

ILLINOIS ASSOCIATION OF HEALTHCARE ATTORNEYS'
23RD ANNUAL HEALTH LAW SYMPOSIUM

Hot Topics in Physician Credentialing
Perspective from the Front Line

October 26, 2005



Edwin E. Brooks
Partner
Gardner Carton & Douglas LLP
191 N. Wacker Drive
Suite 3700
Chicago, Illinois 60606-1698
ebrooks@gcd.com

Hot Topics in Physician Credentialing: Perspective from the Front Line

Introduction

From the perspective of outside counsel, the goal of physician credentialing should be to identify and retain qualified physicians, while at the same time provide a fair process to discover and effectively respond to physicians who fail to meet the appropriate standards of care. While litigation is sometimes unavoidable, by conducting the credentialing process fairly and in substantial compliance with the hospital and medical staff bylaws, the hospital and its medical staff will minimize the risk and disruption of litigation. This is easy to say, but difficult in application. We know what we all want to avoid--having our hospital and its executive and medical staff sued by one of its former physicians for \$40,000,000 after his privileges were suspended for quality of care concerns. To make matters worse, that dispute, involving Putnam General Hospital (then owned by HCA, Inc.), was prominently featured on the front page of *The Wall Street Journal* on September 21, 2005. See *WSJ* article attached hereto. While this may seem dramatic, it is becoming more common these days.

In another recent case against Presbyterian Hospital of Dallas and several members of its medical staff, a jury awarded more than \$200,000,000 in compensatory damages and \$110,000,000 in punitive damages in favor of the physician and against the hospital and each of the medical staff members *individually*. See Summary of the Claim attached hereto. The parties in that case have been in court since 2000 and the case is not over because post trial briefs are still pending. Unless settled, it will likely be appealed to the United States Court of Appeals (and possibly the U.S. Supreme Court), where it will take a year or more to complete the appellate process.

Each of those cases arises out of actions taken by the hospital and medical staff against a physician regarding what they genuinely believed to be quality of care concerns--something all of us have been involved with as counsel to hospitals. In each of those cases, there was either an ad hoc review committee or an outside peer review performed to assess the quality of care. In light of the foregoing, how do we strike the balance between the need for an effective credentialing process that identifies and fairly addresses quality of care or operational concerns while at the same time protects the hospital and those individuals involved in the process? The following will identify some strategies and applicable law that can be utilized to accomplish these goals.

Application Process

Minimizing risks should start at the pre-application and application stages. The application process provides the most effective way to head off problems down the road. In Illinois, a private hospital has the right to refuse to appoint a physician to its medical staff and this refusal is only subject to limited court review. *See, e.g., Barrows v. Nw. Mem'l Hosp.*, 123 Ill. 2d 49 (Ill. 1988); *Knapp v. Palos Comty. Hosp. et al*, 125 Ill. App. 3d 244 (1st Dist. 1984). Further, medical staff privileges do not give a physician any right to work at the hospital; they merely reflects that the physician is qualified to practice in the facility. *Vakharia v. Little Co. of Mary Hosp.*, No. 94 C 5599, 2002 WL 485362 (N.D. Ill. Mar. 29, 2002). Hospitals should have an application and pre-application process clearly delineated in its medical staff bylaws. These bylaws should make it the applicant's burden to provide detailed, relevant information so that the appropriate committees can assess the physician's qualifications. In the case featured in the *WSJ* referred to above, there were numerous red flags that would likely have been available to Putnam General Hospital if it had sought and obtained information regarding the physician's residency

programs, criminal records, prior suits or judgments, and loss of privileges. Further, requiring that the physician provide several superior references might have put the hospital on notice of the issues. It is important to ensure that the applicable bylaws are followed during the pre-application and application processes because violations of the bylaws can be reviewed by the courts. Also, as set forth more fully below, courts deciding disputes over physician credentials require that the hospital provide a fair process when deciding to grant or limit a physician's credentials.

Violation of the bylaws during the application process may result in a court ruling to repeat the application process. As long as the hospital operates in good faith, however, money damages are not available for violation of the bylaws unless the hospital or its agents act maliciously or the physician prevails on another claim, such as defamation or discrimination. *See, e.g.,* 210 ILCS 85/10.2 (2005). Finally, hospital and medical staff bylaws should be reviewed to ensure they are in conformance with current Illinois law and the recommendations by the Joint Commission on Accreditation of Healthcare Organizations. For example, the Illinois Hospital Licensing Act, 210 ILCS 85/10.4 (2005), requires specific provisions to be included in a hospital's medical staff bylaws.

