

## Legal lessons

# Physicians think twice over 'loser pays' rule

A physician at the receiving end of a negative credentialing or peer review decision may want to think twice about responding with a lawsuit aimed at the hospital or peers. That physician may be surprised to learn that:

- 42, U.S.C. 11113 of the Health Care Quality Improvement Act of 1986 (HCQIA) states that defendants may recover attorneys' fees from a physician who files a frivolous or bad-faith claim (see sidebar at right)
- Some medical staffs are adopting no-sue clauses into their bylaws and medical staff applications
- Some medical staffs, following the HCQIA, are adopting clauses in their bylaws and/or medical staff applications that require a physician to reimburse the hospital or other members of the medical staff if he or she loses a peer review or credentialing case

On one hand, hospitals and medical staffs appreciate the additional protections afforded to them by the HCQIA and no-sue clauses. "If I am a medical staff leader, knowing full well I might have to deal with [litigation], I would want some kind of protection," says **Joseph Cooper, MD**, a consultant at The Greeley Company, a division of HCPro, Inc., in Marblehead, MA.

On the other hand, physicians find these provisions onerous and unfair. "If you are the one who is being kicked off [the medical staff] or getting your privileges restricted, you may think it is going overboard," says **Michael Callahan, Esq.**, an attorney at Chicago-based Katten Muchin Rosenman, LLP.

Where can you find common ground? The answer varies from hospital to hospital. What is ideal for physicians is problematic for the hospital, and vice versa. The following tips may help hospitals and physicians work together to more effectively manage these sticky situations.

- **Read the bylaws.** Ironically, physicians are voting provisions that work against them into the medical staff bylaws, including those that protect medical staff members from getting sued as a result of a peer review

or credentialing dispute and/or require physicians who bring a peer review or credentialing case to court to reimburse medical staff members for attorneys' fees if they lose.

Why? Because physicians fail to read the bylaws before they vote, says **Michael Cassidy, Esq.**, an attorney at Tucker Arensberg in Pittsburgh, who represents physicians.

"If, indeed, medical staff members read the bylaws and found [a no-sue] clause in there, I think most of them would say that's not fair," says Cooper. Since medical staff members must vote bylaws into action, they can prevent no-sue clauses from being adopted and work with medical staff leaders for a more reasonable alternative.

### Health Care Quality Improvement Act

**Title 42:** The Public Health and Welfare

**Chapter 117:** Encouraging good-faith professional review activities

**Subchapter I:** Promotion of professional review activities

**Section 11113:** Payment of reasonable attorneys' fees and costs in defense of suit

*In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a) of this title and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith. For the purposes of this section, a defendant shall not be considered to have substantially prevailed when the plaintiff obtains an award for damages or permanent injunctive or declaratory relief.*

Source: Excerpt from the Health Care Quality Improvement Act of 1986.

Physicians may also be voting for these provisions, which are generally written by hospital counsel, because they have no other options.

"The vast majority of the time, individual physicians never ask for an outside opinion. They just vote on what is suggested to them," says Cassidy. "I don't think it ought to be the responsibility of an individual physician [to seek an outside review]. Officers should do that as a matter of course."

► **Weigh your options.** Although some physicians may consider a no-sue clause over the top, they may feel differently about a clause requiring plaintiff doctors to reimburse defendant hospitals, seeing it as a more reasonable means of protecting members of the medical staff from monetary damages. "I think most medical staffs would go along with that," says Cooper.

If a physician loses a credentialing or peer review case, he or she will be reported to the National Practitioner Data Bank, Cooper says. "That is like wearing a scarlet letter on my chest for the rest of my life, so I am going to do everything possible to prevent that from happening, even if it means I may have to pay \$20,000 in lawyers' fees," he says.

► **Check state and federal laws.** Medical staffs and hospitals may not need to include a provision in their bylaws stating that physicians must reimburse attorneys' fees because such a provision already exists in the HCQIA, Cassidy says.

**Note:** The HCQIA does not shut the door on physicians who have legitimate cases against members of the medical staff or the hospital. The statute is discretionary, meaning that a physician needs to reimburse attorneys' fees only if the case he or she files is frivolous or in bad faith (generally, the courts decide whether a case is filed frivolously or in bad faith). This provision applies only to court cases, not medical staff proceedings, Cassidy adds.

Some state statutes allow the prevailing party to seek recovery of legal fees, Callahan says. In addition, courts commonly rule that the plaintiff doctor must reimburse the defendant hospital regardless of whether the medical staff includes such a provision in its bylaws.

In addition, some states consider medical staff bylaws a contract between the physician and the medical staff. If your state is one of them, physicians on your

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### Sample bylaws language: Ensure legal protections

It's not every day that a physician wants to sue members of the medical staff, or even the hospital, but it happens, and when it does, you'll need an action plan. The Greeley Company, a division of HCPro, Inc., in Marblehead, MA, offers the following sample bylaws language to help keep your medical staff out of court.

#### Protections for releasing peer review and credentialing information

*[The physician] authorizes the hospital medical staff and administrative representatives to release any and all credentialing and peer review information to other hospitals, medical associations, licensing boards, appropriate government bodies, and other healthcare entities or to engage in any valid discussion relating to the past and present evaluation of the applicant's training, experience, character, conduct,*

*judgment, or other matters relevant to the determination of the applicant's overall qualifications.*

*[The physician] acknowledges and consents to agree to an absolute and unconditional release of liability and waiver of any and all claims, lawsuits, or challenges against any medical staff or hospital representative regarding the release of any requested information and, further, that all such representatives shall have the full benefit of this release and absolute waiver, as well as any legal protections afforded under the law.*

#### Reimbursement of attorneys' fees

*If an individual institutes legal action and does not prevail, he or she shall reimburse the hospital and any member of the medical staff named in the action for all costs incurred in defending such legal action, including reasonable attorneys' fees.*

## Loser pays

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medical staff may already have limited legal options; the court will most likely see the contract as binding, says Callahan. "It is a factor that any physician must take into consideration and talk to his or her counsel about when they decide to pursue any type of litigation," he says.

► **Balance the scales.** Medical staff bylaws can provide protections to physicians that go over and above—but do not contradict—what is provided in the HCQIA.

For example, the medical staff bylaws could make the "loser pays" rule reciprocal so that medical staff members or a hospital involved in a peer review or credentialing decision would have to reimburse the physician (the plaintiff) for his or her attorneys' fees if the plaintiff prevails.

"The federal law doesn't say that doctors can't [get reimbursed]," Cassidy explains. "It just says that hospitals can."

► **Get comfortable with compromise.** Unfortunately, not everyone is going to walk away happy when it comes to Section 42, U.S.C. 11113 of the HCQIA and various bylaws amendments regarding reimbursement of attorneys' fees and the physician's right to sue.

"Ideal for the hospital means it is the only party that can collect attorneys' fees. Ideal for physicians means they are the only ones that can collect attorneys' fees. If your idea of ideal is neutral, that means either winning party can collect attorneys' fees," says Cassidy.

There is no right or a wrong—what your organization decides depends on its culture, Cooper says. "It comes down to what will the medical staff tolerate and what won't they tolerate," he says. ■

### Medical staff leader training series

HCPPro has partnered with The Greeley Medical Staff Institute to present a series of three Webcasts for new medical staff leaders. These one-hour programs provide new medical staff leaders with an understanding of the roles and responsibilities of the board, medical staff, and management, as well as tools to understand their responsibilities related to credentialing, privileging, and peer review. Visit [www.hcmarketplace.com](http://www.hcmarketplace.com) for more information.

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