Can Health Lawyers Improve Peer Review Through ADR?
The Regulatory and Legal Background

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Regulatory and Legal Background

- **Initial Process upon Complaint triggers Joint Commission and State law considerations**
  - (See Joint Commission Standards LD 01.01.01 & 02.04.01; EP 7 & 10; MS 01.01.01, 08.01.01 & 08.01.03)

- **Time, Expense and Conflict Aspects of Initial Process**

- **Serious Issues Arise for Provider and Hospital from an Adverse Peer Review Decision**

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Collateral Effects of an Adverse Peer Review Action

- National Practitioner Data Bank reporting
- Notice Requirements under Payer Agreements/Network Agreements
- Notice Requirements under other contracts – Employment – Medical Director – etc.

Collateral Effects of an Adverse Peer Review Action

- Medicare/Medicaid Reporting Requirements and potential consequences
- Reporting Requirements applicable to the Hospital/Administrator
- Effect on Referral Sources
Collateral Effects of an Adverse Peer Review Action

- Effect on current/future patients and potential patient relationships
- Potential Licensure Issues

Typical Claims
Once Battle Lines Drawn
Typical Claims in the Physician/Hospital Medical Staff Dispute

- **Breach of contract claims**
  - Breach of the implied “contract of the bylaws”
  - Breach of other express agreements
    - Employment Agreement between Physician and a Hospital Affiliate
    - Medical Directorship and similar contracts

- **Defamation Claims Arising out of:**
  - National Practitioner Data Bank reporting
  - Professional reporting requirements under Virginia statutes
  - Statements made in the review and appeals processes
  - Random statements by Members of the Medical Staff and Peer Review Committees to third parties
Typical Claims

• **Antitrust Claims**
  - Sherman Act § 1 – Conspiracy in Restraint of Trade
  - Sherman Act § 2 – Monopolization/Attempted Monopolization
  - Virginia State Analogs to the Sherman Act

• **Virginia Business Conspiracy Statute (Va. Code §§ 18.2-499, 500)**

Conspiracy to injure one in their trade or profession
Typical Claims

• **Tortious interference with existing and future contractual relationships**
  – Contracts with patients
  – Contracts in the form of referral arrangements
  – Contracts with third party payors
  – Employment and other contracts

Typical Claims

• **General common law “conspiracy” claims**

• **Discrimination-based claims under Federal and State Anti-Discrimination Laws**

• **Intentional infliction of emotional harm**

• **Violation of Va. Code § 32.1-134.1**
Health Care Quality Improvement Act (42 USC §§ 11101, et seq.)

HCQIA

• Creates a limitation on certain State and Federal damage actions – claims relating to Civil Rights Statutes not excluded

• Protects professional “review bodies”

• Protects persons acting as a member or staff of such body, persons under contract or other formal agreement with such body, persons who participate with or assist the body with respect to professional review actions
HCQIA

• Protects persons providing information to a review body unless information is false and person knew it was false

HCQIA

• “Professional Review Action” (“PRA”) means action or recommendation of Professional Review Body based on:
  – Competence or professional conduct
  – Which affects or could affect adversely the health or welfare of a patient
  – Which adversely affects the clinical privileges of a physician
HCQIA

- Action is **not** considered based on competence or professional conduct if based on:
  - Association or lack thereof with a professional society/association
  - Fees or advertising
  - Participation in group health salaried employment or other manner of providing services

HCQIA

- Association with, supervision of or participation in a group practice with particular class of professional
- Other matter not related to competence or professional conduct
HCQIA

“Professional Review Body” means health care entity’s governing body or any committee that conducts professional review activities

HCQIA

• Protections apply to PRA’s taken:
  – In the reasonable belief that the action was in the furtherance of quality health care
  – After reasonable effort to obtain the facts
HCQIA

- After “adequate notice and hearing procedures” are afforded or after such “other procedures as are fair to the physician under the circumstances”

- In the reasonable belief the action was warranted by the facts

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HCQIA

PRA’s are presumed to have met these standards unless the presumption is rebutted by a preponderance of the evidence

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HCQIA Notice and Hearing

• Healthcare entity deemed to have met notice and hearing requirements if physician given notice stating:
  – That a PR Action has been proposed with reasons for the proposed action;
  – That the physician has a right to a hearing;

Any time limit (not less than 30 days) within which to request a hearing; and,

– A summary of the rights in the hearing process
HCQIA Notice and Hearing

• If a hearing is requested, physician must be advised of and provided:
  – Place, time and date of the hearing not less than 30 days from the date of the notice; and,
  – List of the witnesses if any expected to testify on behalf of the PR body

HCQIA Notice and Hearing

• If hearing is requested it shall be held before:
  – A mutually acceptable arbitrator;
  – A Hearing Officer appointed by the entity who is not in direct competition with the physician involved; or,
  – A panel of individuals appointed by the entity who are not in direct economic competition
HCQIA Notice and Hearing

