IAMSS Illinois Association Medical Staff Services

Katten
KattenMuchinRosenman LLP

Webinar Presentation

Impact of Recent Cases on Credentialing Practices and Peer Review Liability

May 23, 2007

Michael R. Callahan
Katten Muchin Rosenman LLP
525 W. Monroe • Chicago, Illinois
312.902.5634
michael.callahan@kattenlaw.com

Charlene Luchsinger, CPMSM, CPCS
President-elect
Illinois Association Medical Staff Services

Kadlec – An Overview of the Case

- Key Facts
  - Dr. Robert Lee Berry ("Berry") was an anesthesiologist who became a partner with Louisiana Anesthesia Associates ("LAA") which, in turn, had an exclusive services contract with Lakeview Regional Medical Center ("Lakeview").
  - It is alleged that upon conducting an audit of Berry's narcotic medication records in 2000, Lakeview determined that he had failed to properly document his withdrawal of Demerol.

Kadlec – An Overview of the Case (Cont'd)

- In March, 2001, Berry failed to respond to a hospital page during a 24 hour shift. It is alleged that Lakeview found him sleeping in a chair and that he "appeared to be sedated."
- Based on this incident and suspicions by LAA that Berry was diverting Demerol for his own use, he was terminated immediately. Thereafter, his Medical Staff membership and clinical privileges expired.

Kadlec – An Overview of the Case (Cont'd)

- Six months later, Berry was placed as an employee at Kadlec Medical Center in Richland, Washington, through a temporary employment agency.
- As part of its application process, Kadlec submitted a letter to Lakeview requesting:
  - a candid evaluation of Berry's training, continuing clinical performance, skill, and judgment, interpersonal skills and ability to perform the privileges requested.

Kadlec – An Overview of the Case (Cont'd)

- Evidence of current competence to perform the requested privileges
- Response to an "Appointment Reference Questionnaire"

– Lakeview did not answer any questions on the questionnaire

– Lakeview only sent a letter which stated that Berry was a member of the Active Staff from March 4, 1997 to September 4, 2001

Kadlec – An Overview of the Case (Cont'd)

- Lakeview stated that the limited response was "due to the large volume of inquiries received in the office."
- Lakeview also claimed, during the subsequent litigation, that this limited response is standard for the industry.
- It is alleged that when Lakeview responded to inquiries about other physicians, it provided more information based on a review of the physician's file – this was not done for Berry.

Kadlec – An Overview of the Case (Cont'd)

- LAA sent two letters of recommendation to Kadlec supporting Berry's appointment, describing him as an "excellent" physician.
  - It was later revealed that in the LAA termination letter to Berry, it stated that he was being fired because he reported to work in an impaired physical, mental and emotional state which prevented him from performing his duties and which put his patients at significant risk.

Kadlec – An Overview of the Case (Cont'd)

- Based on these representations from Lakeview and LAA, Kadlec hired Berry as an employed anesthesiologist.
- One year later, Berry was the anesthesiologist for a straight forward tubal ligation procedure. Patient suffered extensive brain damage which left her in a permanent vegetative state.
- Malpractice complaint alleged that Kadlec, as Berry's employer, was responsible for Berry's gross negligence. Plaintiff further alleged that Berry was impaired by drugs during the surgery.
- Kadlec settled the malpractice suit for $7.5 million.

Kadlec – An Overview of the Case (Cont'd)

- Overview of Litigation and Key Court Rulings
  - After settlement, Kadlec and its liability insurer sued Lakeview, LAA and its four physician shareholders.
  - Kadlec filed suit alleging intentional misrepresentation, negligent misrepresentation, strict responsibility misrepresentation and negligence against the defendants.

Kadlec – An Overview of the Case (Cont'd)

- The Court's ruling in this case was in the context of a motion for summary judgment filed by Lakeview. The standard of review in ruling on this motion is whether there is a genuine issue of material fact. If so, the issue goes to the jury for a decision. If not, the Court can then make a decision on whether, as a matter of law, Lakeview was entitled to judgment in favor of its request to dismiss the lawsuit.

