Peer Review Report

News, analysis and commentary on Medical Staff credentialing, privileging, peer review and governance

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Physician Gets to Trial

Local Hospital Loses HCQIA Immunity For Suspension

A Cincinnati area hospital was forced to trial in November in a physician suspension suit after failing to win dismissal on immunity grounds.

McCullough-Hyde Memorial Hospital had suspended Dr. Keith Wilkey, an orthopedic surgeon, in 2003. After a hospital hearing and appeal that Dr. Wilkey claimed was flawed, he sued MHMH in Cincinnati federal court.

In an October 18, 2007 decision, Judge Michael Barrett of the Southern District of Ohio denied the hospital's motion for summary judgment. The court dismissed some claims but rejected the hospital's defense that it was entitled to immunity under the Health Care Quality Improvement Act. The case is *Wilkey v. McCullough-Hyde Memorial Hospital,* http://www.setterberglaw.com/hottopics/assets/MHMH.pdf

This case presents some instructive examples of a few often-overlooked provisions of the HCQIA. Some of the points are old and obvious yet cannot be overstressed. At least one may even plow a little new ground.

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Editor's note: Your editor advised Dr. Wilkey during various phases of the hearing and ensuing litigation. The facts in this article are drawn from the Judge Barrett's reported decision.

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The Long Arm of Negligent Credentialing

Failure To File Report May Lead To Liability

You should have filed a Data Bank report. But you didn't. The doc went across the river. He hurts a patient. Now the patient sues you. Had you filed, the patient says, the hospital where I was hurt would never have credentialed the physician.

Does the patient win?

Maybe. A New Jersey case is the latest data point holding "innocent" hospitals accountable for poor credentialing practices.

Recall that *Kadlec*, http://www.setterberglaw.com/hottopics/assets/Kadlec%20SJ.pdf, held a Louisiana hospital liable for its failure to provide complete information in its response to a Washington hospital's reference request. (See the January 2006 Peer Review Report in the web site's Newsletters section for an analysis.)

Now a July 2007 New Jersey case holds that a failure to file a required report on a physician can result in liability as well. *Fazaldin v. Englewood Hospital and Medical Center*, http://www.setterberglaw.com/hottopics/assets/Fazaldin.pdf, contains a few "ifs", but the thrust and trend is clear.

Plaintiffs' lawyers rush in where the Joint Commission and the Department of Health & Human Services fear to tread.

The opinion is factually dense and legally complicated. But it boils down to this.

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Local Hospital Loses Immunity . . . (continued)

Facts

Dr. Wilkey joined the staff of McCullough-Hyde in 2001. Conflicts soon arose between Dr. Wilkey and McCullough-Hyde president and CEO Richard Daniel; surgery chair, Dr. Rolf Brunckhorst; and Dr. Wilkey's only orthopedic surgeon competitor, Dr. Paul Cangemi.

The sources of the conflict were in dispute. The hospital claimed there were reports of behavior issues. Dr. Wilkey claimed that the reports were pretext and arrived only when he complained of unkept hospital promises of block operating time, trained staff and adequate equipment. The hospital denied making any promises.

Matters came to a head in early 2003. Competitor Cangemi identified two Wilkey surgery cases entailing complications and sent them for review to the Bylaws and Credentials Committee. Dr. Cangemi claimed there were issues with Dr. Wilkey's surgeries. The Committee voted to recommend to the MEC a 30-day suspension of Dr. Wilkey's privileges. The MEC accepted that recommendation a day later.

Both the ad hoc committee and the MEC made their decisions without waiting for the second expert's report.

The MEC then appointed an ad hoc committee to investigate. The ad hoc committee in turn obtained the services of an outside expert, Dr. Seasons, to review the two surgical cases in question. Dr. Seasons' report was critical of Dr. Wilkey's handling of both cases. Dr. Wilkey raised objections to both Dr. Season's conclusions as well as his qualifications.

On the ad hoc committee's recommendation, the MEC extended the suspension for an additional 60 days to look further into Dr. Wilkey's surgeries. To that end, the ad hoc committee retained a second outside expert, Dr. Ricciardi, to assess Dr. Wilkey's surgeries. Without waiting for this second report, however, the ad hoc committee recommended full revocation of Dr. Wilkey's privileges. The MEC agreed, also without the Ricciardi report. The report arrived two or three weeks later.

At a fall 2003 hearing under the bylaws, a hearing panel upheld the initial suspension. The hospital board affirmed on appeal. Before a separate hearing on the revocation was complete, Dr. Wilkey resigned. This suit followed.

During pretrial discovery, Dr. Wilkey obtained for the first time a copy of Dr. Ricciardi's report. It had found no deviation from the applicable standards of care. The hospital had not made the Ricciardi report part of the hearing. At least one hearing panel member, when informed of the report, said he would like to have seen it.

