse to the affected practitioner's clinical privileges, then he must be notified in writing of the adverse recommendation. This should include the foundation for the adverse recommendation, an explanation of the affected practitioner's right of due process under the Medical Staff Bylaws, including the right to a Fair Hearing, notification by when and vehicle a fair hearing request has to be made, and include a copy of the Medical Staff Bylaws that were in effect at the time of the occurrence of the medical care and treatment that is the subject of the peer review process.

a. Fair Hearing

At this level, the Medical Executive Committee may impose no sanction or take corrective action and pose corrective recommendation(s) to the Governing Board. Should the Medical Executive Committee's recommendation in anyway effect or diminish the affected practitioner's clinical privileges at the hospital then the affected practitioner is entitled to a fair hearing as called for under the HCQIA. Usually, the affected practitioner has thirty days following the date of the receipt of notice of the adverse recommendation by the Medical Executive Committee to request the fair hearing and the request is usually required to be in written form delivered to the president of the Medical Staff. Failure to request the fair hearing in a timely manner will be deemed a waiver of same and the Medical Executive Committee's adverse recommendation will advance to the Governing Board for review and action. Failure of the affected practitioner to appear at the Fair Hearing should be a waiver by the physician for the Fair Hearing and appellate review.

Should the affected practitioner timely request the Fair Hearing then, according the provisions of the hearing and appeal review either contained in the Medical Staff Bylaws will be followed. Usually, there is an appointment of a Fair Hearing Officer and depending upon the adopted rules of the Medical Staff, the hearing officer can be either an attorney with experience as a Fair Hearing Officer in a peer review fair hearing or, in some instances, one of the physicians appointed to the Fair Hearing Panel may be designated as the Fair Hearing Officer. In rare instances should the hearing officer be one of the appointed physicians to the fair hearing panel. The Fair Hearing Panel will consider the documentary and testimonial evidence allowed to be presented by the Fair Hearing Officer during the Fair Hearing sessions. At the conclusion of the Fair Hearing, the Fair Hearing Panel may adopt, modify or reject the adverse recommendation of the Medical Executive Committee. This decision by the Fair Hearing Panel, along with the Fair Hearing record, will be forwarded to the Governing Board at which level if the recommendation is still adverse to the affected practitioner, there is usually a right to an appellate review on the paper record that originated from or compiled during the fair hearing process. After which the Governing Board will make the final decision and take action on the Fair Hearing Panel's recommendation. Again, the Governing Board may accept, modify or reject the Fair Hearing Panel's recommendation.

The members of the Medical Staff participating in the peer review process and Fair Hearing process realize it is their obligation as a Medical Staff member to participate though many Medical Staff members do not relish the role of reviewing another physician. Further, there is significant expenditure of time and money resources to go through the peer review process if it culminates with a fair hearing, which is an expense that is born by the hospital. Nevertheless, the hospital administration understands its obligation to the community that it serves in order to have the Medical Staff members appropriately and properly reviewed in order to ensure the safety of its patient population and compliance with joint commission accreditation, along with federal and state laws.

b. Fair Hearing Panel

Should the affected practitioner timely request a Fair Hearing to review the Medical Executive Committee's adverse recommendation and the basis for same, then a Fair Hearing Panel will need to be selected. This will include the Fair Hearing Officer, who shall preside over the matter along with selected physician staff, who are not in economic competition (meaning practices the same specialty thereby treating the same type of patients with the same maladies in the service area of the hospital).

Some Medical Staff Bylaws require the Fair Hearing panelists must be on the hospital's staff while other Medical Staff Bylaws are silent. In the first instance, because of the prohibition of economic competition, the Fair Hearing Panelists may or may not know of their own training and experience the nuances of the clinical skills and judgment of the specialty of the affected practitioner. A way around this is carefully selecting Panelists who are not in economic competition but are trained and experienced in the area of medicine under review. For example, a cardiologist under review for care rendered to a patient having a cardiac issue, the appointment of a general internist to the Panel will not violate the economic competition prohibition - though both are trained in cardiac conditions, they do not compete for the same patient population.

When the Medical Staff Bylaws are silent on the Panelists membership staff status, a physician that practices outside the service area, though of the same specialty as the affected practitioner will not violate the economic competition prohibition. For example, New Orleans metropolitan area spreads across the Mississippi river from the "east bank" to the "west bank." A Fair Hearing being

conducted at a hospital in Metairie, Louisiana, may appoint a physician practicing in Marrero, Louisiana, in the same specialty of medicine as the affected practitioner, as the two physicians are not competing for the same patient population. The physician from Marrero does not have an obligation to accept the appointment to the Fair Hearing Panel, but most physicians if asked will accept as part of his responsibility of a practicing physician.

c. Hearing Procedure And Burden of Proof

The burden of proof order of presentation is normally set forth in the Medical Staff Bylaws. Preponderance of the evidence or clear and convincing evidence are usually the selected burdens of proof. Beyond a reasonable doubt is too onerous and should never be used for a Fair Hearing. Rarely, the Medical Staff Bylaws does not set forth the burden of proof so the Fair Hearing Officer will have to issue an order setting forth the burden. Order of presentation normally starts with the Medical Staff as it has to present the foundation to support the Medical Executive Committee's adverse recommendation. Thereafter, the practitioner requesting the Fair Hearing presents. The ultimate burden of proof is on the affected practitioner to show continuing eligibility for Medical Staff appointment and clinical privileges. Some Bylaws require the affected practitioner to prove the adverse action/recommendation of the Medical Executive Committee was "either arbitrary, unreasonable, or capricious."

6. Designation and Appeal of Fair Hearing Panel Recommendation

Once the Fair Hearing Panel has rendered its written recommendation, it, along with the Fair Hearing record, is usually delivered to the hospital Chief Executive Officer for publication to the Governing Board. This may be accomplished by the Fair Hearing Officer, after which the Fair Hearing Panel has discharged its duty. A copy of the Fair Hearing Panel's recommendation is provided to the affected practitioner. Prior to the Governing Board's decision and action on the Fair Hearing Panel recommendation, the affected practitioner may ask for an appeal by the board on the paper record from the Fair Hearing proceeding. No new evidence may be presented at this appeal, unless it has been demonstrated such evidence could not have been available at the Fair Hearing proceeding through the exercise of reasonable diligence. Should new evidence be allowed, the same rights of confrontation will be allowed before the Governing

Board or remand to the Fair Hearing Panel for the taking, weighing of the new evidence, along with a review of the previous recommendation.

Once the appeal process has been exhausted, the Governing Board will make the final decision as to the clinical privileges of the affected Medical Staff member. Notice of the board's final decision, usually with a copy of the full record, will be provided to the affected practitioner, Medical Executive Committee and Chief Executive Officer of the hospital.