Kadlec – An Overview of the Case (Cont'd)

- The principal question posed in this case was whether Lakeview had a legal duty to disclose information to Kadlec regarding Berry's suspected or actual impairment in response to Kadlec's inquiries, whether Lakeview breached this duty and if so, did the breach cause the damages sustained by patient on which the malpractice settlement was based.
- Court held that there is a duty to disclose requested information in misrepresentation claims which duty is further supported by public policy considerations relating to "a doctor's adverse employment history that risks death or bodily injury to future patients."

Kadlec – An Overview of the Case (Cont’d)

- “Kadlec and [Lakeview] have a unique ‘special relationship’ which existed in part to further communication between health care providers so that future patients could be protected.”
- “The Court finds that if and when a hospital chooses to respond to an employment referral questionnaire, public policy should encourage a hospital to disclose this sort of information at issue.”

Kadlec – An Overview of the Case (Cont'd)

- Lakeview's response omitted relevant and material information "which may have been exceedingly useful in preventing the harm caused …."

– Kadlec introduced sufficient evidence to support its argument that Lakeview attempted to deceive Kadlec because it typically provided more than a generic response to requesting hospitals regarding physicians who had no adverse employment or other information.

Kadlec – An Overview of the Case (Cont'd)

- During discovery, Lakeview acknowledged that it omitted the information requested because it feared a defamation action and other possible claims by Berry.
- Case went to the jury which ruled in favor of Kadlec and awarded $8.2 million. Because Kadlec and Berry were found 50% negligent, award was reduced to $4.1 million. Case is on appeal.

Kadlec – Real Threat or Aberration?

- Kadlec as Real Threat
  - Fact pattern not dissimilar from experiences at many hospitals.
  - Hospitals and physicians extremely reluctant to disclose all relevant information to third parties thereby raising risk of adverse consequences such as Kadlec.
  - Most hospitals try to avoid Data Bank reports and sometimes cut deals to provide no responses or to limit disclosure in order to avoid hearings and litigation.

Kadlec – Real Threat or Aberration? (cont'd)

- Reluctance to disclose sometimes driven by nature of qualified, versus absolute, waiver of liability forms signed by the physician.
- Kadlec decision could trigger a statutory response –
  - See Joint Commission Medical Standard 4.25
- Ever increasing focus on practice patterns, outcomes and physician profiling: more information is better.

Kadlec – Real Threat or Aberration? (Cont'd)

- Kadlec as Aberration
  - Bad facts make bad law.
  - No other court has held that there is a duty to disclose.
  - Case is still on appeal.
  - Duty difficult to monitor and enforce: Kadlec involved a physician who was part of an exclusive group.
  - How much has to be disclosed?

Best Practices for Requesting and Gathering Information

- Review and update current appointment/reappointment forms
  - Joint Commission Standards
    - Resource utilization (New 2007 Standards)
    - Morbidity/mortality/outcomes
    - Utilization information

Best Practices for Requesting and Gathering Information (cont'd)

- Compare forms with peer organization
- Review state mandated information
  - Who controls the form?
- Make sure that all forms of corrective and remedial action are captured by the questions, i.e., reprimand, probation, voluntary relinquishment of privileges, withdrawal of applications, monitoring, procturing, mandatory consultations with and without prior approval, , reductions in privileges, concurrent review of cases, administrative suspensions, adverse licensure decisions, adverse employment decisions, transfers or resignations, etc.

Best Practices for Requesting and Gathering Information (cont'd)

- Key Bylaw and Application Provisions
  - Applicant has burden of producing any and all information necessary to process the application.
    - failure to meet burden will result in withdrawal of application, decision not to process, or denial.
      - » Physician not entitled to a hearing under these circumstances.

Best Practices for Requesting and Gathering Information (cont'd)

  - » If physician is informed that application most likely will be denied, they will usually withdraw
  - » Not a reportable event
- Always try to seek information from a direct source, i.e., hospital, payor, other physicians

Best Practices for Requesting and Gathering Information (cont'd)

- Do not allow partners/relatives to provide sole references.
- Not a sufficient response that hospital will not provide requested information. Burden is to produce
- If hospital does not respond, application is not processed unless it can be obtained from reliable, independent source.

Best Practices for Requesting and Gathering Information (cont'd)

» Claim that information is confidential under peer review statutes is not a legitimate excuse for non-disclosure – depending on state statute, disclosure is not necessarily deemed a waiver of confidentiality.