Strategies at the Outset of the Problem

As counsel to the hospital, it is critical that you be closely involved in all aspects of the situation as soon as it arises. In many cases, actions are taken, statements are made, or letters or emails are written in the "heat of the moment," only later to surface as key evidence in the litigation. Even an innocent but in artfully drafted letter or email can be used later in the litigation to attribute an ulterior or bad-faith motive to the actions of the hospital or its staff. From a litigation perspective, if taken out of context, the letter or email can cause a court to deny

summary judgment due to a fact issue over the meaning of the letter or email, thus sending the case to a very expensive and risky trial.

Once the appropriate committee or physician becomes aware of an issue, it should review the applicable bylaws to make sure they are substantially followed. If your bylaws allow for (or do not prevent) the formation of an ad hoc review committee or the retention of an outside consulting firm or individual to assist by providing an unbiased, independent analysis, that should be considered. In several successful cases, it was very compelling to be able to tell the court in our papers that in addition to the various unbiased committees at the hospital, unbiased third parties, after an appropriate investigation, determined that the physician presented a danger to patients. This is important because in most of the cases that go to court, in order to avoid the various immunities and the deferential standard of review courts must apply, the physicians invariably claim that someone was “out to get them” for economic, discriminatory, or political reasons. An unbiased, third-party review, while not always necessary, can minimize this argument.

During the initial stages of the problem, there will likely be letters back and forth between the physician and the hospital or medical staff. It is important to respond quickly and carefully word the responses recognizing that every letter will end up as a court exhibit someday if litigation ensues. You should try and keep an open, non-hostile dialogue with the physician while at the same time follow the bylaws. Many times the physician or his counsel will request additional time to prepare for the various hearings. Unless the requests are intended to unnecessarily delay the process, they should generally be honored as that reflects fairness. The Health Care Quality Improvement Act, 42 U.S.C.A. § 1112(b) (2005), has requirements for the notice and hearing that should be followed.

You may be faced with a hostile physician who instead of participating in the peer review process, immediately resorts to court seeking an injunction or temporary restraining order preventing the limitation of his or her privileges. In that case, you and outside counsel need to be prepared to immediately respond with a court brief (sometimes on less than one day's notice) outlining the long line of Illinois cases that, among other things, prevent judicial review of the underlying decision to limit the privileges and require that the physician exhaust his or her administrative remedies before court remedies can be sought. *See, e.g., Pulido v. St. Joseph Mem'l. Hosp.*, 191 Ill. App 3d 694 (5th Dist. 1989); *Knapp v. Palos Comty. Hosp.*, 176 Ill. App. 3d 1012 (1st Dist. 1988). Among other things, it will be critical for counsel to understand the many cases involving physician credentialing and Illinois pleading requirements as they overlay on the standards for injunctive relief.

For example, to avoid the various immunities provided by Illinois law, the physician will likely attempt to plead that the hospital or its agents acted with malice or ill will. Illinois law, however, requires significant factual support for such allegations and therefore, those pleadings should be aggressively attacked at the motion to dismiss stage. *E.g., Adkins v. Sarah Bush Lincoln Health Ctr.*, 129 Ill. 2d 497 (Ill. 1989). Attempts to have a court force the hospital to reinstate medical staff privileges should not succeed and must be headed off quickly with the appropriate citation to Illinois law or the court may err in its ruling and order you to reinstate the offending physician. In that case, you will be forced to take a costly appeal.

All in all, it is important to keep in mind that you want a court or jury reviewing the facts (even if several years after the incident) to conclude that: (1) there was truly an issue over quality of care, (2) the actions were taken because of that concern, and (3) the physician was treated fairly and substantially in accordance with the applicable bylaw provisions.

Peer Review Proceedings and Board Review

Once the peer review and appeal process is underway, it is imperative to understand what Illinois law requires of the hospital and its medical staff. In summary, courts require that a hospital: (1) substantially comply with its medical staff bylaws; (2) provide basic protections of adequate notice and a fair hearing; and (3) produce a decision that is not discriminatory, arbitrary, or capricious i.e., it should be rationally based on a legitimate interest. *E.g., Garibaldi v. Applebaum et al.*, 301 Ill. App. 3d 849 (1st Dist. 1998); *Adkins*, 129 Ill. 2d at 497. Illinois law presumes that administrative decision makers serve with fairness and integrity. *Adkins*, 129 Ill. 2d at 511.