7. Procedural Rights – After Final Decision by the Governing Board

The affected practitioner may seek relief from any court of competent jurisdiction and venue, if the affected practitioner is so inclined. Here, 42 USC § 11111 limitation on damages comes into play. As set forth in the statute, if the HCQIA has been substantially complied with during the professional review activity, the body and individuals involved are immune from damages “under any law of the United States or of any state (or political subdivision thereof).” Except 1983 and Title VII actions.

8. National Practitioner's Data Bank Report

Adverse recommendations that affect a practitioner's clinical privileges for longer than thirty (30) days must be reported to the National Practitioner's Data Bank. Failure to report may lead to the loss for three (3) years of the damages immunity provided under the HCQIA.

9. Negligent Credentialing Liability

This is not a new theory of liability by a patient or a patient's family against a hospital and the Medical Staff members participating in the credentialing process of a physician. Although it may be relatively new to some jurisdictions, such as Louisiana. The threshold case is Darling v. Charleston Community Memorial Hospital, 33 Ill.2d 326, 211 N.E.2d 253, 1965 Ill.Lexis 250, where general practitioner on emergency call improperly casted a broken leg. Although the physician was practicing within his granted credentials, the facts showed he should not have been credentialed for fracture reduction and casting, as he lacked the requisite experience, knowledge and skill to reduce bone fractures and casting. The outcome for the patient was amputation of the lower extremity.

In 2016, the Louisiana Supreme Court in Billeaudeau v. Opelousas General Hospital Authority, 218 So.3d 513, 2016 La. Lexis 2082; 2016-0846 (La. 2016) recognized the liability claim of negligent credentialing for the first time. More importantly, the Court held the claim falls outside the medical malpractice statutory cap of \$500,000.00, thus the damage award is not limited. The Louisiana Medical Malpractice Act (LMMA) is LSA-R.S. 40:1231.1 *et seq.*, which is the private act. The Court reasoned credentialing is an administrative duty and not medical in nature, when it said:

Only plaintiffs' claims arising from medical malpractice are governed by the LMMA, and all other tort liability on the part of the qualified health care provider is governed by general tort law. *Id.* at 527.

Louisiana has a like medical malpractice act regarding state/publicly owned provider. Although the Billeaudeau, *supra*, case focused on the private medical act, it will equally apply to those qualified health care providers under the state medical malpractice act, thus denying the limitation of damages to the hospital and those negligently credentialing a physician.

OVERVIEW OF LEGAL AUTHORITIES IMPACTING PROFESSIONAL REVIEW ACTIONS FROM THE PHYSICIAN'S PERSPECTIVE

The physician's perspective in addressing a peer review and the rights, duties and obligations of the parties is subject to the type of peer review. The term "professional review *action*" is defined as "... an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. See, 42 USC §11151(9). A professional review *activity* is means "... an activity of a health care entity with respect to an individual physician (A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity, (B) to determine the scope or conditions of such privileges or membership, or (C) to change or modify such privileges or membership." See, 42 USC §11151(10). There is a presumption that the standards for a professional review action have been met allowing for those participating in such action to be immune

from damages as set forth 42 USC § 11111(a) unless the presumption is rebutted by a preponderance of the evidence. See, 42 USC §11112(a).

The HCQIA requires the following to be provided to the physician: (i) adequate notice of the proposed professional review action; (ii) a notice of hearing if the physician timely requests a hearing; and (iii) a minimum level of due process if a request for hearing has been made. See, 42 USC §11112(b). The Medical Staff Bylaws may address these rights as well and in some instances expand on them.

The adequate notice of hearing and hearing requirements are deemed to have occurred if the hospital has satisfied the following:

- The notice sets forth the proposed action to be taken, the reasons for such action, the physician's right to request a hearing within any time not less than 30 days to make the request after the notice to do so and a summary of the physician's rights. See, 42 USC §11112(b)(1).
- The physician, if timely request for hearing has been made, is provided notice of the place, date and time of the hearing that shall not be less than 30 days after the date of the notice and a list of witnesses expected to testify at the hearing on behalf of the hospital. See, 42 USC §11112(b)(2).
- The physician has the right to be (i) represented by an attorney or other person of the physician's choice; (ii) to have a record made of the proceedings; (iii) to call, examine, and cross-examine witnesses; (iv) to present evidence determined to be relevant by the hearing officer regardless of its admissibility in court; (v) to submit a written statement at the close of the hearing; and (vi) upon the completion of the hearing the physician has the right to receive the written recommendation of the panel and the written decision of the hospital. See, 42 USC §11112(b)(3).

If the physician does not timely request a hearing, or if the request is made but the physician chooses not to exercise the rights afforded, it shall be deemed a

voluntarily waiver of these rights. It should be noted that the failure of a hospital to meet the conditions established in 42 USC §11112(b)(3) shall not by itself constitute a failure to meet the standards as mandated.

1. Preparation For A Professional Review Action

A physician's focus and preparation for a professional review action is substantially different than that of the hospital. The hospital should have taken the steps as previously set forth herein mandated under the HCQIA to initiate a professional review action and establish immunity from claims arising from the peer review process. Therefore, the hospital is prepared to present the case before the Fair Hearing Panel at that time since a proposed action has been established. The physician though must move quickly to begin to assemble a defense because the time period to do so is limited, especially if an automatic or summary suspension has occurred.

It is recommended the physician immediately begin to (i) review the notice of the proposed review action and determine the exact nature of its basis; (ii) digest the information, documentation and witness list presented by the hospital; (iii) identify persons of knowledge that may serve as witnesses for both the hospital and the physician; (iv) identify and retain expert witnesses and/or medico-legal authority, if necessary, to support the physician's defense or counter the hospital's allegations; and (v) analyze who is the Fair Hearing Officer, if any, and the composition of the Fair Hearing Panel. The Fair Hearing shall occur within 30 days of the physician's request unless the parties mutually agree for the time period to be extended. It may be wise to consider requesting a later hearing date if additional time is necessary to be adequately prepared.

a. Determine the Exact Nature of the Basis for the Proposed Action

The notice of the professional review action must be sufficient to apprise the physician of the nature of the allegations to afford due process and allow the opportunity to prepare an adequate defense. The question is what amount of information is necessary to provide the physician such notice? A notice is not required in all cases to specifically identify each and every alleged act of wrongdoing and the basis for the peer review. A notice containing generalized allegations require the production of specific facts and records to apprise the physician of the nature of peer review. However, as held in Sokol v. Akron General

