Katten

MAMSS 39th Annual Education Conference

May 6, 2022

How to Respond to 3rd Party Inquiries for Privileged Information, Negligent Credentialing Developments and NPDB Over-Reporting

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Responding to Third Party Requests for Privileged Information

Responding to Requests

- Appointment/Reappointment Requests
  - —Do you know what information is or is not privileged?
  - —Is there a statutory/legal requirement to respond to these requests?
    - Generally, no (*See,* Kadlec Decision)
  - —What about accreditation standards?
    - Joint Commission Standard MS.07.01.03

    "Deliberations by the medical staff in developing recommendations for appointment to or termination from the medical staff and for the initial granting, revision, or revocation of clinical privileges, include information provided by peers (of the applicant)."

Responding to Requests

- Rationale for MS.07.01.03

"In circumstances where there are sufficient peer review data available in evaluating recommendation(s) from peers (appropriate practitioners in the same professional discipline as the applicant who had a personal knowledge of the applicant) reflects a basis for recommending the granting of privileges."

—In understanding how and when to respond to third party requests during the appointment and reappointment process, it is important to know the requirements that a hospital medical staff has in obtaining sufficient information in order to adequately credential and privilege an applicant and practitioner for appointment/reappointment.

Responding to Requests

- —Does the hospital/medical staff have an applicable medical staff bylaw, rule, regulation or policy which addresses how to respond to these requests?
- —Do you answer all questions on a questionnaire submitted to the medical staff or just provide rank and serial number?

- Are requests for information funneled to a single individual, or are multiple individuals permitted to respond?
  - —This can lead to inconsistent responses.
  - —Responses should be truthful, objective and based on documented actions.

Responding to Requests

- Responses that are misleading or create misapprehensions may give rise to liability claims either from inquiring hospitals or the physician.
- If the response may likely result in an adverse decision regarding a physician's membership or privileges, consider requiring the physician to sign an absolute waiver form before providing the information.
- Even if there is no recognized duty to disclose in Massachusetts, a hospital that withholds information regarding documented and substantiated impairment, quality of care, behavioral or other problems relevant to the hospital's appointment decision and/or could adversely effect patient care, does so at its own risk.

Responding to Requests

- Disclosure of adverse information should be reviewed and carefully coordinated through appropriate management personnel and, when necessary, legal counsel.
- Consider disclosing the requested information to the effected physician in advance so that there are no surprises. If the physician does not agree with the response, then simply withhold the response, which likely will have an adverse impact on the physician's application.
- Make sure that state laws provide protections for disclosures above and beyond what protections are included in a waiver.
- Be careful about information conveyed over a telephone discussion which may come back to haunt you.

Responding to Subpoenas

- What categories of privileged information do you have and control as an MSP, and what privileged information is being requested?
- Have materials which have been identified as privileged been confirmed by in-house or outside counsel?
- Avoid the problem of comingling privileged and non-privileged information—information contained in the credentials versus the quality file of a practitioner.
- Some courts have held that Data Bank reports may be confidential, but are not privileged, and therefore, you may be obligated to disclose.
- Privileged information under a state peer review statute will not be considered privileged in a federal court proceeding involving a federal claim such as antitrust or discrimination.

Negligent Credentialing

Negligent Credentialing - Environmental Overview

- Plaintiffs are looking for as many deep pockets as possible in a malpractice action

  —Hospital has the deepest pockets

- Tort reform efforts to place limitations or “caps” on compensatory and punitive damages have increased efforts to add hospitals as a defendant
- Different Theories of Liability are utilized

  —Respondent Superior

  - Find an employee who was negligent

  —Apparent Agency

  - Hospital-based physician, i.e., anesthesiologist, was thought to be a hospital employee by the patient and therefore hospital is responsible for physician’s negligence

Negligent Credentialing - Environmental Overview

—Doctrine of Corporate Negligence

- Hospital issued clinical privileges to an practitioner who provided negligent care who they knew or should have known was not competent

- Industry shift from reimbursing providers based on the volume of services provided to the value of services obtained
- Greater transparency to general public via hospital rankings, published costs and outcomes, accreditation status, state profiling of physicians, etc.