Notice is adequate if it complies with the medical staff bylaws and provides the physician with a reasonably precise description of the charges against him sufficiently in advance of the hearing to provide the physician with the opportunity to prepare a defense. A fair hearing is one before an impartial tribunal in which the physician is allowed an opportunity to present witnesses and to confront or cross examine the witnesses against him or her. The participation of counsel is not required unless the bylaws allow it. The decision will be deemed fair if it is supported by substantial evidence. Regarding impartiality, courts consider whether the panel or decision maker had a pecuniary interest in the matter, had a prior involvement in the process, formed opinions on the matter, and whether the prosecutorial/investigative functions overlapped with the adjudicative function. Prior knowledge of the facts and participation in preliminary proceedings has been held not to render the hearing unfair. *Id.* at 513.

A decision that is not discriminatory, arbitrary or capricious is one that is based on a legitimate hospital interest, including operations and quality of care. Specifically, some acceptable bases have included the inability of physicians to get along, failure to maintain

malpractice insurance, certifications, quality of training, exclusive groups, and the failure to comply with record keeping. During the peer review hearing, it is important to utilize a court reporter so that you have a record in the event that litigation ensues. Finally, the decision should be written clearly and supported by the record.

Typical Claims and Current Trends in the Law

In Illinois, a physician will state a claim if the hospital fails to substantially follow its bylaws during a credentialing decision. Some of the more recent decisions couch the claim as one for breach of contract, but, regardless of the label, a claim can be stated for a substantial failure to follow the bylaws. Generally, the only remedy available to the physician is an order requiring a rehearing if the court finds that the bylaws were not followed. Under the well-settled rule of non review, courts will not second guess the decision made by the peer review committee because a court should not substitute their judgment for that of the medical experts. Consistent with that, injunctive relief reinstating the physician's privileges is rare, and should not be awarded. This author believes that awarding injunctive relief is contrary to the important principle embodied in the rule of non review since the court is then substituting its judgment for that of the peer review committee. If the bylaws are not followed, then a new hearing consistent with the bylaws should be the remedy.

In Illinois, compensatory damages are not available unless the hospital or the medical staff's conduct is willful or wanton i.e., deliberately intended to harm the physician. There are several statutes that support this, including the Illinois Hospital Licensing Act, 210 ILCS 85/10.2 (2005), the Illinois Medical Practice Act, 225 ILCS 60/5 (2005), and under federal law in the Health Care Quality Improvement Act ("HCQIA") 42 U.S.C.A §1111(a)(2) (2005).

Recognizing the various hurdles attendant to these claims, many of the physicians filing these cases do not limit their allegations to breach of the medical staff bylaws and malicious behavior. More often than not, the complaints include claims for discrimination, antitrust violations, defamation, tortious interference with contract and prospective economic advantage, due process violations (if state action can be established), intentional infliction of emotional distress, deceptive trade practices, and various conspiracy claims. Accordingly, these cases can be complicated as they generally involve a variety of claims. In the *Poliner v. Presbyterian Hospital of Dallas* case, the multimillion dollar verdict rested on claims for breach of contract, defamation, tortious interference with contract, and intentional infliction of emotional distress. In the *Putnam General Hospital* case, the plaintiff physician alleges claims for violation of substantive and procedural due process, breach of contract, and tortious interference with contract and business relationships.

It is likely that these “kitchen sink” type of claims will be asserted if a credentialing lawsuit is made. Each of these claims has to be dealt with on its own merits by a motion to dismiss or summary judgment once discovery occurs.

Economic Credentialing

Economic credentialing is defined as the use of economic criteria as a factor to determine a physician’s qualification, continuation, or revocation of medical staff privileges. The classic and early example of this is the use of exclusive contracts. These arrangements have been upheld in Illinois. *See, e.g., Garibaldi v. Applebaum et. al.*, 194 Ill. 2d 438 (Ill. 2000). There is increasing legislation and court scrutiny in this area but, generally, most states, including Illinois, allow hospitals to consider economic factors in their credentialing decisions. In Illinois, the legislature has addressed this issue by requiring that credentialing decisions based on economic

factors be reported to the Hospital Licensing Board for further study. Further, if privileges are denied based on economic factors, the hospital must provide notice and a fair hearing. 210 ILCS 85/2 (2005). There have been some decisions outside of Illinois that can be instructive on this issue and may provide some guidelines for decision making. Generally, this author believes that in making credentialing decisions, the quality of care should be the primary consideration even though economic factors can also be a part of the decision.