– Bylaws and application should state that if it is determined that physician provided false, misleading or incomplete information, application deemed withdrawn or corrective action can be imposed if physician is already on the Medical Staff.

Best Practices for Requesting and Gathering Information (cont'd)

- Physician should be obligated to provide any and all information updates responsive to the application questions during the pendancy of the application.

- Application should include an absolute waiver of liability and release form which must be signed by the physician as a condition of processing the application. (See attachment)
  - Most forms and bylaws usually include a modified or limited waiver which grants an immunity or provides an agreement not to sue the hospital or parties providing information as long as their conduct was "in good faith and without malice."

Best Practices for Requesting and Gathering Information (cont'd)

- Despite these waivers, hospital and staffs are reluctant to make full disclosure for fear of litigation, i.e., defamation, tortious interference.
- Some staffs might object if they control the forms. Counter-argument is that it protects them as well as the hospital.

Best Practices for Requesting and Gathering Information (cont'd)

   - » May need to compare with immunity language in existing state peer review statute. Even if language in waiver is broader than statutory immunity, it arguably is still enforceable.
  - At a minimum, waiver should provide at least as much, and not less, immunity as set forth in state statute.
- If physician does not sign, then do not process application.

Best Practices for Requesting and Gathering Information (cont'd)

- Waiver should be included with the application packet and should also be used at the pre-application stage.
- Waiver language also should be included in the bylaws.

- Consider whether to also ask the physician to indemnify the hospital in the event that any false or misleading information or failure to provide complete data later exposes the hospital to professional liability.

Best Practices for Requesting and Gathering Information (cont'd)

- Although enforcement may be questionable, it may at least force the physician to be more truthful, or less "forgetful" when submitting the application.

• Application should make clear and require that physician signs and attests to the accuracy of the information.

- Avoids the "my assistant filled it out" excuse.

Best Practices for Requesting and Gathering Information (cont'd)

- On the issue of possible impairment, hospital should consider very specific questions as to whether the physician has been formally accused of some form of impairment, disruptive behavior or unprofessional conduct or has been asked to seek an evaluation or counseling for such behavior while a member of a staff or while employed.
  - If physician is seeking employment, need to comply with ADA.

Best Practices for Requesting and Gathering Information (cont'd)

- Health status questions are relevant but form of questions are important so as to avoid discrimination issues.
- If physician has participated in a rehab program obtain authorization to review report from treating physician as well as any corrective action plan.

- Look for Questionable Patterns and Conduct

Best Practices for Requesting and Gathering Information (cont'd)

- Resignation as a partner from group
- Gaps in employment or medical staff membership.
- Has moved significant distances or has moved a lot over his or her career.
- Has changed specialties.
- Is requesting privileges which are fewer than is normally granted under core privileging.

Best Practices for Requesting and Gathering Information (cont'd)

- There are gaps in insurance coverage, change in carriers or reduction in coverage over time.
- Reference letters are neutral.
- Response from hospital simply gives dates of service or very limited information.
  - Find out whether this is the hospital's customary response.

Best Practices for Responding and Disclosing

- Third Party inquiries
  - Hospitals, surgicenters, managed care organizations professional associates and physician groups
  - Inquiries in the form of questionnaires and fill in the blank
    - Forms typically request on explanation if any adverse response to a question is provided
  - Forms usually do not request documents
  - Some questionnaires ask that the physicians be rated in various categories
  - Some disclose privilege list and ask if physician had problems exercising any of them

Best Practices for Responding and Disclosing (cont'd)

  - Questions will seek to identify whether physician has been disruptive; has received any form of disciplinary action; has been impaired; has been unprofessional, etc.
- Questions to Ask Before Responding
  - Are there any limitations on what can be disclosed?
    - State confidentiality/immunity statute
    - Bylaws/Policies which may limit the response
    - Hospital cut a deal and has pre-determined scope of response

Best Practices for Responding and Disclosing (cont'd)

- Pending litigation or internal proceedings
- Are there any reporting obligations and, if so, what is scope of required or permissible disclosure?
- What business implications, if any?
- Physician has or is likely to sue depending on response

– How detailed is hospital's documentation in order to support the response?

- If not documented, if no paper trail, it did not happen.

