

Katten

**New York State Association
Medical Staff Services**

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**To Report to the Data Bank or Not:
That is the Question!**

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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.

Background *cont'd*

- Treating an FPPE as an investigation will likely reduce reliance on this method as a remedial measure.
- 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? *cont'd*

- 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

What Is Not Reportable? *cont'd*

- 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.

Updated Data Bank Position on “Investigations” *cont’d*

- 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.
- 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.

Updated Data Bank Position on “Investigations” *cont’d*

- 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

What Impact and What Problems? *cont'd*

- Hospital's failure to follow bylaws and policies before conducting an "investigation"
- 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

Recommendations

- Define when an “investigation” is triggered.
 - After routine peer review remedial measures, including an FPPE, have failed to address the physician’s professional competence or conduct, and the MEC agrees to conduct an investigation after receiving and evaluating a request for disciplinary action.
- Define 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

Recommendations *cont'd*

- Concurrent and/or retrospective case reviews
- Peer counseling/shadowing
- Re-education/re-training
- FPPE plans
- Mandatory consultation not requiring prior approval
- Requiring that routine peer review remedial measures be attempted first before requesting disciplinary action
- Educating leaders as to these measures

Recommendations *cont'd*

- 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
- 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.

Other Recommendations *cont'd*

- 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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