



IHA Dialogue on Discipline

Two Perspectives on Physician Discipline & Implementing New Peer Review Legislation

Presented By

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INTRODUCTIONS



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AGENDA

- A. Environmental Background
- B. Remedial vs. Punitive Action
(Concept of Progressive Discipline)
- C. What Triggers a Report to the Data Bank?
- D. Common Mistakes and How to Avoid Them
- E. HB546 Overview/Impact
- F. Challenging Scenarios
- G. Questions



BACKGROUND

- Quality initiatives may identify more quality of care issues and patterns of substandard care
- Challenge is to balance interests in improving care while convincing physicians to actively participate in peer review and performance improvement process



REMEDIAL vs. PUNITIVE MEASURES



Remedial v. Punitive Measures – Golden Rules of Peer Review

1. Everyone makes mistakes
2. Everyone deserves a second or third chance
3. Emphasis should be on creating an environment in which the physician feels comfortable acknowledging that mistakes were made and that the hospital and medical staff are willing to work to get him back on track.



Remedial v. Punitive Measures – Golden Rules of Peer Review

4. Medical staffs and hospitals should strive to create an intra-professional versus an adversarial environment and to take steps to de-legalize the peer review process.
5. Hospital/Medical Staff should emphasize the use of remedial, non-punitive measures as an alternative to suspensions, reductions and terminations of privileges. Examples include:



Remedial v. Punitive Measures – Golden Rules of Peer Review

- a. Monitoring
- b. Proctoring
- c. Mandatory Consultations which do not require prior approval
- d. Retraining or re-education
- e. Probation
- f. Reprimand
- g. Concurrent/retrospect review of cases
- h. Voluntary relinquishment of privileges at time of reappointment where physician is no longer qualified to exercise privileges
- i. Outside reviews



Remedial v. Punitive Measures – Golden Rules of Peer Review

6. Follow your bylaws, rules, regs and policies and apply standards uniformly. Physician in question should be involved early on in the process before any adverse recommendation is made. There are always two if not three sides to every story.



Remedial v. Punitive Measures – Golden Rules of Peer Review

7. Take steps to maximize confidentiality and immunity protections under the Hospital Licensing Act, the Medical Studies Act and the Patient Safety Act.

8. Know what actions do and do not trigger a Data Bank report and use this knowledge effectively.

The only actions which are reportable are the following when based on actions or conduct which “affects or could affect adversely the health or welfare of a patient or patients....” when there is a final action by the Board except in the case of summary suspensions in excess of 30 days.



REPORTABLE ACTIONS (cont'd.)

- a. Denial of appointment/reappointment
- b. Involuntary reduction in clinical and/or medical staff privileges
- c. Termination
- d. Summary suspensions greater than 30 days
- e. Recommended suspensions greater than 30 days
- f. Mandatory consultation requiring prior approval
- g. Resignation in lieu of formal correction action
- h. Resignation while under investigation if likely to lead to a reportable action



Remedial v. Punitive Measures – Golden Rules of Peer Review

9. All other actions are not reportable and therefore should be used in lieu of reportable decisions if appropriate. Such actions should only be recommended when efforts at remedial measures have failed. This emphasis should be communicated to all leaders and medical staff members so as to change the tone of the organization and to encourage the intra-professional approach to peer review.



Remedial v. Punitive Measures – Golden Rules of Peer Review

10. Bylaws and policies should clearly identify and distinguish between remedial and punitive action as well as what recommendations do and do not trigger a hearing – avoid references to hearing where a physicians privileges are “adversely affected”.



Remedial v. Punitive Measures – Golden Rules of Peer Review

11. As a general proposition, only those decisions which are reportable should trigger hearing rights.



Common Mistakes and How to Avoid Them



Common Mistakes and How to Avoid Them

1. Do Follow Your Medical Staff Bylaws

Courts follow a rule of non-review.

Internal staffing decisions at private hospitals are subject to very limited judicial review. Review is limited to determining whether the decision was in compliance with the hospital's bylaws. Courts are unwilling to substitute their judgment for judgment of hospital officials with superior qualifications



Common Mistakes and How to Avoid Them

However:

"A court ... will be justified in reviewing a private hospital's action even where the bylaws are followed if actual unfairness on the part of the hospital, its committees or individual members of the committees is demonstrated in the record."

Adkins v Sarah Bush Lincoln Health Center

129 Ill 2d 497 (1989):



Common Mistakes and How to Avoid Them

2. Do Question the Source of a Complaint

Conflicts can arise from:

- Hospital interests
- Competing physician interest
- Internal politics
- Personal conflicts



Common Mistakes and How to Avoid Them

3. Do Vigorously Investigate Allegations of Improper Discriminatory Animus

"Unlawful discrimination" means discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, disability, military status, sexual orientation, or unfavorable discharge from military service.

Common Mistakes and How to Avoid Them

4. Do Respond With Measured Prudence.

This means that you need to act fairly and follow the Callahan approach.



Common Mistakes and How to Avoid Them

5. Do Provide a Fair Hearing.

- Avoid actual unfairness
- Check for conflicts of interest.





Common Mistakes and How to Avoid Them

6. Do Rely on the Opinion of Medical Experts for Quality Decisions.

When it comes to fairness, a key principle is abuse of discretion.



Common Mistakes and How to Avoid Them

7. Don't Rely on Economic Competitors for Expert Medical Testimony.

Against public policy as expressed
in the Hospital Licensing Act.



Common Mistakes and How to Avoid Them

8. Don't Make Decision on Basis of Physician Competition.

- Don't favor employed physicians
- Be careful about insisting on the use of hospitalists
- *Murphy v. Baptist Hospital.*

Common Mistakes and How to Avoid Them

9. Don't Make Decision on Basis of Referrals.

Certain medical staff credentialing practices may implicate the antikickback statute.