Med. Center, 173 F.3d 1026 (6th Cir. 1999), an action based upon based upon statistical overviews of the physician's cases generally relating to specific claims was sufficient to apprise the physician of the allegations levied in the professional review action and the production of specific records with specific issues stated regarding each patient's care was not required.

b. Digest the Information, Documentation and Witness List Presented by the Hospital

The hospital is required to provide the information, documentation and proposed witnesses to support any proposed action during the hearing process. The physician should review this information immediately upon receipt to determine if it provides sufficient notice so a defense may be mounted. If it is determined that the information is insufficient, the physician should immediately make a formal request for the documentation. Additionally, the physician should consult other records that may be needed such as medical records maintained in the clinical setting or by other physicians or ancillary providers that assisted in the care.

c. Identify Persons of Knowledge Who May Be Potential Witnesses

The physician will receive a list of the hospital's proposed witnesses with the notice of the hearing. The physician will need to compile a similar list of fact witnesses in light of those listed and the allegations made. The physician will also want to interview those on the hospital's proposed witness list to determine what they could potentially say and whether any witnesses are necessary to counter the hospital's witnesses. The hospital's list will have a large number of people listed as potential witness but in reality, only a fraction of those listed will actually testify. The hospital does not have to provide the physician access to these individuals so many times it requires locating those who may not want to be involved or at helpful in the preparation. Be prepared to face that challenge which is why it is necessary to consider this a priority.

d. Identify and Retain Expert Witnesses and Medico-Legal Authority

The basis for the proposed action may be one that does not necessarily require independent authority but rather may be reviewed by the testimony of the individuals involved and the information and documentation readily available.

However, in some instances, independent authority is needed such as with specific diseases, questions on the prevailing standard of care and progressive treatments. While this on its face may not seem difficult, there are a myriad of reasons why retaining the right authority and scheduling them during the allotted time of the peer review may be difficult. An expert witness or one who may provide medico-legal authority may not be readily available, not have the best of qualifications or otherwise simply make a bad witness. Also, when searching for either an expert witness or medico-legal authority, one should consider the resources for opposing views and the basis for their opinion. This information may be useful to have the full breadth of the anticipated testimony of the hospital's expert or medico-legal witnesses.

e. Analyze Who is the Fair Hearing Officer, if any, and the Composition of the Hearing Panel

The analysis of the Fair Hearing Officer and Fair Hearing Panel may be one of the most integral parts of the physician's preparation. The process by which these individuals are chosen and the requirements for their service in those capacities are set forth in other parts of this presentation. The physician must not only be satisfied the Fair Hearing Officer and Fair Hearing Panel members meet those qualifications but whether there is anything tangential regarding those individuals that may serve as the basis to contest them from serving in that capacity. Have there been instances where a bias may have previously been expressed that may keep the Fair Hearing Officer or Fair Hearing Panel member from truly providing a Fair Hearing? If this bias may be present with one or more of the individuals serving in their respective capacity, it should be immediately raised upon presentation of the list of individuals and its review. This bias must not simply be an impression though. It must be based on an event or circumstance that clearly demonstrates that the individual should not serve in that capacity.

2. Consider Avenues Of Settlement

The analysis and steps in preparing for the Fair Hearing may lead a physician to consider whether settlement is an option rather than going through the time, expense and aggravation of defending oneself. An effective Fair Hearing defense is disruptive to the professional and personal life of the physician with no guarantee of a favorable ruling. Even if there is a positive recommendation for the physician by the Fair Hearing Panel, the hospital ultimately may choose not to

accept it. These all lead to whether it may be in the physician's best interest to settle the matter.

Depending upon the issues faced and the ability to defend the physician's actions, such discussions with the hospital and its counsel may begin prior to or upon receipt of the notice of proposed action. It may not be feasible to make that determination until the allegations are fully investigated so one must be open to such consideration throughout this process. However, a settlement during the investigation of the peer review matter and through a final determination does not relieve the hospital from its reporting requirements to the National Practitioner Data Bank or state or local licensure boards. The hospital may not contract around such duties imposed upon it by law. This includes refraining from carrying out a peer review or a disciplinary action against the physician. The hospital is obligated to take such steps necessary to ensure that it properly investigates any events that may affect quality and act on them. Otherwise, the hospital's failure to do so may result in it being liable for damages if a subsequent event occurs that is similar to the initial allegations.

If the parties begin settlement discussions, the proposal and any counters should be set forth in writing so as to ensure that the ultimately reduced agreement is clear, concise and demonstrates the intent of the parties and the scope and pertinent facts of the agreed upon settlement. It is not uncommon that the parties arrive at a settlement, one party presumes one thing to happen, and the other party presumes otherwise. An example of this occurring is whether the settlement is reportable to the National Practitioner Data Bank and, if so, does the hospital draft and submit the language or does the physician have the right to participate in the drafting? It is recommended that the proposed report language contained within the settlement itself so there is no question.

A physician who is employed by a hospital or whose employment agreement with a non-hospital entity contains a requirement related to maintaining specific hospital staff privileges must consider the impact on the employment agreement. A settlement may trigger for cause termination of the employment agreement if the physician's privileges are negatively affected in any way. The employment agreement will likely have a provision that requires any investigation of the physician or the initiation of a peer review action to be reported to the employer. It would serve the physician to apprise the employer of the peer review

and the proposed action during the settlement process if it is questionable whether it create a termination event under the employment agreement.

Many times a physician may not wish to settle the matter because it may be perceived as an acknowledgement of wrongdoing. The physician should be leery of terminating the Medical Staff privileges rather than going through this process due to the hospital's privileges not being material to the physician's practice, the physician does not like the politics at the hospital or simply does not wish to go through the time, effort and cost of going through the process. The HCQIA requires a hospital report when a physician resigns from the Medical Staff and surrenders privileges while under investigation or in exchange for the hospital not initiating, or continuing with, an investigation. See, 42 USC §11133(a)(1)(B).

3. Fair Hearing

It is best to approach the Fair Hearing like a trial or arbitration rather than an informal hearing. The case must be presented to the Fair Hearing Panel in such a way to clearly articulate the physician's position with supporting testimony and documents. Organization is especially important because many times the Fair Hearing is conducted over a number of days and may appear piecemeal with no continuity. Evidence should be presented in such a way to be able to easily "connect the dots", recognizing the need to build off one day's presentation to the next. To effectively make such a presentation, the following are suggestions to be implemented:

- *Request a Court Reporter.* It provides for a record that may be used later in the event the physician's due process rights are restricted or demonstrate that the physician did not waive their rights, allows for the record to be revisited from one day to the next and may be a useful tool if transcribed immediately in preparation for the next day of proceedings.
- *Make a record of anything that may demonstrate the failure to provide for the due process rights the physician is entitled to receive.* The making of the record should be done formally through the Court Reporter with sufficient specificity to demonstrate what has occurred and why it was not proper. However, the physician may not cease going through with the peer review because it appears that a failure has occurred.