Best Practices for Responding and Disclosing (cont'd)

- Have you pulled together all relevant documentation?
- Reliance on rumor, innuendo, distant memories or anecdotal information will only cause problems.
- If you don't know, you don't know.

– What form of waiver of liability did the physician sign?

- Absolute or qualified? — Need to read closely.
- No waiver, no response.

Best Practices for Responding and Disclosing (cont'd)

- Is an accurate, objection response likely to lead to an adverse appointment/reappointment decision by inquiring third party?
  - Is a factor, but should not be the deciding factor on how to respond.
- Is the physician on Staff?
  - Need to be consistent and fair in how you treat this physician.
- What do your Medical Staff Bylaws provide regarding protection and immunities relating to disclosures?
  - Presents an opportunity to amend bylaws.

Best Practices for Responding and Disclosing (cont'd)

- What is the immunity standard for your state and inquiring states?
- Do you have a separate waiver form that physician is required to sign?
- What are your insurance coverages?
  - Always a good idea to reaffirm to Medical Staff the coverage and state protections afforded to physician participating the peer review process.

Best Practices for Responding and Disclosing (cont'd)

- Check Board policies and procedures.
- Need to decide whether qualified or absolute waiver should be used.

- Responses and Disclosures
  - Need to determine if state statutes, caselaw or regs dictate or affect nature of scope of response.
    - i.e. – Louisiana hospitals bound by Kadlec decision.

Best Practices for Responding and Disclosing (cont'd)

– Form Responses

- Responses which simply provide dates during which physician was on the Medical Staff and is in good standing should only be used for physicians who have not had any quality of care, professional conduct or similar issues which have resulted in any kind of investigations or reviews that had led to the imposition of any form of corrective or remedial action.

  Examples Where Use of Form is Appropriate

Best Practices for Responding and Disclosing (cont'd)

- The perfect physician - no problem, no complaints in file, no investigations, no remedial actions.
- Physician has had some cases reviewed and some medical record suspensions but no remedial action imposed.
- Physician is difficult to deal with and may even have been counseled but no remedial action ever taken against him.

Examples Where Use of form is Inappropriate

Illinois Association Medical Staff Services IAMSS

Katten
KattenMuchinRosenman LLP

Best Practices for Responding and Disclosing (cont'd)

- Form letter should not be used if any remedial action has been imposed within the previous two years for quality of care or professional conduct which did or may have had an adverse impact on patients. Actions would include monitoring, proctoring, mandatory consultations, privilege restrictions on reductions, resignations in lieu of correction action and any time hospital has been required to report the physician to federal or state agency or authority.
- Under these circumstances, answer the questionnaire.

Best Practices for Responding and Disclosing (cont'd)

- Responding to Questionnaires
  - Respond to all questions
  - Be truthful, accurate, objective and base response on clear documentation
  - If a question asks for an explanation because of a response provided, be brief and to the point.
    - Response , at a minimum, should provide enough information to give the answer proper context. You need not go overboard but you also want to avoid follow up questions from the hospital.

Best Practices for Responding and Disclosing (cont'd)

Example:

1. Did physician regularly comply with hospital and medical staff policies?

   ☐ Yes ☒ No

If "no", please provide an explanation.

a. Physician did not always follow department policies – Insufficient
b. Physician, on occasion, did not abide by scheduling policy and protocols for treatment of his patients – Okay.
c. Physician, on occasion, would claim his patients had an emergency condition as a way of avoiding compliance with scheduling policies and protocols. His actions were disruptive and he was placed on a compliance plan. Physician has followed the plan and we have not had any subsequent problems - Better response

Best Practices for Responding and Disclosing (cont'd)

- If questionnaires completed by more than one person, i.e., Department Chair and Division Head, attempt to coordinate and strive for consistency, if possible.
- Make sure that Medical Staff Coordinator or other administrative personnel reviews response before it is sent out.

- Responding to Ratings Questions
- If you don't know because of little or low activity levels, simply say so and do not provide rating responses.

Illinois Association Medical Staff Services IAMSS

Katten KattenMuchinRosenman LLP

Best Practices for Responding and Disclosing (cont'd)

- Try to come up with an agreed to approach on the profile of a physician who should get highest, middle and lowest ratings and strive for consistency.
- Any rating of average or less will be viewed as evidence of a potential problem physician and may require an explanation.
- Always make sure you have facts and documentation to support any response.
- Keep in mind that MS.4.25 requires that:

  "The decision to grant, deny, revise, or revoke privilege(s) is disseminated and made available to all appropriate internal and/or external persons or entities, as defined by the organization and applicable law."