• **In the hearing, physician has the right:**
  - To representation by an attorney or other person of the physician’s choice;
  - To have a record made of the proceeding;

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HCQIA Notice and Hearing

- To call, examine and cross-examine witnesses;

- To present evidence determined relevant by the Hearing Officer regardless of admissibility in court;

- To submit a written statement at the close of the hearing;

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HCQIA Notice and Hearing

- To receive a written recommendation from the arbitrator, officer or panel including a statement of the basis for the recommendations; and,

- To receive a written decision from the health care entity

HCQIA Notice and Hearing

• Above procedures not required:

  - Where no adverse PRA is taken

  - In the case of a suspension or restriction of clinical privileges for not more than 14 days
HCQIA Notice and Hearing

• To the extent defendant met standards and substantially prevails, court shall award costs, including reasonable attorney’s fees, if claim or claimant’s conduct was “frivolous, unreasonable, without foundation or in bad faith”

HCQIA Notice and Hearing

• Immunity is also conditioned on entity’s compliance with reporting requirements of the National Practitioner Data Bank
HCQIA and ADR

Can the Protection from Monetary Damages Exist if ADR is Utilized?

• HCQIA requires that PR Actions be taken after a hearing or “other procedures as are fair to the physician under the circumstances…” (42 USC § 11112(a)(3))

• Hearing Notice and procedures may be “waived voluntarily by the Physician…” (42 USC § 11112(b))

HCQIA and ADR

• “A professional review body’s failure to meet the conditions described in this Section shall not, in itself, constitute failure to meet the standards of subsection (a)(3).” (§ 11112(b)(3))
VA. Code § 32.1-134.1

Improper practice for hospital with 25 or more licensed beds

• To refuse or fail to act within 60 days of a completed application for staff membership or privileges

• To deny, or withhold staff membership or privileges
VA. Code § 32.1-134.1

- To exclude or expel a physician from staff membership, or
- To curtail, terminate or diminish professional privileges
- Without stating in writing the reasons therefore and providing a copy to the physician

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VA. Code § 32.1-134.1

- Such reasons stated must relate to:
  - Standards of patient care
  - Patient welfare
VA. Code § 32.1-134.1

- Violation of the rules and regulations to the institution or staff
- Objectives or efficient operation of the institution
- Or the character or competency of the applicant

• Physician aggrieved by a violation of this Section may seek injunction in Circuit Court
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<thead>
<tr>
<th>Immunities Under Va. Code § 8.01-581.16</th>
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<tbody>
<tr>
<td>• Members and professional consultants to committees, boards, groups, commissions or other entities immune from civil liability for any action, decision, omission or utterance in the performance of duties while serving as a member of or consultant to such entity</td>
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<td>• Where entity functions primarily to review, evaluate or make recommendations on, among other subjects, the competency and qualifications for professional staff privileges, patient safety and the professional services furnished with respect to necessity for such services</td>
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Immunities Under Va. Code § 8.01-581.16

• When the entity is established and duly constituted by one or more public or licensed private hospitals or health care systems

• Provided such act, decision, omission or utterance is not made in bad faith or with malicious intent

National Practitioner Data Bank

• Hospitals and other health care entities must report adverse clinical privileges actions:
  
  – That constitute “professional review actions” that adversely affect clinical privileges for a period of more than 30 days; or
  
  – Acceptance of surrender of clinical privileges or restrictions while under investigation or in return for not conducting an investigation
National Practitioner Data Bank

- Professional Review Actions are those based on physicians’ professional competence or professional conduct that adversely affect or could adversely affect the health or welfare of a patient

- Reporting obligation applies to conduct of physicians and dentists – other practitioners’ reports are optional

National Practitioner Data Bank

- Summary suspensions must be reported if in effect or imposed for more than 30 days

- Where proctors are appointed for more than 30 days, reporting depends on role of the proctor
Relevant Cases

Virginia and 4th Circuit Cases

• *Medical Center Hospitals* v. Terzis, 235 Va. 443 (1988) (Interpretation of Va. Code § 32.1-134.1)

Virginia and 4th Circuit Cases

• *Wuchenich v. Shenandoah Memorial Hospital*, 215 F.3d 1324 (4th Cir. 2000) (breach of contract; common law conspiracy; Va. Code § 18.2-499-500; defamation; tortious interference)

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Virginia and 4th Circuit Cases


• *Wood v. Archbold Medical Center*, 738 F. Supp. 2d 1298 (M.D.Ga. 2010) (HCQIA; antitrust; tortious interference; breach of contract; intentional infliction of emotional harm)
Virginia and 4th Circuit Cases

• *Moore v. Williamsburg Regional Hospital*, 560 F.3d 166 (2009) (HCQIA definition of professional conduct; due process; tortious interference; 42 U.S.C.A. § 1983; civil conspiracy)

• *Heins-Muniz v. Aiken Regional Medical Centers*, 905 F. Supp. 2d 729 (D.S.C. 2012), Aff’d. 532 F. App’x 342 (4th Cir. 2013) (HCQIA)