Negligent Credentialing - Environmental Overview

- Required focus on evidenced-based guidelines and standards and the six Joint Commission competencies (patient care, medical knowledge, practice based learning and improvement, interpersonal and communication skills, professionalism and systems based practice) and ongoing and focused professional practice evaluation ("OPPE" and "FPPE") as a basis of determining who is currently competent to exercise requested clinical privileges
- The result of all of these evolving developments is an unprecedented focus on how we credential and privilege physicians as well as the volume of information we are requesting and generating as part of this ongoing analysis

The Tort of Negligence

- Plaintiff must be able to establish:
  - —Existence of duty owed to the patient
  - —That the duty was breached
  - —That the breach caused the patient's injury
  - —The injury resulted in compensable damages

Duty - Doctrine of Corporate Negligence

- Hospital, along with its medical staff, is required to exercise reasonable care to make sure that physicians applying to the medical staff or seeking reappointment are competent and qualified to exercise the requested clinical privileges. If the hospital knew or should have known that a physician is not qualified and the physician injures a patient through an act of negligence, the hospital can be found separately liable for the negligent credentialing of this physician
- Doctrine also applies to managed care organizations such as PHOs and IPAs and also will apply to ACOs, CINs, etc.

Duty - Doctrine of Corporate Negligence

- Restatement of this Doctrine and duty is found in:
  - —Case law, i.e., Darling v. Charleston Community Hospital, (33 Ill. 2d 326 (1965); Frigo v. Silver Cross Hospital (377 Ill. App. 3d 43 (1st Dist. 2007); Spradley v. Pergament Home Ctrs., 689 N.Y.S. 2d-516 (1999); Palmer v. City of Rome, 466 N.Y.S. 2d 238 (1983)
  - —State hospital licensing standards
  - —Accreditation standards, i.e., The Joint Commission and Healthcare Facilities Accreditation Programs
  - —Medical staff bylaws, rules and regulations, department and hospital policies, corporate bylaws and policies

Duty - Doctrine of Corporate Negligence

- Some questions associated with this duty:
  - —How are core privileges determined?
  - —Based on what criteria does hospital grant more specialized privileges?
  - —Are hospital practices and standards consistent with those of peer hospitals?
  - —Were any exceptions to criteria made and, if so, on what basis?

Duty - Doctrine of Corporate Negligence

—Were physicians to whom the exemption applied "grandfathered" and, if so, why?

—Did you really scrutinize the privilege card of Dr. Callahan who is up for reappointment but has not actively practiced at the Hospital for the last two or more years?

—Has each of your department's adopted criteria which they are measuring as part of The Joint Commission FPPE or OPPE obligations such as length of stay patterns or morbidity and mortality data?

—Has the hospital developed policies to identify, implement, monitor and enforce provider compliance with required quality metrics?

Breach of Duty

- The hospital breached its duty because:
  - —It failed to adopt or follow state licensing requirements
  - —It failed to adopt or follow accreditation standards, i.e., FPPE and OPPE
  - —It failed to adopt or follow its medical staff bylaws, rules and regulations, policies, core privileging criteria, etc.
  - —It reappointed physicians without taking into account their accumulated quality or performance improvement files

Breach of Duty

- It reappointed physicians even though they have not performed any procedures at hospital over the past two years and/or never produced adequate documentation that the procedures were performed successfully elsewhere
- It failed to require physicians to establish that they obtained additional or continuing medical education consistent with requirement to exercise specialized procedures
- It appointed/reappointed physician without any restrictions even though they had a history of malpractice settlements/judgments, disciplinary actions, insurance gaps, licensure problems, pattern of substandard care which has not improved despite medical staff intervention, current history or evidence of impairment, non-compliance with quality metrics, etc.

