2013

Pursuing Quality Through Medical Staff and Physician Oversight

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A Report from the Trenches

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Traditional Model for Responsibility for Oversight of Quality of Care

- **Medical Staff**
  - Right to self-governance
  - Prohibition of the corporate practice of medicine
  - Operates under bylaws, rules and regulations, policies and procedures, approved by the board of directors
  - Responsible for ensuring the quality of care
    - Supervisory committees
    - Quality Assessment and Performance Improvement ("QAPI")
- **Board of Directors**
  - Oversees medical staff through its approval and review of procedures for the selection and reappointment of medical staff members and oversight of quality of care

Peer Review Immunity – Federal and California

- **HCQIA – 42 U.S.C § 11111(a)**
  - Must be a peer review committee
  - Must proceed with the reasonable belief that the action was in furtherance of quality health care
  - Must have reasonable effort to obtain the facts of the matter
  - Physician must be given adequate notice and a fair hearing
  - Peer review authority must act with reasonable belief that the facts known after a reasonable investigation warrant the action taken
- **CA Civil Code § 43.7**
  - If the member acts without malice

Governing Body Responsibility

- B&P § 809.05 and bylaws vest governing body with responsibility and authority to:
  1. Investigate
  2. Initiate corrective action
  3. Summarily suspend
- *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal. 4th 976, 301 P.3d 1146.

Changing Environment Mandates Governing Body Involvement

- **Pay for Performance**
  - Failure to meet quality measures
  - Utilization of resources
- **Joint Commission Standard MS 01.01.01**
  - Enhanced role for governing body
- **Growth of Multi-Hospital Systems**
  - Clinical integration
  - CMS Final Rule 3244-P
    - Permits single governing body for multi-hospital systems

Corrective Action

- Quality of care concerns
- Disruptive behavior
- Procedure
  - Investigation
  - Review
  - Corrective action
  - Hearing rights

Criteria for Investigation

- Investigation authorized if reliable information indicates a member may have exhibited acts, demeanor or conduct, either within or outside the hospital that is reasonably likely to be:
  1. Detrimental to patient safety or delivery of quality patient care
  2. Unethical
  3. Contrary to the bylaws or rules
  4. Below applicable professional standards
  5. Disruptive of medical staff or hospital operations
  6. An improper use of hospital resources

Evidence Code § § 1156 and 1157

- **Evidence Code § 1156**
  - Protects from discovery research for the purpose of reducing morbidity and mortality and findings and recommendations relating to that purpose
- **Evidence Code § 1157**
  - Protects the records and proceedings of the medical staff from compelled disclosure in litigation, such as a malpractice suit against a physician on the medical staff
    - Applies to "peer review bodies" – protects only medical staff records and not hospital records
    - Disclosure of records to board could inadvertently waive § 1157 protection

Medical Executive Committee Action

- **Possible Actions:**
  1. Do nothing
  2. Defer action
  3. Letter of admonition, censure, reprimand or warning
  4. Probation or limit medical staff membership or privileges
  5. Reduction, modification, suspension or revocation of privileges
  6. Reduction of membership status or limitation on delivery of patient care
  7. Suspension, revocation or probation of medical staff membership
  8. Refer to well-being committee
  9. Behavioral contract
  10. Any other action deemed appropriate under the circumstances

Summary Suspension

- Immediate suspension or restriction if failure to take action may result in imminent danger to the health of any individual
- Physician may not exercise suspended privileges during hearing
- Most bylaws provide for informal hearing with Medical Executive Committee within 7 days to determine if suspension should continue, be modified or lifted
- If suspension lasts in excess of 14 days, report must be filed under B&P § 805

Issues to Consider in Deciding Whether to Impose Corrective Action

- Will it keep patients safe?
- Reportable under B&P Code § 805 or National Practitioner Data Bank ("NPDP")?
  - Willful failure to report -- $100,000 penalty
  - Non-willful failure to report -- $50,000 penalty
  - Ethical issues
- Hearing rights?
- Will the proposed final action protect the hospital?
  - Corporate liability
  - *See Elam v. College Park Hospital (1982) 132 Cal. App. 3d 332*
- Ability to advance severity of action in the future
- Reporting to hospitals, medical groups, health plans etc.
  - *Kadlec Medical Center v. Lakeview Anesthesia Associates*, 2005 WL 1309153 (2005)

Overview of Administrative Proceedings Following Corrective Action

- **Judicial Review Committee ("JRC")**
  - Was MEC or Board decision reasonable and warranted?
- **Appeal to Board of Directors**
  - Was physician afforded a fair procedure?
  - Was JRC decision supported by substantial evidence?
- **Petition for Writ of Mandamus to Superior Court CCP § 1094.5**
  - Was physician afforded a fair procedure?
  - Was the Board decision supported by substantial evidence?
- **Court of Appeal**
  - Was physician afforded a fair procedure?
  - Was the Board decision supported by substantial evidence?
- **California Supreme Court**

