

PEER REVIEW PRIMER; PART I: WHAT IS HOSPITAL PEER REVIEW, ANYWAY?

By Karen C. Duncan

Community hospitals and the doctors who supply the patient care in the hospitals have a symbiotic relationship. Both independent and co-dependent, they need each other to survive. The complicated character of that relationship is most clearly demonstrated through the hospital peer review process; that is, the procedure by which the hospital and the physicians regulate the quality of care provided by the physicians to the hospital patients.

The doctors who provide patient care in a hospital are organized into a formal association, the Medical Staff, which is further subdivided into medical specialty departments and regulated by their own set of rules and bylaws. Each department has a committee that supervises the care provided by the doctors in the department. Physician patient care quality is also monitored by the members of particular cross-specialty quality committees. Each medical department is headed by a department chairperson, who is elected by the physicians within the department. The Medical Staff president is elected by all the members of the Medical Staff. Rotating every two years, the Medical Staff departmental and quality committee chairs are volunteers and are not employees of the hospital. Even though they perform extra work and work many additional hours, they are not paid.

Data on an individual physician's patient quality, often statistical data is first collected by hospital staff. That data can only be properly evaluated by the physician's peers; it is reviewed using the medical committees. In order to identify inadequate quality or incompetent physicians, the physician's peers on the hospital's medical committees must be willing to conduct investigations that may be professionally embarrassing to a fellow physician. The regular two-year turnover in departmental leadership creates a natural tension and disincentive to aggressively supervise quality. A departmental chair may find himself asked to pursue an investigation of a colleague whom, the next year, could in turn be the department head. The fear of personal lawsuits by the reviewed colleague, the negative effect on a referral network and the inevitable resulting social tensions are additional barriers to complete and effective quality analysis.

Although there are disincentives to conducting adequate review of their peers, the doctors also have a strong incentive to eliminate incompetent care. The Medicare Conditions of Participation, as illustrated and enforced by the Joint Commission on Accreditation for Hospital Organizations (JCAHO), require that a hospital and its medical staff conduct an effective program for monitoring the quality of the patient care in order to be paid by federal funding programs. Without real evaluation of the quality of care delivered to the hospital's patients, the physicians on staff would not be able to treat many of their patients at the hospital, and the symbiotic relationship would fail.

If the Medical Staff finds inadequate patient care that is serious enough to require action, it has several options. It may recommend to the hospital's Board of Governors either that the reviewed physician's clinical practice be restricted or that the relationship be severed and the physician be suspended from practicing at the hospital. If either of those recommendations is approved by the hospital board, both federal and state law then give the affected physician procedural rights of due process. The hospital is also required, under certain circumstances, to report the adverse action taken against the physician to the National Practitioner Databank, a centralized federal databank that collects information about the qualifications of physicians.

The affected physician will then have the opportunity to present his or her view of the matter to an administrative panel during a hospital "Fair Hearing." The hearing generally consists of three or more volunteer hospital physicians and an attorney chair. In a highly structured process, the affected physician and medical staff, each frequently represented by a lawyer, present evidence to the panel. The hearing panel then makes a recommendation to the hospital board regarding whether the restriction or the suspension of the privilege to practice was justified and appropriate. The hospital board then makes an ultimate determination regarding whether to continue the restrictions earlier imposed.

Once again, there are tremendous disincentives for Medical Staff doctors to serve on the Fair Hearing panel. Not only is the possibility of criticizing a colleague face to face inherently unpleasant, a Fair Hearing is a time consuming and emotional process. The physician facing the panel has likely experienced economic and professional damage as a result of the imposed restrictions on his or her practice. If the panel's recommendations are adverse to the affected physician, the members of the panel are sometimes rewarded for their pro bono efforts with a lawsuit.

Recognizing those concerns and disincentives, the federal and state governments have created immunities to protect those participating in the process. The Healthcare Quality Improvement Act was enacted by the federal government to give protection from liability for the payment of damages to anyone who provides information about professional competence to a hospital peer review committee. Louisiana has also enacted separate protections for those participating in the process. However, the two do not protect the same types of participants in exactly the same way or for exactly the same things. Consequently, the failure to consider the complex interplay of these two protective statutes can leave liability landmines for the unwary hospital attorney's client.

Future parts of this Peer Review Primer will examine those holes in protection, as well as an explanation of how a doctor requests and receives privileges to treat hospital patients, the parameters for reporting to the National Practitioner Data Bank, a detailed Fair Hearing primer and negligent credentialing as a cause of action against hospitals.

Karen C. Duncan is an attorney with Frilot Partridge, L.C. in New Orleans, Louisiana.