Breach of Duty

- It failed to grandfather or provide written explanation as to why physician, who did not meet or satisfy credentialing criteria, was otherwise given certain clinical privileges
- It required physician to take ED call even though physician clearly was not qualified to exercise certain privileges
- It gave privileges to a physician who did not meet their eligibility criteria
- It did not collect and/or review all of the information required as part of its appointment/reappointment procedures

Causation

- The hospital's breach of its duty caused the patient's injury because:
  - —If the hospital had uniformly monitored and applied its credentialing/privileging criteria, physician would not have received the privileges which he negligently exercised and which directly caused the patient's injury
  - —History of malpractice suits since last reappointment should have forced hospital to further investigate and to consider or impose some form of remedial or corrective action, including reduction or termination of privileges, and such failure led to patient's injury

Causation

- Causation is probably the most difficult element for a plaintiff to prove because plaintiff eventually has to establish that if hospital had met its duty, physician would not have been given the privileges that led to the patient's injury
- Plaintiff also must prove that the physician was negligent. If physician was not negligent, then hospital cannot be found to have breached the Doctrine of Corporate Negligence

Negligent Retention/Credentialing

- **Evans v. Akron General Medical Center, No. 2020-Ohio-5535 (Ohio Sup. Ct. December 8, 2020)**

  —Background

  - The patient in this lawsuit brought a negligent hiring/supervision and retention case regarding an ER physician who allegedly sexually assaulted her while in the hospital.
  - The trial court had dismissed the lawsuit on the grounds that she had failed to bring a civil suit against the accused physician within the statute of limitation, and further, there was no pending criminal case against the physician, which the Court found was a requirement before the case could go forward.

Negligent Retention/Credentialing

- The Appellate Court reversed holding that a finding of civil liability or a determination of guilt in the criminal defense was not a precondition or requirement in order to bring a negligent hiring/retention lawsuit against the hospital.
- The Supreme Court of Ohio decided to accept the appeal, but did not focus on the five-part test that the Appellate Court relied on in determining whether the plaintiff could continue to pursue her negligent hiring and retention case.
- Instead, the Court focused only on whether an employer could still be liable under this negligence theory if the employee in question can no longer be held civilly liable or guilty of the claimed criminal charge.

Negligent Retention/Credentialing

- The Court instead looked to the question of whether the employee committed a wrong what was recognized as a civil tort or a crime in Ohio and not whether the wrong was proven to be tortious or criminal. Here, the allegation of sexual assault is a wrongful act and because there were still genuine issues of material fact relating to the physician's purported conduct, the hospital was not entitled to summary judgment.

Negligent Retention/Credentialing

- **Rieder v. Siegal, No. 19-0767, 2021 WL1936057 (Iowa May 14, 2021)**

  —Background

  - In this medical malpractice case, the patient underwent a number of upper neck and lower back surgeries in an attempt to relieve significant pain.
  - Despite efforts to address her problems, the patient continued to experience pain and other complications after she was discharged.
  - On the day she was discharged, the Iowa Board of Medicine filed a statement of charges against the physician relating to medical care he provided to other patients.

Negligent Retention/Credentialing

- The charges stated that he “demonstrated professional incompetency … when he failed to provide appropriate and responsible care to numerous patients in Cedar Rapids, Iowa.”
- The physician admitted that they informed the hospital regarding this pending investigation prior to operating on the patient.
- The patient filed suit, including the claim of negligent credentialing against the clinics and hospitals that employed and credentialed the physician

Negligent Retention/Credentialing

- She alleged that the hospital:
  - "failed to exercise reasonable care in investigating and selecting qualified and competent medical staff physicians and giving them the privilege of using its facilities. Moreover, the hospital knew or should have known that the physician did not possess the proper competency which led to her injuries"
- The principal issue in this case was whether Mercy breached the standard of care under negligent credentialing when it knew or should have known that the physician had been sued on numerous occasions in 2004 through 2008 and in 2014 and 2015.