Best Practices for Responding and Disclosing (cont'd)

- Other Questions and Issues
  - Must you disclose response to physician?
    - No, although if requesting an absolute waiver, physician may not sign until you disclose the proposed response
  - If physician refuses to sign an absolute waiver, can you refuse to provide a response
    - Yes, although you should inform physician that response will not be provided to requesting hospital which likely will delay processing or result in involuntary withdrawal of application or even denial.

Best Practices for Responding and Disclosing (cont'd)

- You could also advise physician that if contacted, you will tell hospital that you are withholding response pending signature on absolute waiver.

– Should I provide a copy of any portion of peer review record?

- Never! never! never! Once document is released, you should assume that everyone and their uncle will see it, including one or more plaintiff's attorneys.

Best Practices for Responding and Disclosing (cont'd)

- Am I obligated to respond to subsequent requests for additional information?
  - If first response was specific enough so as to provide a context or background to questionnaire answers, there is no need or requirement to provide additional information unless otherwise mandated by law.
  - Use your judgment.
- Should I ever provide verbal responses: What if the hospital wants to know the "real story?"

Best Practices for Responding and Disclosing (cont'd)

- You should limit your responses to written answers.
- Verbal disclosures will, I repeat, will be misconstrued, misinterpreted and possible misrepresented to suit ones purposes. It will come back to haunt you.
- You should have told the real story in your written response.
- Verbal responses might not be protected under waiver or state immunity structure.

Managing Settlement Negotiations and Data Bank Reports

- Settlement Environment
  - Most hospitals and medical staffs are reluctant to impose corrective action generally but specifically, are loathe to make decisions which trigger hearings and state and/or Data Bank reports.
    - Are concerned about time, expense, litigation, impact on careers as well as the “there but for the grace of God go I” concern.

Managing Settlement Negotiations and Data Bank Reports (cont'd)

- There are windows of opportunity regarding resignations and voluntary relinquishment of privileges that will not require a report.
  - Must be considered before an "investigation" is initiated.
    - » What is "under investigation?"
  - Resignations or relinquishments in lieu of corrective action are reportable.

Managing Settlement Negotiations and Data Bank Reports (cont'd)

- When some form of remedial action is unavoidable but has not yet been specified or where a hearing right has been triggered, it is not uncommon for the parties to consider a "settlement agreement."
  - At this point, a Data Bank Report is required but generally, a hearing has not yet been commenced.
  - Outcome of hearing is uncertain but hospital/medical staff is trying to avoid the time and expense of a hearing, whereas physician wants to avoid a bad outcome.

Managing Settlement Negotiations and Data Bank Reports (cont'd)

- Physician at this point is usually trying to negotiate a "watered down" Data Bank report versus one that would contain more detail if there was an adverse hearing recommendation which includes specific findings that often find their way into the report.
  - There are no particular legal standards regarding this level of detail in these reports other than they cannot be overly vague.

Managing Settlement Negotiations and Data Bank Reports (cont'd)

- Settlements also include how the hospital will respond to third party inquiries, i.e., Kadlec's request of Lakeview to supply background information on Berry.
- Settlements also include a covenant not to sue as long as settlement terms are not breached.
  - Issue of acting "in good faith and without malice".

Managing Settlement Negotiations and Data Bank Reports (cont'd)

- Impact of Kadlec on Settlements
  - Hospitals likely will feel compelled to be more forthcoming and responsive to third party inquiries at time of appointment and reappointment.
  - Consequently, hospitals may be less willing to agree to vague or ambiguous disclosures as part of settlement agreement.

Managing Settlement Negotiations and Data Bank Reports (cont'd)

- Data Bank reports will likely contain more detail recognizing that the "facts" may not have been fully investigated.
- Comparative Example:
  - Dr. Callahan resigned at time of reappointment based on questions raised about compliance with record keeping requirements

Managing Settlement Negotiations and Data Bank Reports (cont'd)

– Dr. Callahan resigned at time of reappointment based on a medical record audit which revealed a continuous pattern of not seeing patients within 24 hours of their admission and not completing histories and physicals within 48 hours of discharge [which failures led to adverse patient consequences] [including one patient death].

