CDLA Professional Liability Committee: Current Trends in Negligent Credentialing

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Michael R. Callahan assists hospital, health system and medical staff clients on a variety of health care legal issues related to accountable care organizations (ACOs), patient safety organizations (PSOs), health care antitrust issues, Health Insurance Portability and Accountability Act (HIPAA) and regulatory compliance, accreditation matters, general corporate transactions, medical staff credentialing and hospital/medical staff relations.

Michael's peers regard him as "one of the top guys […] for credentialing—he's got a wealth of experience" (*Chambers USA*). Additionally, his clients describe him as "always responsive and timely with assistance," and say he is "informed, professional and extremely helpful" and "would recommend him without reservation" (*Chambers USA*). Michael's clients also commend his versatility, and say "He is willing to put on the hat of an executive or entrepreneur while still giving legal advice," according to *Chambers USA.*

He is a frequent speaker on topics including ACOs, health care reform, PSOs, health care liability and peer review matters. He has presented around the country before organizations such as the American Health Lawyers Association, the American Medical Association, the American Hospital Association, the American Bar Association, the American College of Healthcare Executives, the National Association Medical Staff Services, the National Association for Healthcare Quality and the American Society for Healthcare Risk Management.

Michael was recently appointed as chair of the Medical Staff Credentialing and Peer Review Practice Group of the American Health Lawyers Association. He also was appointed as the public member representative on the board of directors of the National Association Medical Staff Services.

He was an adjunct professor in DePaul University's Master of Laws in Health Law Program, where he taught a course on managed care. After law school, he served as a law clerk to Justice Daniel P. Ward of the Illinois Supreme Court.

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Negligent Credentialing - Environmental Overview

- Plaintiffs are looking for as many deep pockets as possible in a malpractice action
  - Hospital has the deepest pockets
- Tort reform efforts to place limitations or "caps" on compensatory and punitive damages have increased efforts to add hospitals as a defendant
- Different Theories of Liability are utilized
  - Respondent Superior
    - Find an employee who was negligent
  - Apparent Agency
    - Hospital-based physician, i.e., anesthesiologist, was thought to be a hospital employee by the patient and therefore hospital is responsible for physician's negligence

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Environmental Overview (cont'd)

- Doctrine of Corporate Negligence
  - Hospital issued clinical privileges to an practitioner who provided negligent care who they knew or should have known was not competent
- Industry shift from reimbursing providers based on the volume of services provided to the value of services obtained
- Greater transparency to general public via hospital rankings, published costs and outcomes, accreditation status, state profiling of physicians, etc.

Environmental Overview (cont'd)

- Medicare Shared Savings Program ACOs which require compliance with 33 identified quality metrics in order to share in savings
- Medicare Value Based Purchasing standards based on quality metrics
- Payment denials for growing list of never events, i.e., wrong site surgery
- Payment denials for hospital acquired infections
- Payment penalties tied to high readmission rate
- Pay for performance standards required by managed care payors

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Environmental Overview (cont'd)

- This "volume to value" shift will require continuous and ongoing monitoring of provider's compliance with these quality metrics and outcome requirements which will result in the generation of sensitive quality, peer review and risk data, reports and analysis
- Hospitals and physicians are being required to report their outcome data to state and federal agencies which are made available to the public resulting in greater transparency for comparative shopping based on quality and price
- All of this and more information must be taken into consideration when appointing, reappointing, credentialing, privileging and monitoring physician/APN/PA performance so as to assess current competencies to perform all clinical privileges at hospitals, managed care organizations, nursing homes, clinics, surgicenters, clinically integrated networks, etc.