Negligent Retention/Credentialing

- The hospital argued and the trial court agreed that this information was inadmissible in addition to an expert witness who testified that these lawsuits should have put the hospital on notice that the physician did not have current competency to conduct the surgical procedures.
- The Court of Appeals reversed and the case was appealed and accepted by the Supreme Court of Iowa.
- Interestingly, the Supreme Court stated that the tort of negligent credentialing has never been formally accepted in Iowa. The trial court never ruled on whether the theory was liable although the parties seemed to acknowledge the existence of the tort.

Negligent Retention/Credentialing

- The issue which became the focus of the Supreme Court's review was whether the hospital should have conducted an independent investigation when the Iowa Board of Medicine issued its charges against the physician, and the physician subsequently resigned from the practice of medicine in Iowa.
- According the rules of evidence in Iowa, it is not proper to admit evidence of prior malpractice cases.
- However, the Supreme Court held that the trial court erred when it excluded the testimony of the expert witness who stated that the physician breached the standard of care based on his prior lawsuits.
- Because there was a disputed issue of material fact the decision of the trial court to dismiss the case was reversed.

Negligent Retention/Credentialing

- **Lessons Learned**
  - —More than 30 state jurisdictions recognized recognize the tort of negligent credentialing, retention, hiring or supervision.
  - —Under this theory, the hospital has a duty to determine whether a physician is currently competent to exercise all of the clinical privileges he or she is requesting.
  - —If the hospital knew or should have known through reasonable investigation that the physician was not competent in one or more areas, resulting in the injury to a patient, the hospital can be held liable under this theory.

Negligent Retention/Credentialing

—The hospital and through the MSPs and its existing appointment/reappointment applications, are required and expected to conduct reasonable investigations as well as to follow up with any missing or incomplete information before making any recommendations.

—If additional questions arise during the application process, follow up questions should be provided and the application not processed until such time as all requested information has been obtained.

—The medical staff bylaws should include language that the physician has the burden of producing any information which is requested and that the failure to provide such information in a timely fashion will result in the withdrawal of the application from further processing.

Negligent Retention/Credentialing

—In addition, should the misrepresentation or false information be found during the process, the application should be withdrawn, and if found after the application is granted, the physician can be subject to disciplinary action as well as a report to the Data Bank.

Data Bank Reporting

Background

- Data Bank concerned about history of underreporting.
- Draft Guidebook issued in 2014 took the position that an FPPE Plan qualified as an “investigation” for reporting purposes.
- NAMSS, AHLA, the AHA and other associations and groups pushed back arguing that FPPE and similar remedial measures are effective tools in advancing “Just Culture” principles and assisting physicians in their efforts to improve patient care and reduce risk.
- Treating an FPPE as an investigation will likely reduce reliance on this method as a remedial measure.

Background

- Data Bank relented and indicated that it would look to a Hospital's Medical Staff Bylaws and policies to determine whether a physician was under investigation in the event of a dispute. Data Bank also stated, however, that these documents would be nonbinding in this determination as to whether an investigation was initiated.

What is Reportable?

- Professional review actions which result in an involuntary reduction, restriction, suspension, termination or denial of clinical privileges for greater than 30 days if based on professional competence or professional conduct.
- Acceptance of a surrender or restriction of clinical privileges while under investigation for possible professional incompetence or unprofessional conduct or in return for not conducting an investigation or taking a professional review action that otherwise would be reportable.

What is Reportable?

- Additional examples:
  - —Mandatory consultations requiring prior approval before a practitioner can exercise clinical privileges for more than 30 days.
  - —Mandatory proctoring requiring the physical presence of the proctor in order for the practitioner to exercise clinical privileges for more than 30 days.
- The decision is not reportable unless there is a final decision except for summary suspensions and other decisions which restrict privileges for more than 30 days.

What Is Not Reportable?

- Actions taken which do not involve professional competence or professional conduct.
- Administrative action/automatic suspensions for:
  - —Failure to pay dues
  - —Malpractice insurance reductions
  - —Failure to obtain or maintain board certification
  - —Failure to complete medical records
  - —Failure to get vaccinated
- Denial based on failure to satisfy eligibility criteria.
- Giving up privileges voluntarily.
- Resignation during routine peer review where there is no threat of an investigation or a professional review action.