In *Radiation Therapy Oncology, P.C. et. al., v. Providence Hospital*, No. 1022099, 2005 WL 78756 (Ala. Jan. 14, 2005), the hospital transferred ownership of a hospital based oncology practice to an office based practice, and, in doing so, a group of radiation oncologists, who had a competing practice, lost its medical staff privileges. The radiation oncologists brought suit for breach of the medical staff bylaws and tortious interference with contract. The Alabama Supreme Court affirmed the appellate court's decision in favor of the hospital. In analyzing the hospital's actions, the courts found it important that the hospital board, in reviewing the fair-hearing panel's decision, made its decision based on quality of care concerns.

In *Mahan v. Avera St. Luke's*, 621 N.W.2d 150 (S.D. 2001), the plaintiffs, a group of orthopedic surgeons, brought an action for breach of the medical staff bylaws when the hospital closed its medical staff to certain spine procedures except for two surgeons recruited by the hospital. The hospital had lost its neurosurgeon and because the community was small, the hospital believed that a neurosurgeon would need the spine surgery to supplement his practice. The hospital was successful in recruiting a neurosurgeon but at the same time, the orthopedic surgeons established a day surgery center that directly competed with the hospital, and the hospital operating room usage dropped precipitously. The plaintiffs then recruited a spine-fellowship trained surgeon who applied for medical staff privileges but was denied them. The

trial court found that the hospital breached its medical staff bylaws by closing the medical staff without first consulting the medical staff. It entered a mandatory injunction requiring the hospital to consider plaintiff's privileges. On appeal, the Supreme Court, reviewing the hospital corporate bylaws, found the trial court erred because the bylaws provide that the hospital board has final approval relating to medical staff privileges. The court noted that the decision to close the medical staff relating to profitability concerns was legitimate as the profitable surgery funded other unprofitable areas of the hospital. Then, because South Dakota considers medical staff bylaws a contract, the court determined that the hospital had complied with its contractual obligation of good faith and fair dealing in closing the privileges.

Defense Strategies Including Applicable Privileges

There are several viable defenses to a physician credentialing claim. Assuming that the first pleading you receive is a complaint for injunctive relief and a motion for a temporary restraining order or preliminary injunction, an opposition to the motion should be quickly filed asserting that an injunction is improper under the deferential rule of non review. You should also consider whether the plaintiff has waited too long to obtain the preliminary relief. Also, if the plaintiff has not exhausted his remedies under the bylaws, then that is another basis to defeat a complaint or motion for temporary restraining order. Further, the standards for a preliminary injunction need to be addressed. In Illinois, the plaintiff has the burden to establish, by a preponderance of the evidence, that a clearly ascertainable right needs protection, irreparable injury will occur without the injunction, there is no adequate remedy at law, and there is a probability of success on the merits. *Knapp*, 125 Ill. App. 3d at 244. In opposing a motion for temporary restraining order, the focus should be on whether the bylaws were followed because if they were, the plaintiff cannot show a probability of success on the merits. The decision by the

peer review committee or the letter suspending the physician's privileges will likely be an exhibit to the motion for temporary restraining order; therefore, it is important that in preparing the decision or the letter, the hospital clearly set forth the decision, the basis for the decision, and how the bylaws were followed citing to the pertinent provisions.

In the event that you receive a complaint, you will likely have numerous grounds to argue for a dismissal. If it purports to allege a breach of contract action, you may seek to dismiss it based on Illinois law that does not allow such a claim or compensatory damages. If, for example, the complaint purports to allege defamation, in addition to the particular pleading requirements for that claim, consider the defenses of qualified privilege and that by his actions, plaintiff has made himself a public figure, thus invoking the actual malice standard necessary to state a claim. *See, e.g., Rodriguez-Erdmann v. Ravenswood Hosp. Med. Ctr.*, 190 Ill. App. 3d 24 (1st Dist. 1989). You should also consider the various privileges under HCQIA, the Illinois Hospital Licensing Act, and the Medical Practice Act. You can assert the rule of non review to attempt to limit the relief to a re-hearing. If the complaint purports to allege malice to avoid the various privileges, you should carefully review the allegations to ensure that they pass muster under Illinois pleading requirements. If the complaint purports to allege violation of substantive or procedural due process, counsel should consider whether there is the necessary "state action" to sustain the claim.