Failure to do so may be considered waiver of the right for the Fair Hearing.

- *Take advantage of the Opening Statement.* The physician's defense is being presented directly to the individuals who will make the recommendation as to the proposed action. Take advantage of this opportunity to clearly state the defense rather than a short refute of the allegations or making allegations against the hospital. The Fair Hearing Panel should hear the steps you are going to take and the evidence you will submit to refute any allegations.
- *Have witnesses prepared to be tendered.* Witnesses must be contacted in advance to ensure that they are readily available at the required day, time and location of the Fair Hearing. The need to have physician witnesses lined up in advance is especially important since they may have surgeries that run long or are on call. The Fair Hearing Panel does not have to give leeway if the witness is not available. Also, if you have a situation where the witness may not be available in person, it should be agreed upon in advance that a witness may appear telephonically or through video conferencing.
- *Have documents organized and marked as exhibits to be easily introduced into evidence and referenced.* Again, the fact that the Fair Hearing may go over a number of topics and days will necessitate being able to easily refer back to an exhibit introduced earlier. All exhibits should be marked and introduced as part of the record through the Court Reporter.
- *Be prepared to cross-examine witnesses.* It was earlier noted the need to determine in advance the testimony to be provided by those individuals on the hospital's witness list. The ability to cross-examine these witnesses may be as important as your case-in-chief to dispel part of the basis for the proposed action.
- *Closing Argument.* The physician's ability to "connect the dots" should occur at this time. The Opening Argument establishes the defense and this opportunity to show how all of the evidence is tied together. It should not be used, as noted in the Opening Statement section, to make allegations against the hospital. The Fair Hearing Panel is to make a

recommendation on facts submitted and not opinions as to how terrible the hospital has been in this process.

4. Post Fair Hearing Considerations

The HCQIA provides the physician the opportunity to present a written statement at the conclusion of the Fair Hearing. See, 42 USC §11112(b)(3)(C)(v). This opportunity should never be wasted because it provides you one last opportunity to “connect the dots” in advocating your case. The Court Reporter’s transcript and previously marked and introduced evidence should be utilized to highlight those things that the physician feels is important in the case. Do not use this opportunity to rehash every piece of evidence presented. Highlight the best points to support the physician’s case and dispute the hospital’s case rather than your argument getting lost in a lot of minor things that dilute your position and evidence. Also, the physician should suggest a suitable alternative available that is less onerous than the proposed action for the Fair Hearing Panel to recommend that is not contrary to the law or the Medical Staff Bylaws.

After a final decision is made regarding the proposed action and the Fair Hearing, the HCQIA provides the physician the right to receive both the written proposal from the Fair Hearing Panel and the written decision of the hospital including the basis for the decision. See, 42 USC §11112(b)(3)(D). This decision must meet the requirements as set forth in this section providing the rights to such documents. If either document does not meet such requirements then the nonconforming one should be contested. Otherwise, the physician is left to any avenues of appeal that may be available in the Medical Staff Bylaws. These opportunities are usually limited so the last consideration may be the ability to bring suit against the hospital. Remember, there is a presumption that the professional review action met the requirements of the HCQIA so the ability to overcome such presumption is difficult.

PEER REVIEW CONFIDENTIALITY/PRIVILEGE AND COMPLIANCE CONCERNS

It is important in the peer review process for people to feel free to express thoughts and exchange information allowing for candid observations for a complete review. Many times, the information that is pertinent to the peer review will include medical records and other documentation that is not expected to be

publicly released or otherwise made available without safeguards in place to prohibit such from occurring. These protections primarily are accomplished through federal and state law.

a. Confidentiality and Privilege Protections

The HCQIA establishes certain rights and standards regarding peer review but it does not provide for confidentiality and privilege for the information arising from such a review. The vast majority of confidentiality and privilege protections are at the state level. Every state and the District of Columbia has passed legislation that makes certain information that is part of a peer review to be confidential and privileged. These laws are not uniform in nature and each state's protections may be different than others. The varying degree of protection may allow for information to be unquestionably confidential and privilege in one state and the same information not protected and subject to discovery in another state.

b. Privacy Laws

Privacy laws, such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA) provide some protections for information that falls under the purview of the law. See, 42 USC §1320a-7e(b). The restrictions on availability and use under HIPAA pertain to individually identifiable health information including demographic data, medical histories, test results, insurance information and other information used to identify a patient or provide healthcare services or healthcare coverage.

c. Patient Safety Work Product

The Patient Safety and Quality Improvement Act of 2005, or "PSQIA", protects from disclosure certain documents that fall within "patient safety work product". 42 USC §299b-21, *et seq.* PSQIA protections apply to include records and statements used in developing and improving patient safety, healthcare quality and healthcare outcomes. Some states have similar laws protecting information that would be deemed to fall within this category as well.

d. Compliance and Waiver

It is important to develop and utilize standard operating procedures to ensure that information subject to confidentiality and privilege protections are in fact maintained in such fashion. The main sources of concern are when the availability of protection is triggered, what documents does it apply to, how the documents are maintained and how to address the privilege issue if subject to discovery requests. The following are recommendations on how to address these concerns to ensure that waiver does not occur:

- *The beginning of a peer review process must be clearly established.* A party that is unable to demonstrate when it was initiated cannot point to a definite point in time when protections should begin meaning that some information that should be privileged may not be cloaked with such;
- *The individuals having access to the information should be specifically identified.* Not doing so may lead to the argument that not limiting access voids any privilege;
- *All documents must be analyzed to determine if they are subject to the duty of confidentiality and privilege.*
- *Those documents identified should be marked to indicate they are subject to confidentiality or privilege such as “Peer Review Material – Confidential” or something similar;*
- *If presented with a discovery request that includes documentation that is privileged, the Privilege Log should contain an adequate description of what the document is and how it is privileged.* A blanket statement that the documents are confidential and privileged may not be specific enough to demonstrate that it is in fact privileged.

Failing to take these steps may cause the privilege to be waived. Furthermore, it may result in liability for not properly protecting the documents that otherwise are cloaked from unauthorized release.

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

A. The Medical Staff Bylaws is Silent as to the Burden of Proof Before the Fair Hearing Panel

One should examine the entire Medical Staff Bylaws regarding the Peer Review Fair Hearing and appeal process, looking for any suggestions or guidance which may bear on this issue. For example, if the Medical Staff Bylaws provides:

The Medical Executive Committee, when its action has prompted the hearing, will appoint a representative to present facts in support of its adverse recommendation and to examine witnesses. It will be the obligation of the representative to present appropriate evidence in support of the adverse recommendation. The practitioner will be responsible for supporting his challenge to the adverse recommendation or decision.