Judicial Review Hearing is Exclusive Remedy

- **Anti-SLAPP Protection – CCP § 425.16**
  - *Kibler v. Northern Inyo County Local Hospital* (2006) 39 Cal. 4th 192.
  - *Nesson v. Northern Inyo County Local Hospital* (2012) 204 Cal. App. 4th 65.
- **Whistleblower Exception?**
  - Health & Safety Code § 1278.5
  - *Fahlen v. Sutter Central Valley Hospitals*, 2012 WL 3292405 (Cal.App. 5 Dist. 2012) Under Supreme Court Review

Hearing

- **Governed by bylaws and B&P § 809**

- **Grounds for hearing:**
  - Denial of application for medical staff membership/privileges
  - Revocation, suspension, restriction, involuntary reduction of medical staff membership/privileges
  - Involuntary imposition of significant consultation or Level III proctoring requirements

Notice of Charges

- **Notice of Charges Must:**
  - Clearly and concisely state reasons for the adverse action or recommended action
  - Identify the acts or omissions with which the practitioner is charged
  - List the charts in question where applicable
- **Adequacy of Notice?**
  - *Unnamed Physician v. Board of Trustees of Saint Agnes Medical Center* (2001) 93. Cal. App. 4th 607

Selection and Powers of Hearing Officer

- **Selection of Hearing Officer:**
  - Qualifications:
    - Attorney qualified to preside over quasi-judicial hearing
    - Not from a firm regularly used by the hospital
    - No direct benefit from outcome
  - Certified by California Society of Healthcare Attorneys
  - Judges/arbitrators?
- **Authority of Hearing Officer:**
  - Rule on procedural and evidentiary matters
  - Limitations
    - *Mileikowsky v. West Hills Hospital* (2009) 45 Cal.4th 1259

Selection of Judicial Review Committee

- Criteria
  - Appointed by Chief of Staff – voir dire permitted
  - Minimum of 3 physicians
    - At least one from same specialty
    - Can go to outside hospitals
  - Knowledge of matter does not preclude from serving
  - Member cannot have acted as:
    - Accuser
    - Investigator
    - Fact finder
    - Initial decision-maker
    - Active participation in consideration of matter leading up to recommended action
- Voir dire process
- Judge/arbitrator?

Right to Counsel?

- **Business & Professions Code § 809.3(c)**
  - Physician may be represented by counsel
  - If physician chooses not to be represented, medical staff or peer review body may not be represented
    - *What is the role of counsel?*

Hearing Procedure and Rights

- Must commence within 60 days of request for hearing
- Discovery
  - Parties must produce:
    - Documents to be relied upon
    - Witness lists
  - Both parties have the right to:
    - All information to be provided to Judicial Review Committee
    - Call and cross examine witnesses
    - Present and rebut evidence

Evidentiary Rules/Burden of Proof

- **Burden of Proof:**
  - **Denial of Application for Appointment:**
    - Practitioner has burden of proving by a preponderance of the evidence that he/she:
      - Meets the qualifications for membership
      - Resolved all doubts concerning his/her qualifications for membership and privileges
  - **Action or Recommendation Against Membership/Privileges:**
    - Hospital must prove by a preponderance of the evidence that its action was reasonable and warranted
    - Hospital presents evidence for each case or issue in support of its action or recommendation
    - Practitioner presents evidence in response

Evidence

- Administrative rules of evidence
- Judicial Review Committee participation
- Scope of evidence:
  - Is action reasonable and warranted?
  - Can you introduce new evidence?

Conclusion of Evidence

- Once evidence concludes:
  - Judicial Review Committee must prepare written decision within 30 days
  - Right to appeal must be exercised within 30-40 days of receipt of Judicial Review Committee Decision

Appeal

- Appeal heard by governing body
- Governing body may appoint appeal board
  - But governing body must approve its decision
- Governing body may accept new evidence so long as there is a showing that evidence could not have been made available in exercise of reasonable diligence
- Governing body may remand for taking of further evidence
- Each party entitled to submit written statement and to oral argument
- Decision within 30 days of adjournment of appellate review

Petition for Writ of Mandate to Superior Court

- Governed by CCP § 1094.5(d)
- Trial court reviews record and decides if:
  - Findings supported by substantial evidence
  - Fair procedure – *de novo* review
- Beware:
  - Evidence Code § 1157 & HIPAA issues
    - It is now in public domain
  - Trial judges have very limited knowledge of this area

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