Managing Settlement Negotiations and Data Bank Reports (cont'd)

- "Deal cutting", which results in resignation and no report when one actually is required probably will diminish.
- Points to Remember
  - Settlement should include
    - Absolute waiver of liability/covenant not to sue.
    - Agreed to language in Data Bank report, if required, which is truthful and specific enough to put third parties on notice about the physician's issues.

Managing Settlement Negotiations and Data Bank Reports (cont'd)

- » Try to avoid any required script, verbal or written, with respect to third party inquiries, including responses to questionnaires.
- » If third party inquiry received, physician should be required to sign absolute waiver relating to future disclosures.

- If physician does not sign the waiver, then do not respond to inquiries.
  - » Advise physician that you will advise hospital of his/her refusal to sign.
  - » Advise hospital that physician has relevant information but be careful about release of confidential peer review documents.

Poliner – An Overview of the Case

- Key Facts
  - Dr. Lawrence Poliner is a board certified cardiologist who sought membership and clinical privileges at Presbyterian Hospital of Dallas in 1997.
  - Several questions arose regarding three incidents in the cath lab, one resulting in a patient's death, that led to a review by two Medical Staff Committees and later by the Department of Internal Medicine.
  - During the pendency of this review, a fourth case was identified in which it was alleged that an angioplasty was performed on the wrong artery leaving the blocked artery untouched. Director of Lab reviewed this error as potentially life threatening.

Poliner – An Overview of the Case (cont'd)

- Shortly thereafter, Department Chair met with Poliner after meeting with hospital management, including the CEO and UPMA, and requested that he voluntarily agree not to exercise any cath lab procedures until an ad hoc committee could be appointed to review these cases.
  - Poliner claimed that he was not told about the fourth case, did not have an opportunity to defend himself against the accusations, was not told which cases were to be reviewed, that he could

Illinois Association Medical Staff Services IAMSS

Katten
KattenMuchinRosenman LLP

Poliner – An Overview of the Case (cont'd)

not consult with legal counsel before signing the "abeyance letter", and unless he signed within three hours of receiving the letter, he would be summarily suspended.

- Committee reviewed 44 cases and found that substandard care had been rendered in 29 cases.
- Cases and findings referred back to the Department which sought an outside review. A review was not conducted prior to scheduled Department meeting.
- Poliner sent a letter one day before the scheduled meeting seeking a one or two day extension in order to prepare. Request was denied.

Poliner – An Overview of the Case (cont'd)

- Poliner was given one hour to discuss the cases. Department Committees unanimously recommended suspension based on:
  - Poor clinical judgment
  - Inadequate skills, including angiocardiology and echocardiography
  - Unsatisfactory medical record documentation
  - Substandard patient care

Poliner – An Overview of the Case (cont'd)

- Upon receipt of report, Department Chair summarily suspended Poliner's cath lab and echocardiography privileges. Admitting, consultation, non-cath lab privileges and echos were unaffected.
- Hearing was held almost three months later based on Poliner's request.
- Hearing Committee recommended unanimously that Poliner's privileges be restored, with conditions, and determined that the summary suspension, when imposed, was appropriate.

Poliner – An Overview of the Case (cont'd)

- Poliner sought to appeal the earlier decision which imposed the summary suspension because he wanted his record cleared.
- Poliner was informed that the sole basis for any appeal is whether he had been provided procedural due process.
- Appeals Committee held that Poliner received due process and that it did not have the authority to overturn the suspension. This decision was upheld by the Board.