Though not specific, the cited Bylaw requires the Medical Executive Committee to present a case to support its adverse recommendation. This leads to the conclusion the Medical Executive Committee initially bears the burden of proof.

What about a situation where the Bylaws fail to provide any guidance on the requisite burden of proof to be applied at the Fair Hearing? Peer Review matters are controlled by the HCQIA, which also supersedes any Medical Staff Bylaw provision which may be in conflict with HCQIA. Specifically, 42 USC 11112 sets forth the standard for a professional review action and it requires the health care entity to give “adequate notice and hearing requirement” to the affected practitioner. Adequate notice includes the proposed adverse recommendation with reasons, which must be given to the affected practitioner. The physician has the right to request a hearing on the proposed adverse recommendation. Under the circumstances provided by HCQIA, the body proposing the adverse recommendation should have to bear the initial burden of proof. Accordingly, the Medical Executive Committee under a fair interpretation of HCQIA will bear the initial burden of proof at the Fair Hearing.

Once the conclusion is reached on the initial burden of proof, the order of presentation naturally follows: the Medical Executive Committee should present its case-in-chief first, followed by the practitioner's case-in-chief and lastly, true rebuttal by the Medical Executive Committee.

B. The Medical Staff Bylaws is Silent as to the Evidentiary Standard to be Applied During the Fair Hearing

The adopted evidentiary standard will apply equally to the body whose adverse recommendation is being reviewed and the affected practitioner. There are three evidentiary standards employed by law: (1) beyond a reasonable doubt; (2) clear and convincing evidence; and (3) preponderance of the evidence. No known or reported case law reviewing the evidentiary standard within the adopted Medical Staff Bylaws of beyond a reasonable doubt. This standard is too strict, and even if contained within the Bylaws, probably should not be applied.

The Courts have allowed a clear and convincing evidentiary standard when it is contained within the adopted Medical Staff Bylaws. However, to infer this strict standard in the absence of such a specific provision contained within the adopted Medical Staff Bylaws would most likely be improper and should not be applied. Again, one should turn to the statutory text of HCQIA for guidance on what evidentiary standard should be applied in the absence of a provision within the Medical Staff Bylaws. The standard sought by the HCQIA is one of "reasonableness," which is the equivalent to the preponderance of the evidence. Further, under 42 USC 11112(a)(4), it provides a professional review action is presumed to have met the standards contained within the statute "unless the presumption is rebutted by a preponderance of the evidence." Under the circumstances of the HCQIA the evidentiary standard would be by the preponderance of the evidence, both for the body whose adverse recommendation is being reviewed and affected practitioner.

C. Absence of a Fair Hearing Panelists Before, During or After the Fair Hearing

The Fair Hearing Plan set forth in the Medical Staff Bylaws usually states the number of Fair Hearing panelists to be named to the panel. The number of panelists is an odd number and usually the Bylaws call for three or five panelists. Serving as a panelist is a burden and unpleasant having to judge a colleague for

whatever reason. So, what happens when a panelist fails to attend or is called away from the Fair Hearing proceeding?

If a panelist is called away while the Fair Hearing proceeding is ongoing, the hearing may continue in the panelist's absence or the proceedings may be halted until all panel members are available to continue the hearing. Should the proceeding continue in the absence of a panel member the physician is asked to return to the proceedings as soon as possible, meanwhile, the Fair Hearing may continue in the absence of the panelist. The same is not true for the Fair Hearing panelist deliberations, all panelists must be present for deliberations. If a panelist gets called away during deliberations, one of two ways to handle are: cease the deliberations to be resumed at a time when all panelists are available or proceed with deliberations with the remaining panelists and the absent panelist is precluded from further participation in the deliberations and decision/recommendation by the Fair Hearing panel.

If a panelist becomes unavailable before the Fair Hearing begins, then the alternatives are: (1) delay the hearing until all panelists; or (2) proceed with the hearing as scheduled and the above mechanism for a panelist being called away from the proceedings will be employed. Sometimes, depending on the scheduling circumstances, it will be obvious the absent panelist will not ever be in attendance to any of the hearing. Should this occur, the Fair Hearing Officer should ask the parties if they wish to proceed or delay until the full panel is available. If the parties wish to proceed, the Fair Hearing Officer should get both parties to state on the record although the Medical Staff Bylaws calls for a certain number of panel members, the parties agree to vary from the Bylaws and proceed with a smaller sized panel.

Should the proceeding continue with an even number of panelists because of the missing panelist, there is a risk of the panel having a deadlock or a tied vote on its decision. Meaning if a four-panelist Fair Hearing proceeding with the vote going two in favor of the adverse recommendation from the MEC and two opposed to the adverse recommendation of the MEC. What is the Fair Hearing Panelists' decision if the vote is a tie?

D. The Physician Requests Access to Individuals and Interview Them in Preparation of, or to Call as Witnesses in, the Professional Review Action

The first scenario may occur when the physician is of the belief that the professional review action was initiated for an improper purpose such as economic or discrimination concerns or for personal issues amongst the parties that are unrelated to quality of care. The physician requests the hospital to direct those who participated in recommending the professional review action appear, either prior to or during the peer review hearing, to stand for questioning by the physician regarding such topics. Those individuals the physician wishes to question refuse to be interviewed or appear at the hearing so that the physician does not have the ability to question them on the decision to initiate the action. The hospital may deny directing those individuals not to respond to the request and/or provides no assistance to the physician to allow access to the individuals to be questioned.

The HCQIA provides the physician the right to call, examine, and cross-examine witnesses but does not require the hospital to assist in obtaining the witnesses requested by the physician. However, one must question that if a committee or an ad hoc group was formed by the hospital for the purpose of making the determination whether the impacted physician should have the ability to direct the individuals requested by the physician to appear so as to provide for a Fair Hearing. The following are possible solutions to the situation:

- The hospital provide a representative of its committee or ad hoc group who initiated or otherwise furthered the decision to begin the peer review process for the physician to question but limit questioning to only whether there were any improper motives related to the initiation of the peer review
- The hospital provide the physician the ability to present written questions related solely to improper motives to be answered by one or more of the parties
- If able in the jurisdiction where the peer review is occurring, an action be filed with the state court for a deposition before suit or to investigate claims

The first two options provide some access in a controlled setting to ensure the physician some access but ensuring that such is limited to not create any

adverse situation arising such as a waiver of privilege. The third option is usually available only in the event there are exigent circumstances that require the need to perform discovery immediately that would not otherwise be available such as a possible witness not being available (i.e. death, relocating outside of a court's jurisdiction). For example, Texas Rule of Civil Procedure 202 allows such to occur for those reasons but has been successfully used once by a physician where the information was necessary to mount an effective defense.