The Tort of Negligence

- Plaintiff must be able to establish:
  - Existence of duty owed to the patient
  - That the duty was breached
  - That the breach caused the patient's injury
  - The injury resulted in compensable damages

Duty - Doctrine of Corporate Negligence

- Hospital, along with its medical staff, is required to exercise reasonable care to make sure that physicians applying to the medical staff or seeking reappointment are competent and qualified to exercise the requested clinical privileges. If the hospital knew or should have known that a physician is not qualified and the physician injures a patient through an act of negligence, the hospital can be found separately liable for the negligent credentialing of this physician
- Doctrine also applies to managed care organizations such as PHOs and IPAs and also will apply to ACOs, CINs, etc.

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Duty - Doctrine of Corporate Negligence (cont'd)

- Restatement of this Doctrine and duty is found in:
  - Case law, i.e., Darling v. Charleston Community Hospital, (33 Ill. 2d 326 (1965); Settle v. Basinger (2013 COA 18. No. 11CA 1342, (Feb. 28, 2013); Frigo v. Silver Cross Hospital (377 Ill. App. 3d 43 (1st Dist. 2007)
  - State hospital licensing standards
  - Accreditation standards, i.e., The Joint Commission and Healthcare Facilities Accreditation Programs
  - Medical staff bylaws, rules and regulations, department and hospital policies, corporate bylaws and policies

Duty - Doctrine of Corporate Negligence (cont'd)

- Some questions associated with this duty:
  - How are core privileges determined?
  - Based on what criteria does hospital grant more specialized privileges?
  - Are hospital practices and standards consistent with those of peer hospitals?
  - Were any exceptions to criteria made and, if so, on what basis?

Duty - Doctrine of Corporate Negligence (cont'd)

- Were physicians to whom the exemption applied "grandfathered" and, if so, why?
- Did you really scrutinize the privilege card of Dr. Callahan who is up for reappointment but has not actively practiced at the Hospital for the last two or more years?
- Has each of your department's adopted criteria which they are measuring as part of The Joint Commission FPPE or OPPE obligations such as length of stay patterns or morbidity and mortality data?
- Has the hospital developed policies to identify, implement, monitor and enforce provider compliance with required quality metrics?

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Duty - Doctrine of Corporate Negligence (cont'd)

- Has the hospital taken remedial/corrective action against providers who do not comply with metrics and standards of care?
- Has the hospital followed its bylaws, peer review, quality and risk management policies which are discoverable documents?

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Breach of Duty

- The hospital breached its duty because:
  - It failed to adopt or follow state licensing requirements
  - It failed to adopt or follow accreditation standards, i.e., FPPE and OPPE
  - It failed to adopt or follow its medical staff bylaws, rules and regulations, policies, core privileging criteria, etc.
  - It reappointed physicians without taking into account their accumulated quality or performance improvement files

Breach of Duty (cont'd)

- It reappointed physicians even though they have not performed any procedures at hospital over the past two years and/or never produced adequate documentation that the procedures were performed successfully elsewhere
- It failed to require physicians to establish that they obtained additional or continuing medical education consistent with requirement to exercise specialized procedures
- It appointed/reappointed physician without any restrictions even though they had a history of malpractice settlements/judgments, disciplinary actions, insurance gaps, licensure problems, pattern of substandard care which has not improved despite medical staff intervention, current history or evidence of impairment, non-compliance with quality metrics, etc.

Breach of Duty (cont'd)

- It failed to grandfather or provide written explanation as to why physician, who did not meet or satisfy credentialing criteria, was otherwise given certain clinical privileges
- It required physician to take ED call even though physician clearly was not qualified to exercise certain privileges
- It gave privileges to a physician who did not meet their eligibility criteria
- It did not collect and/or review all of the information required as part of its appointment/reappointment procedures

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Causation

- The hospital's breach of its duty caused the patient's injury because:
  - If the hospital had uniformly monitored and applied its credentialing/privileging criteria, physician would not have received the privileges which he negligently exercised and which directly caused the patient's injury
  - History of malpractice suits since last reappointment should have forced hospital to further investigate and to consider or impose some form of remedial or corrective action, including reduction or termination of privileges, and such failure led to patient's injury