Updated Data Bank Position on "Investigations"

- The Data Bank interprets the word "investigation" expansively.
- Not controlled by how the term is defined in Bylaws, policies or procedures.
- The investigation must be focused on the practitioner in question.
- Must concern the professional competence and/or professional conduct of the practitioner in question.
- The activity should be the precursor to a professional review action.
- The investigation is ongoing until the entity's decision making authority makes a final decision or closes the investigation.
- A routine or general review of cases is not an investigation.

Updated Data Bank Position on "Investigations"

- A routine review of a particular practitioner is not an investigation.
- There is no requirement that the practitioner be notified that they are under investigation.
- If conducting an investigation but privileges remain intact, there is nothing to report.
- Entity should be able to produce evidence (*e.g.,* minutes or excerpts from committee minutes or orders from hospital officials directing an investigation) that the investigation began before the practitioner took action.
- A practitioner's decision to voluntarily relinquish privileges greater than 30 days in order to avoid an investigation or during an investigation is reportable. (Chapter E: Reports-Reporting Adverse Clinical Privileges Actions)

What Impact and What Problems?

- Confusion
- Over-reporting
- Failure to notify practitioner when under investigation
- Investigations after practitioner left without any notice that an investigation has been triggered
- Reports before consulting with legal counsel
- What is routine peer review versus what qualifies as an investigation
- Hospital's failure to follow bylaws and policies before conducting an "investigation"

What Impact and What Problems?

- Reporting before an investigation has been completed or an investigation has been triggered
- Medical staff education as to the proper procedures and promotion of collegial intervention and other routine peer review and related remedial measures in lieu of triggering an investigation

Data Bank Reports

- **Doe v. Rogers, Civil Action Criminal 12-01229 (TFH), 2020 U.S. Dist. Lexus 184719 (D.D.C. September 10, 2020)**

  —Background

  - Plaintiff physician is a surgeon who performed an emergency laparoscopic appendectomy on a 14 year old girl to remove an “inflamed band” which turned out to be the patient’s right fallopian tube.
  - The hospital immediately filed a report on the incident to the New York Patient Incurrence Reporting and Tracking System.
  - The report stated that, “the physician has been placed on suspension pending completion of the investigation and the family notified”.

Data Bank Reports

- The physician subsequently executed a letter voluntarily suspending his surgical privileges for a period of two weeks. Shortly thereafter he submitted his resignation from the medical staff.
- Two months later, the hospital submitted an adverse action report to the National Practitioner Data Bank.
- Although the hospital did not take further action regarding the physician's privileges or employment, it did include information that as a result of the investigation, the hospital concluded that the physician departed from the standard of care regarding the laparoscopic appendectomy in question.
- The physician subsequently sued the Secretary of HHS and the National Practitioner Data Bank arguing that the report was factually inaccurate and was not submitted in accordance with reporting requirements.

Data Bank Reports

—Court's Decision

- After reviewing the legal history leading up to the adoption, the Court noted that Data Bank reports can be as simple as a one sentence description. However, the report does "require … action or surrender."
- Furthermore, the Court stated that the language is broad enough to include the results of an investigation in order to enable "queriers to more fully understand the circumstances of the incident, and protect patients by providing entities with enough information to make informed hiring decisions."

Data Bank Reports

- The fact that the investigation had not been concluded by the time the physician resigned is irrelevant to the requirement that a hospital report a physician who resigns while under investigation.
- Even if the investigation resulted in a determination that the physician did not breach standard of care and no disciplinary action was going to be recommended, the resignation is still reportable.