E. Peer Review Hearing Reveals New Events that May Require Additional Investigation or Peer Review Action

There are some instances where a peer review may reveal additional events that result in the need for further investigation and possible action. An example of this occurring is when it is discovered that two physicians are playing games with medical records due to managed care reimbursement. In one instance a surgeon would perform the procedure and a different surgeon would sign the OR record as if he did the surgery so they could maximize reimbursement based on which physician was in-network and who was out-of-network. In another instance, a second surgeon would show up in the OR at the end of a procedure and bill as an assisting surgeon. The following are possible solutions to the situation:

- No action by the hospital since it is outside the purview of the peer review
- The hospital peer review committee admonish the physician of such activities on the record
- Initiate a separate peer review activity to determine whether the physician the subject of the initial peer review where the information came to light and any other physicians involved should be investigated
- All of the above

The concern with the first option is that failure by the hospital to act once such possible activity is revealed may result in claims the hospital was participating in billing fraud if it knew about such activity and did not do anything to stop it. The second option may be of use to protect against the hospital or any other providers but an admonishment does not carry much significance if the peer review activity is unrelated to the claim and may not reach the scope of all of those involved. The third option is one that is recommended but does not address the issue once it

comes to light. Therefore, all are recommended but each situation may be different.

F. Peer Review Committee Deviates From Agreed Upon Scheduling of the Peer Review Hearing and Require Physician to Present Defense Prior to the Time Agreed Upon Prior to Hearing

It is common that prior to a peer review hearing that will last multiple days the parties agree to the timing of when each party shall present their case. The reason for such consideration is to ensure that witnesses as well as the physicians who comprise the peer review panel are available outside of clinic and operating hours. But what about the instance where the hospital completes its case-in-chief earlier than contemplated, whether intentional or not, and then insists the Fair Hearing proceed with the deviation from the proposed schedule? I have qualified this event as “intentional or not” because a hospital or the Fair Hearing panel may wish to move forward so as to end the hearing sooner than what is contemplated or it may be calculated to require the physician to begin their case prior to the time he or she was expected to do so. The HCQIA requires that a physician exercise their rights to the hearing and proceed accordingly when it begins or a waiver of rights may occur. The following are possible solutions to the situation:

- Do not deviate from the agreed upon schedule even if the Fair Hearing Panel insists to demonstrate that physician is being afforded the rights agreed upon
- If the Fair Hearing Panel insists on moving forward with the physician’s case over the objections of the physician, provide the physician with considerations recognizing that some aspects of his or her case, such as scheduling of witnesses, may not occur as contemplated
- Attempt to reach a resolution that may be reduced to writing or entered into the record if the hearing is being transcribed or otherwise memorialized in writing

The concern from each party’s standpoint should be whether such an action affects the conduct of the hearing as mandated by the HCQIA. The physician is concerned that if he or she does not move forward that a waiver of the hearing or associated rights has occurred. The first option where the hospital acquiesces to allow the hearing to move forward in deviation of the agreed upon schedule may

be considered a failure to provide the physician a fair hearing. The same may be considered with the second option respective of the considerations provided because the physician may feel forced to proceeding due to the waiver issue. The third option is preferable to allow for the hearing to move forward based upon what the physician is comfortable presenting in the time prior to the schedule agreed upon by the parties and acknowledged by the Fair Hearing Panel.

LANDMINES AND OTHER SURPRISES: ANTICIPATING AND ADDRESSING UNEXPECTED PROFESSIONAL REVIEW ACTION ISSUES

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Phoenix, Arizona



PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Organization of Hospital Medical Staff

- Joint Commission – Medical Staff Organization
- Joint Commission – Medical Staff Credentialing
- Federal Regulation and State Law Organization of Hospital Medical Staff
- Medical Staff Bylaws
- Medical Staff Rules and Regulations
- Hospital Policy Regarding Medical Staff

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Joint Commission – Medical Staff Organization

The threshold Joint Commission standard for the organization of a hospital medical staff is standard MS.01.01.01, along with its thirty-seven elements of performance. The Joint Commission MS.01.01.01-MS.03.01.03 provides for the organized medical staff.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Joint Commission – Medical Staff Credentialing

The Joint Commission standard MS.06.01.01–MS.06.01.07 set forth the credentialing requirements which must be followed by the hospital.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Federal Regulation and State Law

Organization of Hospital Medical Staff

CMS requires any hospital that wishes to participate in Medicare/Medicaid as a condition of participation have an organized medical staff operating under bylaws approved by the hospital governing body, which is ultimately responsible for the quality of medical care provided to patients by the hospital.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Medical Staff Bylaws

- Most states recognize the Medical Staff Bylaws of a particular hospital is a contract between the hospital and its medical staff.
- A few states still do not recognize the Medical Staff Bylaws as a contract but may be enforced if it involves a larger contractual relationship.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

OPPE and FPPE

Ongoing Professional Practice Evaluations
(OPPE)

Focused Professional Practice Evaluations
(FPPE)

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Review of Conduct

A review is necessary if it appears the medical staff member:

- Jeopardizes the safety or best interest of a patient, visitor or employee.
- Presents issues of competence, character, judgment, ethics, stability of personality, adequate physical or mental health or moral character.
- Violates the Medical Staff Bylaws rules and regulations.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Suspension

- Summary suspension may be done by the hospital's division director, the president of its medical staff, its president/CEO or designee or any combination.
- Done if necessary to protect the life of any patient or to reduce the likelihood of imminent danger to the health or safety of an individual.
- The physician has procedural due process rights under the Medical Staff Bylaws after the suspension has occurred.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Suspension

- Automatic suspension occurs for different reasons other than summary suspension such as loss or negative impact to the physician's license, violation of hospital rules that are not corrected, exclusion from governmental programs, loss of professional liability insurance or commission of a criminal act.
- May not provide for the same procedural due process rights.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Procedural Rights in the Medical Staff Bylaws and the Health Care Quality Improvement Act (“HCQIA”)

- Reasonable belief that the action was in the furtherance of quality health care;
- After a reasonable effort to obtain the facts of the member;
- After adequate notice and hearing procedure are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and
- With the reasonable belief that the action was warranted by the facts known after such reasonable efforts to obtain facts and after meeting the above third bullet point requirements. See, 42 USC § 11112.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Fair Hearing