Poliner – Court Decision

- Poliner filed a multi-count complaint in federal court against the hospital and several physicians based on:
  - Antitrust, both state and federal
  - Breach of contract by failure to follow due process procedures under the bylaws
  - Business disparagement, slander and libel
  - Tortious interference with business and with prospective advantage
  - Texas Deceptive Trade Practices Act
  - Intentional inflection of emotional distress and mental anguish

Poliner – Court Decision (cont'd)

- A declaration that defendants were not entitled to immunity under HCQIA or the Texas Medical Practice Act

- Hospital bylaws which required procedural due process rights in medical staff bylaws created a contract right
- HCQIA immunity protections did not apply because the court found there were genuine issues of material fact which questioned whether abeyance (summary suspension) was taken in the reasonable belief that it was taken in the furtherance of quality care and after a reasonable effort to obtain the facts
  - Was imposed while cases were under investigation which was pending and not resolved

Poliner – Court Decision (cont'd)

- Poliner was not given information about the cases nor an opportunity to give his side of the story. As per medical bylaws standard, not clear whether there was an imminent threat to patients
- Poliner also was threatened with suspension if he did not agree to the abeyance letter
- There was evidence that the hospital and certain physicians violated bylaws and HCQIA when forcing him to sign the abeyance letter and that some of them harbored animosity

Poliner – Court Decision (cont'd)

- Court's denial of defendant's summary judgment on many counts allowed case to go to the jury which reached a verdict in favor of Poliner for $366 million.
  - Department Chair acknowledged that at the time he forced Poliner to sign the abeyance letter he did not yet have enough information to determine whether he posed a present danger to his patients. No such conclusion was reached.
- After mediation failed, trial court reduced award under the maximum recovery rule to $22.54 million.

Impact of Poliner on Correction Action Decisions

- Key Lessons Learned
  - Abeyance letter was treated as a summary suspension. This form of corrective action rarely should be used and only where there is a documented, immediate and real tortious threat to patient care
  - Decision makers need to understand the summary suspension standard under the Medical Staff Bylaws and must make sure that standard clearly has been met before a suspension has been imposed

Impact of Poliner on Correction Action Decisions (cont'd)

- As a general rule, you should always have at least two persons concur that a summary suspension is the only remedial action available to address the actual or perceived threat to patient care
- Make sure that direct competitors or anyone with an actual or perceived bias is not involved in direct decision making
  - Not always possible; may need to involve outside parties
  - Sometimes physician wants a physician in same specialty area to be involved at hearing stage – get a waiver

Impact of Poliner on Correction Action Decisions (cont'd)

- You must always follow your Medical Staff and Corporate Bylaws
- Hearing and appellate review bodies should be able to look at the basis of the decision as a whole to determine if action was appropriate and not be limited to a question of whether procedures were followed or procedural due process given

Impact of Poliner on Correction Action Decisions (cont'd)

- Unless otherwise required by state or federal law, bylaws should not reference a right to "procedural or substantive due process"
  - Not required
  - Can create a higher standard
  - Courts confuse what is and is not due process
- Forcing a physician to make an immediate decision under threat of a greater sanction, with no opportunity to consult with a peer or legal counsel and without being advised of the background or right to rebut the charges is ill advised

Impact of Poliner on Correction Action Decisions (cont'd)

- As a general rule, you should bend over backwards to accommodate physician on procedural issues such as extensions of time, access to records, access to counsel and related procedural issues
- Remember to incorporate HCQIA standards into bylaws
  - Was action taken in the reasonable belief that it furthered quality care
  - Was there a reasonable effort to investigate the facts before disciplinary action was imposed

Impact of Poliner on Correction Action Decisions (cont'd)

  - You must know the language and standards of state immunity and confidentiality standards so as to guide your procedures and decision
  - Remember the state confidentiality and immunity statutes generally do not apply in federal courts to federal versus state claims, i.e., federal antitrust versus a state defamation lawsuit
- Remember the Golden Rules of Peer Review
  - Everyone deserves a second or third chance.

Impact of Poliner on Correction Action Decisions (cont'd)

- Medical staffs and hospitals should strive to create an intra- professional versus adversarial environment.
- Steps should be taken to de-legalize process.
- Develop alternative remedial options and use them.
- Comply with bylaws, rules and regulations and quality improvement policies.
- Apply standards uniformly.
- Take steps to maximize confidentiality and immunity protections.

Impact of Poliner on Correction Action Decisions (cont'd)

- Know what actions do and do not trigger a Data Bank report and use this knowledge effectively.
- Be fair and reasonable while keeping in mind the requirement to protect patient care.
- Carefully review hospitals insurance coverage as applied to peer review process in order to maximize insurance protections to all peer review participants.
- If necessary, may need to consider formal indemnification of peer review participants, despite state immunity and insurance protection, if medical staff balks at peer review participation in light of Poliner decision

Questions and Answer Session