Under the Medical Studies Act, 735 ILCS 5/8-2102 (2005), information relating to the peer review process is not admissible in court. Outside counsel for the hospital should be familiar with and vigilant in asserting these various privileges and immunities. A recent Illinois decision highlights the issues involved.

In *Lo v. Provena Covenant Medical Center*, 342 Ill. App. 3d 975 (4th Dist. 2003), the hospital CEO summarily suspended a heart surgeon's privileges without a hearing after the medical staff failed to take action under the applicable medical staff bylaws. The physician brought a motion for a temporary restraining order seeking to prevent the revocation of his privileges and alleged breach of contract for violation of the medical staff bylaws. The trial court granted the temporary restraining order and the hospital appealed. The appellate court reversed the temporary restraining order finding that despite the medical staff bylaws that required the medical staff to recommend suspension, the ultimate responsibility for quality of care rested with the hospital board and, therefore, the suspension was proper. On remand, the trial court then granted the hospital's motion to dismiss and the plaintiff appealed. On appeal again, the court affirmed the trial court finding that the Hospital Licensing Act immunized the hospital and its agents from liability for its peer review decisions. *Lo v. Provena Covenant Medical Center*, 356 Ill. App. 3d 538 (4th Dist. 2005). *Lo* is significant because despite medical staff bylaws that required the involvement of the medical staff on summary suspension, the court found that the hospital board still had the responsibility to act when the medical staff refused to act. Also, upon a showing of good faith and no ill will, the hospital was not subject to a damage claim for its decision.

Managing the Litigation to Control Costs and Minimize Exposure

Budget and Task-Based Time Line

At the outset of the litigation, counsel should prepare a budget to enable the client to assess and understand the costs likely to occur. Budgets should be reviewed on a quarterly basis for compliance and to determine if revisions are necessary. Budgets also serve to keep the costs in check as they provide a framework for a discussion on the invoices if they materially exceed

the budget. It is important to note, however, that budgets are a prediction of the future, and litigation is very difficult to predict because the variables, including court rulings and the activities of opposing counsel, are not easily discernible. The budget should also specify a time line to complete the various tasks involved in the litigation. This is more difficult when you are a defendant but defendants can plan their discovery and other tasks to prepare the case for the various preliminary motions and ultimately a motion for summary judgment. It is more difficult, however, to schedule the trial as that also requires the plaintiff to be ready.

Document Retention and E-Mail

Much has been written on document retention policies and the focus of this paper is not to delve deeply into that subject. It is worth mentioning, however, that a document retention policy should be in place to safeguard the important documents such as insurance policies and to discard documents that no longer are useful. This not only ensures that important documents are retained, but also eases the burden and costs of unnecessary documents and provides an explanation as to why certain documents may no longer be available. Care should be taken not to discard documents that may relate to a claim or pending litigation. Those at the hospital should be educated that, subject to certain limited privileges, emails are generally available to the opponent if litigation ensues. Also, since emails are written on a casual basis, they are not always worded as precisely as a letter. Therefore, emails can easily be taken out of context. Finally, deleting an email on your computer does not make it disappear. It still resides on your hard drive. Generally, unless overwritten, those emails can easily be retrieved. Further, many companies, including hospitals, back up and store their emails.

Conclusion

There are a number of Illinois decisions where courts, with the benefit of substantial deliberation and a dose of 20/20 hindsight, critically review hospital and medical staff credentialing decisions. Unfortunately, as highlighted in the *Lo* decision, when dealing with quality of care issues, hospitals and their medical staff do not always have the luxury of time. Nevertheless, if the decision makers act in good faith, substantially follow the applicable bylaws, provide notice and a fair hearing, then the risks and burdens of litigation will be minimized.

CH01/ 12444630.1

This work is the sole property of the author. The content and opinions expressed by him do not necessarily reflect the views of nor are they endorsed by Gardner Carton & Douglas LLP, where he is a partner. This article is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned here.

TABLE OF CONTENTS

	Page
Introduction	1
Application Process	2
Strategies at the Outset of the Problem.....	3
Peer Review Proceedings and Board Review	6
Typical Claims and Current Trends in the Law	7
Economic Credentialing	8
Defense Strategies Including Applicable Privileges.....	10
Managing the Litigation to Control Costs and Minimize Exposure.....	12
Budget and Task-Based Time Line.....	12
Document Retention and E-Mail	13
Conclusion.....	14