- Procedural due process rights are available to the physician if the Medical Executive Committee recommends a sanction or corrective action that in anyway effects or diminishes the physician's clinical privileges at the hospital.
- These rights include a Fair Hearing that must be timely requested by the physician after notice of the recommended action.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Fair Hearing Panel

- Presided over by a Hearing Officer.
- Medical Staff Bylaws will govern who composes the Fair Hearing Panel.
- If the Panelist are members of the hospital's medical staff they must not be in economic competition with the subject of the Fair Hearing.
- The Medical Staff Bylaws may be silent as to who composes the Fair Hearing Panel.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Hearing Procedure and Burden of Proof

- The order of presentation normally starts with the Medical Staff establishing the foundation supporting the Medical Executive Committee's adverse recommendation.
- The physician then presents his or her case refuting the Medical Staff's presentation.
- The ultimate burden of proof is on the affected physician to show continuing eligibility for Medical Staff appointment and clinical privileges.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Hearing Procedure and Burden of Proof

- Selected Burden of Proof usually either (i) preponderance of the evidence; or (ii) clear and convincing evidence.
- A burden of beyond a reasonable doubt is too onerous and should never be used.
- Some Medical Staff Bylaws require the affected physician to prove the proposed action is either “arbitrary, unreasonable or capricious”.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Designation and Appeal of Fair Hearing Panel Recommendation

- Once the Fair Hearing Panel renders its written recommendation, it and the Fair Hearing record are usually delivered to the hospital's CEO for publication to the governing board.
- Prior to the governing board rendering its decision, the physician may ask for an appeal by the board on the paper record from the Fair Hearing.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Designation and Appeal of Fair Hearing Panel Recommendation

- No new evidence may be presented unless it is demonstrated it could not be available at the Fair Hearing.
- If new evidence is allowed, the same confrontation rights are available prior to the governing board rendering its decision.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Procedural Rights – After Final Decision by the Governing Board

- The physician may file an action in any court of competent jurisdiction and venue.
- The HCQIA provides for the body and individuals involved in the peer review to have immunity from damages if the activity met certain the requirements.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

National Practitioner's Data Bank Report

Adverse recommendations that affect a practitioner's clinical privileges for longer than thirty (30) days must be reported to the National Practitioner's Data Bank. Failure to report may lead to the loss for three (3) years of the damages immunity provided under the HCQIA.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Negligent Credentialing Liability

- A theory of liability asserted by the patient or the patient's family against a hospital and the medical staff members participating in the credentialing process.
- The hospital may be liable under this theory if a physician is granted medical staff privileges when the hospital has an appropriate credentialing process that it does not follow and grants privileges it would not ordinarily grant.

PEER REVIEW PROCESS FROM HOSPITAL PERSPECTIVE

Negligent Credentialing Liability

- There may be additional liability if the hospital has an inadequate credentialing process that grants privileges to a physician that it should not grant.
- Not all states recognize a cause of action for negligent credentialing.

PEER REVIEW PROCESS FROM THE PHYSICIAN PERSPECTIVE

- The HCQIA requires that adequate notice of the proposed professional review action be provided the physician, the notice of hearing provided if the physician timely requests a hearing and a minimum level of due process be provided if the physician requests a hearing on a timely basis. See, 42 USC §11112(b).
- The Medical Staff Bylaws will address these rights as well and in some instances expand on them.

PEER REVIEW PROCESS FROM THE PHYSICIAN PERSPECTIVE

Preparation for a Professional Review Activity

- Review the notice of the proposed review action and determine the exact nature of the basis for such;
- Digest the information, documentation and witness list presented by the hospital;
- Identify persons of knowledge that may serve as witnesses for both the hospital and the physician;
- Identify and retain expert witnesses or medico-legal authority if necessary, to support the physician or counter the hospital's allegations; and
- Analyze who is the Fair Hearing Officer, if any, and the composition of the Hearing Panel.

PEER REVIEW PROCESS FROM THE PHYSICIAN PERSPECTIVE

Determine the Exact Nature of the Basis for the Proposed Action

- The notice of the professional review action must be sufficient to apprise the physician of the nature of the allegations.
- It does not need to be specific to each patient and alleged activity as long as it is sufficient to identify the alleged improper acts.

PEER REVIEW PROCESS FROM THE PHYSICIAN PERSPECTIVE

Digest the Information, Documentation and Witness List Presented by the Hospital

- This information will generally come in batches with the proposed witness list provided with the notice.
- Important to review information to determine if it contains all the pertinent records.
- Do not forget to consult clinical records and those maintained by other physicians and ancillary providers.

PEER REVIEW PROCESS FROM THE PHYSICIAN PERSPECTIVE

Identify Persons of Knowledge who may be Potential Witnesses

- It is best to cull the medical records and related documents to identify and interview those who may have material information even if it may not be a main issue.
- It is important to arrange for all possible witnesses to be available on the dates of the Fair Hearing even if the physician may not call them to testify.

PEER REVIEW PROCESS FROM THE PHYSICIAN PERSPECTIVE

Identify and Retain Expert Witnesses and Medico-Legal Authority

- The basis for the proposed action will dictate if there is a need for expert witness and medico-legal authority.
- Imperative to determine this early in the process since it may be difficult to identify and retain the necessary witnesses.
- Be cognizant of the background of these witnesses including publications they may have authored.

PEER REVIEW PROCESS FROM THE PHYSICIAN PERSPECTIVE

Analyze who the Fair Hearing Officer is, if one is appointed, and the Composition of the Hearing Panel

- Do they meet the qualifications as dictated by the Medical Staff Bylaws?
- Are there any instances of bias or otherwise issues that might cause them to be impartial?
- If there are any issues with the Fair Hearing Officer or a member of the Fair Hearing Panel, immediately contest in writing the inclusion of the individual early on and then again on the record during the Fair Hearing.

PEER REVIEW PROCESS FROM THE PHYSICIAN PERSPECTIVE

Consider Avenues of Settlement

- A peer review may be expensive and time consuming even if the physician is of the belief that there was no wrongdoing.
- A settlement may be advisable depending upon its terms and whether the settlement is reportable to the National Practitioner Data Bank.
- A hospital may never contractually agree to not investigate a matter if it is otherwise required to do so.
- A voluntary relinquishment of staff privileges in some instances is reportable.
- The settlement should consider who will draft the Report.

PEER REVIEW PROCESS FROM THE PHYSICIAN PERSPECTIVE

The Fair Hearing

- Request a Court Reporter.
- Make a record of anything that may demonstrate the failure to provide for the due process rights the physician is entitled to receive.
- Take advantage of the Opening Statement.
- Have witnesses prepared to be tendered.
- Have documents organized and marked as exhibits to be easily introduced into evidence and referenced.
- Be prepared to cross-examine witnesses.
- Closing Argument.