Common Mistakes and How to Avoid Them

10. Don't Use Physician Profiling to Improve Profits.

Care must be taken when addressing overutilization because of diagnosis related group reimbursement



Common Mistakes and How to Avoid Them

11. Don't Discipline in Retaliation for Physician Quality Complaint.

In order to get a sympathetic review by a court, the physician needs to show bias. Retaliation could be considered a violation of public policy.





Common Mistakes and How to Avoid Them

12. Don't Discipline in Retaliation for Physician Active Participation in Self-Government.

This is another caution to avoid allegations that discipline is a pretext for punishing the physician's participation in medical staff self government which is mandated by law and Joint Commission standards.

Common Mistakes and How to Avoid Them

13. Don't Discipline if Physician Already Off of Staff

Once a physician is off of the medical staff the hospital's ability to take a corrective action ends.





Illinois House Bill 546

HB 546

- Sent to the governor June 17, 2009. Expected to be signed into law.





HB 546

- Three areas of change:
 1. A medical staff governance committee must meet as soon as reasonably possible to make a recommendation on the propriety of a summary suspension if requested.
 2. Summary suspension may not be implemented unless there is actual documentation or other reliable information that an immediate danger exists.
 3. New provisions for peer review effecting membership or clinical privileges.



MEDICAL STAFF GOVERNANCE COMMITTEE REVIEW



HB 546 –SUMMARY SUSPENSION PROVISIONS

- If requested, the medical executive committee or comparable governance committee of the medical staff must meet as soon as reasonably possible to review the imposition of a summary suspension.



HB 546-SUMMARY

SUSPENSION PROVISIONS

- a) This is a new process that may not be in your medical staff bylaws.
- b) A review must be undertaken when requested by a suspended physician.
- c) No time frame is specified for when the request may be made.
- d) This review is in addition to a fair hearing.
- d) The review would be a review on the record.
- e) The review must be undertaken by the medical staff governance committee “as soon as reasonably possible.”
- f) The governance committee may recommend to the hospital board that the suspension be affirmed, lifted, expunged, or modified.



BOARD REVIEW AND DECISION



HB 546-SUMMARY SUSPENSION PROVISIONS

Board review of the suspension is only required if the MEC does not approve the suspension:

“If the Medical Executive Committee recommends that the summary suspension should be lifted, expunged, or modified, this recommendation must be reviewed and considered by the hospital governing board, or a committee of the board, on an expedited basis.”



HB 546 – SUMMARY SUSPENSION PROVISIONS

The medical staff governance committee cannot change the suspension it may only recommend a change to the hospital board.



HB 546 – SUMMARY SUSPENSION PROVISIONS

This new preliminary review of the suspension is not part of the fair hearing process and the hospital board may have to consider the matter again.



HB 546 – SUMMARY SUSPENSION PROVISIONS

The review and decision by the hospital board must occur on an “expedited” basis.



A summary suspension may not be implemented unless there is actual documentation or other reliable information that an immediate danger exists.



HB 546 – SUMMARY SUSPENSION PROVISIONS

This may be the biggest change.

This is a fairly strict standard.

**The information used must be
reliable and the danger must
be immediate**



HB 546 – SUMMARY SUSPENSION PROVISIONS

A practical change for fair hearings:

No hearing is required if the medical staff suspension is due to the suspension or revocation of the practitioners IDFPR license.



EXTERNAL PEER REVIEW



EXTERNAL PEER REVIEW

A. Using Outside Reviews – General Comments

1. Use of outside or third party reviews to assist in an internal peer review investigation is becoming more prevalent



EXTERNAL PEER REVIEW

- a. Sometimes the only available physician reviewers are clear and direct competitors – need to avoid a conflict of interest
- b. The issues in question may involve a specialty or practice that is beyond the scope of the medical staff's expertise
- c. Medical staff wants to be as fair and reasonable as possible
- d. Anticipation of possible hearing and/or litigation



EXTERNAL PEER REVIEW

2. Some disadvantages in using outside reviewers include:
 - a. Medical staff and hospital are sometimes stuck with the assessment even if there is a disagreement as to the results
 - b. Reviewers should never recommend any particular action – sole purpose should be to provide an independent medical judgment about care provide



EXTERNAL PEER REVIEW

- c. Reviewers must be willing to make themselves available for a hearing or possible litigation – if not, their reviews are somewhat useless
- 3. Need to determine in advance what role the physician will have, if any, in choosing or approving the outside reviewer; whether the physician will be allowed to send any explanation of the cases



EXTERNAL PEER REVIEW

in question as part of the review packet; or whether the reviewer will be allowed to contact the physician if there are questions.



HB 546 – PEER REVIEW PROVISIONS

If an external report is sought, any “adverse report” must be in writing and made a part of the internal peer review process as described under the bylaws.



HB 546 – PEER REVIEW PROVISIONS

The report must be shared with a medical staff peer review committee and “the individual under review” although the statute says that only an adverse report needs to be shared, a better practice is to share the report even if favorable to the practitioner.



HB 546 – PEER REVIEW PROVISIONS

If the peer review committee or the individual prepares a written response to the external report within 30 days after receiving the report, the Board must consider the response prior to implementing any final action-- As a practical matter, you should allow either party under the bylaws to prepare a response



HB 546 – PEER REVIEW PROVISIONS

to the report within 30 days and such response should be shared with the other side. Time frame could change if there is a need to act more expeditiously depending on the findings in the report



CHALLENGING SCENARIOS



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