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Causation (cont'd)

- Causation is probably the most difficult element for a plaintiff to prove because plaintiff eventually has to establish that if hospital had met its duty, physician would not have been given the privileges that led to the patient's injury
- Plaintiff also must prove that the physician was negligent. If physician was not negligent, then hospital cannot be found to have breached the Doctrine of Corporate Negligence

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Examples of Negligent Credentialing Cases

- Darling v. Charleston Community Memorial Hospital (1965)
  - First case in the country to apply the Doctrine of Corporate Negligence
  - Case involved a teenage athlete who had a broken leg with complications and was treated by a family practitioner
  - Leg was not set properly and patient suffered permanent injury
  - Hospital claimed no responsibility over the patient care provided by its staff physician

Examples of Negligent Credentialing Cases (cont'd)

- Court rejected this position as well as the charitable immunity protections previously provided to hospitals
- Part of the basis for the decision was the fact that hospital was accredited by the Joint Commission and had incorporated the Commission's credentialing standards into its corporate and medical staff bylaws

Examples of Negligent Credentialing Cases (cont'd)

- These standards reflected an obligation by the medical staff and hospital to make sure physicians were qualified to exercise the privileges granted to them
- Physician was found to be negligent
- The medical staff and hospital's decision to give privileges to treat patients with complicated injuries to an unqualified practitioner directly caused the patient's permanent injuries. Therefore, the hospital was held liable for the damages

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Examples of Negligent Credentialing Cases (cont'd)

- Frigo v. Silver Cross Hospital (2007)
  - Frigo involved a lawsuit against a podiatrist and Silver Cross
  - Patient alleged that podiatrist's negligence in performing a bunionectomy on an ulcerated foot resulted in osteomyelitis and the subsequent amputation of the foot in 1998
  - The podiatrist was granted Level II surgical privileges to perform these procedures even though he did not have the required additional post-graduate surgical training required in the Bylaws as evidenced by completion of an approved surgical residency program or board eligibility or certification by the American Board of Podiatric Surgery at the time of his initial appointment in 1992

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Examples of Negligent Credentialing Cases (cont'd)

- At the time of his reappointment, the standard was changed to require a completed 12 month podiatric surgical residency training program, successful completion of the written eligibility exam and documentation of having completed 30 Level II operative procedures
- Podiatrist never met these standards and was never grandfathered. In 1998, when the alleged negligence occurred, he had only performed six Level II procedures and none of them at Silver Cross

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Examples of Negligent Credentialing Cases (cont'd)

- Frigo argued that because the podiatrist did not meet the required standard, he should have never been given the privileges to perform the surgery
- She further maintained that the granting of privileges to an unqualified practitioner who was never grandfathered was a violation of the hospital's duty to make sure that only qualified physicians are to be given surgical privileges. The hospital's breach of this duty caused her amputation because of podiatrist's negligence
- Jury reached a verdict of $7,775,668.02 against Silver Cross
- Podiatrist had previously settled for $900,000.00

Examples of Negligent Credentialing Cases (cont'd)

- Hospital had argued that its criteria did not establish nor was there an industry-wide standard governing the issuance of surgical privileges to podiatrists
- Hospital also maintained that there were no adverse outcomes or complaints that otherwise would have justified non-reappointment in 1998
- Court disagreed and held that the jury acted properly because the hospital's bylaws and the 1992 and 1993 credentialing requirements created an <u>internal standard of care</u> against which the hospital's decision to grant privileges could be measured

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Examples of Negligent Credentialing Cases (cont'd)

- Court noted that Dr. Kirchner had not been grandfathered and that there was sufficient evidence to support a finding that the hospital had breached its own standard, and hence, its duty to the patient
- This finding, coupled with the jury's determination that Dr. Kirchner's negligence in treatment and follow up care of Frigo caused the amputation, supported jury's finding that her injury would not have been caused had the hospital not issued privileges to Dr. Kirchner in violation of its standards
- Jury verdict was affirmed. Petition for leave to appeal to Illinois Supreme Court was denied