PEER REVIEW PROCESS FROM THE PHYSICIAN PERSPECTIVE

Post Fair Hearing Considerations

- Always submit the Post-Hearing Written Statement.
- Suggest to the Hearing Panel a reasonable alternative to the proposed action.
- Review the Fair Hearing Panel's Written Proposal and Final Decision and contest either one if they do not meet their requirements.

PEER REVIEW CONFIDENTIALITY/PRIVILEGE AND COMPLIANCE

Confidentiality and Privilege Protections

- The HCQIA does not provide for confidentiality and privilege of the peer review.
- Majority of confidentiality and privilege protections are at the state level.
- Every state and the District of Columbia has statutory authority making the peer review information confidential and privileged.

PEER REVIEW CONFIDENTIALITY/PRIVILEGE AND COMPLIANCE

Privacy Laws

- Certain privacy protections are contained within the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) provides some protections for information.
- There are restrictions on that information that ordinarily falls under Protected Health Information.

PEER REVIEW CONFIDENTIALITY/PRIVILEGE AND COMPLIANCE

Patient Safety Work Product

- The Patient Safety and Quality Improvement Act of 2005 protects from disclosure of certain documents that fall within “patient safety work product”.
- The protections apply to records and statements used to develop and improve patient safety, health care quality and health care outcomes.

PEER REVIEW CONFIDENTIALITY/PRIVILEGE AND COMPLIANCE

Compliance and Waiver

- It is important to recognize the importance of ensuring confidentiality and privilege of the peer review information.
- A formal recognition of the exact date when the process begins will allow for the physician to know when the duty.
- Limit who has access to the information.

PEER REVIEW CONFIDENTIALITY/PRIVILEGE AND COMPLIANCE

Compliance and Waiver

- Determine which information is subject to confidentiality and privilege.
- Mark the information that it is subject to peer review protections.
- Be specific when presented with a discovery request so that there is specificity included in the Privilege Log.

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

The Medical Staff Bylaws is Silent
as to the Burden of Proof
Before the Fair Hearing Panel

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

The Medical Staff Bylaws is Silent as to the Burden of Proof Before the Fair Hearing Panel

- The Bylaws may set forth who has the burden.
- If the Bylaws are silent, the HCQIA controls. The body proposing the adverse recommendation should have to bear the initial burden of proof. Accordingly, the Medical Executive Committee under a fair interpretation of HCQIA will bear the initial burden of proof at the Fair Hearing.

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

The Medical Staff Bylaws is Silent
as to the Evidentiary Standard to be
Applied During the Fair Hearing

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

The Medical Staff Bylaws is Silent as to the Evidentiary Standard to be Applied During the Fair Hearing

- The adopted evidentiary standard will apply equally to the body whose adverse recommendation is being reviewed and the affected practitioner.
- There are three evidentiary standards employed by law: (1) beyond a reasonable doubt; (2) clear and convincing evidence; and (3) preponderance of the evidence.

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

The Medical Staff Bylaws is Silent as to the Evidentiary Standard to be Applied During the Fair Hearing

- The Courts have allowed a clear and convincing evidentiary standard when it is contained within the adopted Medical Staff Bylaws.
- If the standard is not contained within the Bylaws, the standard sought by the HCQIA is one of “reasonableness,” which is the equivalent to the preponderance of the evidence.

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

Absence of a Fair Hearing Panelists
Before, During or After the Fair Hearing

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

Absence of a Fair Hearing Panelists Before, During or After the Fair Hearing

- The Fair Hearing Plan set forth in the Medical Staff Bylaws usually states the number of Fair Hearing panelists.
- If a panelist is called away while the Fair Hearing proceeding is ongoing, the hearing may continue in the panelist's absence or the proceedings may be halted until all panel members are available to continue the hearing.

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

Absence of a Fair Hearing Panelists Before, During or After the Fair Hearing

- The same is not true for the Fair Hearing panelist deliberations, all panelists must be present for deliberations.
- If a panelist becomes unavailable before the Fair Hearing begins, then the alternatives are: (1) delay the hearing until all panelists; or (2) proceed with the hearing as scheduled and the above mechanism for a panelist being called away from the proceedings will be employed.

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

The Physician Requests Access to Individuals
and Interview Them in Preparation of, or to Call
as Witnesses in, the Professional Review Action

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

The Physician Requests Access to Individuals and Interview Them in Preparation of, or to Call as Witnesses in, the Professional Review Action

- The hospital provide a representative of its committee or ad hoc group who initiated or otherwise furthered the decision to begin the peer review process for the physician to question but limit questioning to only whether there were any improper motives related to the initiation of the peer review.

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

The Physician Requests Access to Individuals and Interview Them in Preparation of, or to Call as Witnesses in, the Professional Review Action

- The hospital provide the physician the ability to present written questions related solely to improper motives to be answered by one or more of the parties.
- If able in the jurisdiction where the peer review is occurring, an action be filed with the state court for a deposition before suit or to investigate claims.

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

Peer Review Hearing Reveals New Events
that May Require Additional Investigation
or Peer Review Action

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

Peer Review Hearing Reveals New Events that May Require Additional Investigation or Peer Review Action

- No action by the hospital since it is outside the purview of the peer review.
- The hospital peer review committee admonish the physician of such activities on the record.
- Initiate a separate peer review activity to determine whether the physician the subject of the initial peer review where the information came to light and any other physicians involved should be investigated.
- All of the above.

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

Peer Review Committee Deviates From Agreed
Upon Scheduling of the Peer Review Hearing
and Require Physician to Present Defense Prior
to the Time Agreed Upon Prior to Hearing

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

Peer Review Committee Deviates From Agreed Upon Scheduling of the Peer Review Hearing and Require Physician to Present Defense Prior to the Time Agreed Upon Prior to Hearing

- Do not deviate from the agreed upon schedule even if the Fair Hearing Panel insists to demonstrate that physician is being afforded the rights agreed upon.

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

Peer Review Committee Deviates From Agreed Upon Scheduling of the Peer Review Hearing and Require Physician to Present Defense Prior to the Time Agreed Upon Prior to Hearing

- If the Fair Hearing Panel insists on moving forward with the physician's case over the objections of the physician, provide the physician with considerations recognizing that some aspects of his or her case, such as scheduling of witnesses, may not occur as contemplated.
- Attempt to reach a resolution that may be reduced to writing or entered into the record if the hearing is being transcribed or otherwise memorialized in writing.

LANDMINES AND OTHER SURPRISES AND HOW EACH SHOULD BE ADDRESSED

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ANY QUESTIONS?

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