Data Bank Reports

- **Jane Doe v. Community Memorial Hospital**

  —Background

  - This case involves a 16 year old patient who suffered a gun shot wound to his head, which resulted in the family's decision to have a procedure whereby his "organs were scheduled to be harvested for donation".
  - The patient was otherwise healthy, but in order to control his pain, was given high doses of fentanyl and other pain relieving medications.
  - When the procedure to harvest organs was scheduled, he was under the care of an advanced practice nurse who administered additional medications in order to keep him comfortable during the procedure.

Data Bank Reports

- Because he had developed a high tolerance of the medication doses during his two-week stay at the hospital, the nurse had to give higher does than usual order to relieve pain and keep him as comfortable as possible.
- Because the patient did not expire within the 90 minute requirement, he was removed from the surgical suite and re-admitted to the hospital where he was subsequently discharged.
- The day in which the procedure occurred happened to be the last day of the nurse's employment. In fact, she had submitted her resignation 3 months previously in order to take a new job.

Data Bank Reports

- Up until that point of time, she was in good standing and was not under any investigation.
- Moreover, as per the terms of her contract and the medical staff bylaws, her membership on the allied professional staff and her clinical privileges automatically expired on the last day of her employment.
- One day after the procedure and after she had resigned, she received a call from the hospital's VPMA asking her if she would be willing to voluntarily participate in an interview to discuss her decisions to administer high doses of pain medication during the procedure. In response to the question of whether she was under investigation or whether she needed an attorney, the VPMA then responded by saying it was an informal interview and that legal counsel was not necessary.

Data Bank Reports

- A few weeks later, the hospital reported her to the state nurse licensing board and to the National Practitioner Data Bank claiming that she resigned while under investigation.
- The Data Bank report was very specific about claims of breach of a standard of care in administering the high doses of pain medication.
- After investigating the circumstances of the procedure, along with the medical records and information from the nurse's expert, the nursing board took no action against her.

Data Bank Reports

- The nurse then challenged the basis of the hospital's report to the Data Bank arguing that she had not resigned while under investigation because no investigation had been triggered prior to her resignation and departure.
- The hospital had contended that she still retained privileges until such time as she was contacted by human resources to ask whether she wished to retain privileges two weeks after her resignation.

Data Bank Reports

- **The Data Bank's Decision**

  —There were a number of communications back and forth between the nurse and the hospital as to whether the hospital had met all of the requirements for reporting to the Data Bank in light of the nurse's contention that she had already resigned, was never informed that she was under investigation, she had no clinical privileges at the time that she resigned, and furthermore, under the bylaws and under her employment contract, she no longer had clinical privileges.

Data Bank Reports

—In addition, the Data Bank was given deposition testimony from the VPMA taken from litigation that was filed against the hospital which she conceded that the nurse really was not under investigation pursuant to the medical staff bylaws, but instead, was part of an interview which the hospital attempted to characterize as an investigation for reporting purposes.

—The Data Bank specifically requested that the hospital provide “a copy of any written communication addressed directly to [Jane Doe] notifying her that a formal investigation into her professional competence or conduct had been initiated.”

Data Bank Reports

—Although the hospital argued and the Data Bank acknowledged that there was no obligation to advise a practitioner that they were under investigation, it cited to the Guidebook, which provided that:

> "The healthcare entity that submits a clinical privileges action based on surrender, restriction, or failure to renew a physician's or dentist's privileges while under investigation should have evidence of an ongoing investigation at the time of surrender, or evidence of a plea bargain."
>
> "Reporting entity should be able to produce evidence that an investigation was initiated prior to the surrender of clinical privileges."

Data Bank Reports

> "Examples of acceptable evidence may include minutes or excerpts from committee meetings, orders from hospital officials directing an investigation, or notices to practitioners of an investigation."

—In its communication to the hospital, the Data Bank further stated that "such documentation must also include the effective date of the initiation of the investigation, the reason(s) the investigation was opened, and, if applicable, the timeframe by which this investigation was expected to be completed.

Data Bank Reports

—The hospital was given 15 additional calendar days to provide such documentation to support its argument that the nurse was under investigation when she resigned.

—The hospital failed to provide such documentation in a timely manner. Its efforts to provide a response subject to the deadline was rejected by the Data Bank.