Examples of Negligent Credentialing Cases (cont'd)

- Settle v. Basinger
  - Patient sustained numerous injuries after an ATV he was riding flipped over and landed on him
  - Was taken to the ER at Rio Grande Hospital where a chest tube was inserted and was to be transferred to Swedish Hospital in Denver
  - AirLife, a transportation company, arrived and another chest tube was inserted by Dr. Basinger while AirLife nurses and he also tried to intubate the patient but unsuccessfully at which point a "combitube" was inserted

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Examples of Negligent Credentialing Cases

(cont'd)

- Swedish discovered multiple lacerations to trachea and the esophagus which required multiple surgeries to repair
- Patient file suit against hospital, Dr. Basinger and the nurses, among others, alleging direct negligence by the providers, negligent supervision by Dr. Basinger over the nurses and against the hospital under the doctrine of corporate negligence
- Plaintiff alleged that hospital breached its duty by failing to properly monitor Basinger, disregarded its credentialing requirements and therefore negligently extended clinical privileges to Basinger

Examples of Negligent Credentialing Cases (cont'd)

- More specifically it claimed that Basinger's application did not reveal that she had not completed her residency and suffered from a medical condition that affected her ability to practice safely
- Appellate court recognized prior case law which established common law liability for negligent credentialing (now specifically identified by state) but affirmed trial court's determination that there was no causal connection between the hospital's alleged negligent credentialing and plaintiff's injury because it was not established that Basinger was negligent under any of the liability theories

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Defending Against a Corporate Negligence Claim

- Existence of duty and breach of duty and causation is usually established through expert testimony
- Plaintiff's expert must establish that Doctrine of Corporate Negligence was breached, i.e., that hospital failed to:
  - Comply with Medicare CoPs, accreditation standards
  - Comply with its own bylaws, credentialing/privileging standards
  - Did not effectively monitor compliance with quality requirements
  - Did not respond quickly or appropriately when problems were identified
- In some jurisdictions it is an affirmative defense if hospital can establish, through expert and other testimony, that it fully complied with all required standards.

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Defending Against a Corporate Negligence Claim (cont'd)

- Courts and juries may be less likely to hold in favor of the plaintiff even if, for example, a physician's lack of qualifications or history of malpractice actions raises the issue of whether privileges should have been granted, as long as some action was taken, i.e., physician was being monitored or proctored or was under a mandatory consultation
- A judge and jury will be more likely to find in favor of the plaintiff if the hospital did absolutely nothing with respect to the physician's privileges
- Although the peer review record may not be discoverable, the actions taken or not taken are not privileged

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Defending Against a Corporate Negligence Claim (cont'd)

- It will be important for hospital to establish that there is not necessarily a black and white standard on what qualifications are absolutely required before issuing clinical privileges although such a position, at least for certain privileges, may have been established, i.e., PTCAs
- Also, the hospital should argue that even if a physician was identified as having issues or problems, a reduction or termination of privileges is not always the appropriate response. Instead, the preferred path is for the hospital to work with the physician to get them back on track by implementing other remedial measures such as monitoring, proctoring, additional training, etc.

Defending Against a Corporate Negligence Claim (cont'd)

- Attempt to introduce physician's peer review record to establish that Hospital met it's duty
  - Colo. Rev. Stat. §12-36.5-101 states that such records are not subject to subpoena or discovery and are not admissible in any civil suit but are subject to subpoena and are available for use "[b]y either party in an appeal or de novo proceeding" subsequent to a hospital peer review hearing and decision
- In the context of a medical malpractice action this information, however, is not discoverable and therefore, as in Frigo, a Colorado court might prevent an attempt by the hospital to introduce peer review compliance information into evidence

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Peer Review Privilege Protections

- Background
  - Plaintiff's always seek access to as much information as possible to prove up their negligent credentialing claim
  - Although bylaws, policies, procedures, medical records, and factual information are not protected, internal peer review, quality and information relating to the adverse event which injured the patient is typically privileged although subject to certain limitations
  - A question to consider is whether this information is better protected under Colorado Peer Review statute or the federal Patient Safety and Quality Improvement Act of 2005 ("PSA")

Peer Review Privilege Protections (cont'd)

- Scope of Covered Activities – Colorado
  - Protects records, broadly defined, of professional review committees authorized "to review and evaluate the competency, professional conduct of, or the quality and appropriateness of patient care provided by licensed physicians and APNs
  - Protections also apply to the quality assurance, risk management, peer review and other quality management functions used to identify, evaluate and improve patient and resident care and to reduce the risk of injury at licensed or certified health care facilities

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Peer Review Privilege Protections (cont'd)

- Scope of Covered Activities – PSA
  - "Patient safety activities" includes all "efforts to improve the quality of health care delivery"
  - Includes the collection and analysis of patient safety work product ("PSWP"), the utilization of PSWP and all supporting operational efforts to implement same

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Peer Review Privilege Protections (cont'd)

- Scope of Covered Entities – Colorado
  - Medical staff of hospital and hospital related corporations
  - Physician society and associations
  - IPAs, PPOs
  - Ambulatory surgical center
  - Professional services entity
  - Provider network which includes licensed physicians and APNs
  - Health system with two or more authorized entities with a common governing board
  - HMOs and ACOs
  - Hospitals

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Peer Review Privilege Protections (cont'd)

- Scope of Covered Entities – PSA
  - An individual or entity licensed or otherwise authorized under state law to provide health care services
  - Includes non-licensed corporate parent that owns, controls or manages a licensed provider

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Peer Review Privilege Protections (cont'd)

- Scope of Protections – Colorado
  - Applies to "records" including written, verbal and electronic communications, reference letters, interviews or statements, reports, memoranda, assessments and progress reports developed to assist in professional review activities
  - Records cannot be subpoenaed and are not subject to discovery or admissible into evidence in any civil suit

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Peer Review Privilege Protections (cont'd)

- But records are subject to subpoena and available in
  - De novo reviews and in a suit seeking judicial review of a governing board decision
  - Colorado Department of Public Health
  - CMS
  - Medical and nursing boards
  - May be released to a CMS deemed accreditation authority, i.e., The Joint Commission

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Peer Review Privilege Protections (cont'd)

- Scope of Protections – PSA
  - Patient safety work product ("PSWP") means any data, reports, records, memoranda, analyses (such as root cause analysis), or written or oral statements (or copies of these materials which improve patient safety, health care quality or health care outcomes which are collected within a provider's patient safety evaluation system (PSES) for reporting to a patient safety organization (PSO) and are reported
  - Such information produced by PSOs also is PSWP

Peer Review Privilege Protections (cont'd)

- PSWP is privileged and not subject to subpoena or discovery nor admissible into evidence in <u>any</u> federal, state, local, or Tribal civil, criminal or administrative proceeding or a professional disciplinary hearing of an established state disciplinary body
- There are disclosure exceptions

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Peer Review Privilege Protections (cont'd)

- Are Protections Waivable? – Colorado
  - Not waivable where there are permissible disclosures and responses to subpoenas as per the statute
  - Not clear if protections are waived if disclosed beyond these permitted disclosures
- Are Protections Waivable? – PSO
  - Protections are never waived

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Peer Review Privilege Protections (cont'd)

- Can Protected Information be Freely Shared? – Colorado
  - Statute does permit sharing of records among authorized entities within a health care system if the licensed or certified hospital or holding company of the licensed or certified hospital has ownership or control of the entity
- Can Protected Information be Freely Shared? – PSA
  - Identifiable PSWP can be freely shared between corporate parent and any licensed providers which it or an affiliated licensed provider owns, controls or manages

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