—Consequently, the Data Bank ordered the hospital to void the report which it submitted.

Data Bank Reports

- **Lessons Learned**
  - —Although the Data Bank initially backed off on its position that an FPPE constitutes an “investigation” for reporting purposes, a few years ago it reiterated its view that that term is interpreted broadly.
  - —This position has created confusion among hospitals and medical staffs in terms of what type of activity does or does not qualify as an investigation.
  - —The result, in part, is what I believe has been the unintended over-reporting to the Data Bank when physicians decide to resign even if there has been no formal request for disciplinary action.

Data Bank Reports

—One way to address this issue is to in fact define the term "investigation" in the medical staff bylaws so that there is a clear standard and understanding as to when an investigation is triggered.

—It is the recommendation of many attorneys and healthcare consultants that an investigation does not begin until such time as the MEC receives a formal request for disciplinary action and, after reviewing the request and any supporting information, decides to pursue an investigation, typically through an *ad hoc* committee.

Data Bank Reports

—An example Bylaw definition would be as follows:

- The term “Investigation”, for Data Bank reporting purposes, shall refer to that decision made by the Medical Executive Committee under Article ___, Section ___ of these Bylaws in response to a request for a formal request for (corrective) (disciplinary) (remedial) action under Article __, Section ___ to initiate an investigation after reviewing the request and any supporting materials. All other remedial measures, including but not limited to collegial intervention, monitoring, re-education, and FPPE plans shall be considered routine Peer Review activities.

Data Bank Reports

place by an *ad hoc* committee. All other remedial measures including but not limited to, collegial intervention, monitoring, re-education and FPPE reviews are considered routine peer review."

—Other than this defined term, you should avoid using the word "investigation" in any other section of the bylaws, policies or rules and regulations so as not to cause further confusion.

—Requests for disciplinary action which could trigger an investigation should only be submitted after all other efforts to address the quality of care, disruptive behavior or other similar actions have failed.

Data Bank Reports

—The purpose is to create a “just culture” environment whereby physicians believe the hospital and the medical staff is there to assist them when problems arise rather than move towards disciplinary action.

—This will encourage physicians to be more upfront and honest in acknowledging that issues or problems exist so that they can be addressed in a proactive and productive manner.

—It is important to identify what actions are and are not reportable to the Data Bank or to any state or governmental entity and therefore generally limit hearings to those disciplinary actions.

—Make sure you consult with in-house or outside legal counsel before determining whether a Data Bank report is required.

Recommendations

- Define when an “investigation” is triggered
- Define “Peer Review” and utilize routine peer review and other remedial measures, including:
  - —Collegial intervention
  - —Inviting/requiring physician to respond to case reviews, adverse events, patient complaints, etc.
  - —Monitoring
  - —Concurrent and/or retrospective case reviews
  - —Peer counseling/shadowing
  - —Re-education/re-training
  - —FPPE plans
  - —Mandatory consultation not requiring prior approval

Recommendations

- Require that routine peer review remedial measures be attempted first before requesting disciplinary action
- Educate leaders as to these measures
- Avoid communications, including decision to take action, if remedial measures fail
- Inform physicians when under investigation and educate about impact if they resign
- Disciplinary action should only be requested if seeking to impose a reportable action

Recommendations

- Eliminate the term “investigation” in policies, except for use in definitions and MEC’s action to trigger an investigation
- Educate medical staff on Just Culture principles
- Should you instead of be following Code of Conduct or Physician Wellness procedures?

Other Recommendations

- If a report is a required attempt to negotiate language in advance with practitioner and their legal counsel in order to limit or avoid litigation.

  —Expect third party inquiries and need to coordinate a unified response.

- Inform physician early on as to the progressive steps leading to possible disciplinary actions in order to encourage cooperation and participation.
- Who is the physician's "rabbi or confessor"?
- Consult with legal counsel.
- Reports need to be factual and objective. No need to include all of the gory details.

Questions?

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