The hospital moved for summary judgment at the close of discovery. Among other claims, the hospital contended that it was entitled to immunity under the HCQIA.

This is a good time for review. A hospital is immune from liability if:

--the action was taken in the reasonable belief that it furthered quality health care;

--after a reasonable effort to obtain the facts of the matter;

--after a procedure that meets stated safeguards or is otherwise fair; and

--the punishment was warranted by the facts.

The second expert's report found no deviation from the applicable standards of care

There is a fifth requirement where, as here, there has been a summary suspension. A hospital may suspend first and hold the hearing later only "where the failure to take such an action may result in an imminent danger to the health of any individual."

The Lessons

The court held that immunity was not available for three reasons.

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Local Hospital Loses Immunity . . . (continued)

The first reason (and the first lesson) comes from the suspension language quoted immediately above. The hospital suspended Dr. Wilkey after questions about two of his surgeries, but there is nothing in the record to indicate he was an "imminent danger" to anyone. Judge Barrett sent the case to trial to see if there really was such a danger.

This additional requirement for HCQIA immunity is often overlooked in suspension cases. Many bylaws use language like "best interest of patient safety" or "immediate harm" or similar phrases. Close, but no cigar. If you have these words in your bylaws, you are courting disaster. Do a word search of your document and look for the phrase "imminent danger." If it's not there, put it in. Then apply it. Or face trial.

If you do not have the words "imminent danger" in your bylaws provisions on summary suspension, you are courting disaster.

The court only needed one reason to deny immunity, but it found two others.

The second reason – lesson two – was the involvement of Dr. Wilkey's competitor in the discipline process. This was a bad idea. Don't do this.

The HCQIA does not, in so many words, forbid competitors from participating in anything other than the hearing panel. But the more you use a competitor in a peer review process – the deeper his or her involvement – the more likely it will be that a court will ask whether "furtherance of health care" was really the purpose of the proceeding.

That is exactly what happened here. Setting the stage was evidence of conflict between Dr. Wilkey and hospital and staff leaders. So, Judge Barrett found,

> "[T]here is a question of fact as to whether or not [the] review process was in the furtherance of quality health care or as a way to remove a physician that did not get along well with some of the other doctors. It is also for a jury to determine if Dr. Cangemi's motive was one for quality health care or for competitive reasons."

Dr. Cangemi was in far too deeply. He was the physician who initially referred the quality problem to the Bylaws and Credentials Committee. He also sat on that committee. He also sat on the MEC, which acted on three separate occasions to adversely affect Dr. Wilkey's privileges.

The third reason for denial, and perhaps the most interesting lesson, was the withholding of the Ricciardi report. It was clear to the court that Daniels, Dr. Brunckhorst, the ad hoc committee and the MEC (and perhaps others) were aware of the request to Dr. Ricciardi for a report. Despite this, the committees acted without reading or even waiting for it.

The more you use a competitor in the peer review process, the more likely a court will be to question whether the effort really was in furtherance of health care.

Why? Judge Barrett held that a jury could reasonably conclude that the report was purposefully withheld from Dr. Wilkey and the hearing panel because it was favorable to Dr. Wilkey. Thus, he found, the jury might find that this did not amount to a "reasonable effort to obtain the facts."

What makes this ruling interesting is its impact on the exchange of information in fair hearing cases.

Students of the HCQIA know that the statute requires sharing only two forms of information with a physician: (1) the "reasons" for the adverse action and (2) a list of hospital witnesses expected to testify at the hearing. This short list does not include depositions, document discovery, subpoenas to witnesses or other forms of court-like disclosure. Indeed, it does not require production of experts' reports. Although some bylaws and some parties engage in more than the bare minimum, nothing requires it.

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Local Hospital Loses Immunity . . . (conclusion)

Nothing, that is, until you dissect the meaning of "reasonable effort to obtain the facts," as did Judge Barrett. Significant here is that the act of "obtaining" facts does not stop with the hospital's own prosecutorial preparation for the hearing. It extends through the hospital-controlled hearing and appeal process itself. One part (hospital as prosecutor) cannot withhold significant, relevant information from another part (hospital as judge) and call that a reasonable effort.

"Obtaining the facts" does not stop with the hospital's own prosecutorial preparation for a hearing.

[For another case holding that withheld documents deprives both a physician and a hospital of a full view of the facts, see *Estate of Blume v. Marion Health Center*, http://www.setterberglaw.com/hottopics/assets/Blume.pdf, discussed in the August 2007 edition of Peer Review Report.]

Whatever this may mean for other information in a hospital file, the lesson here seems clear at least respecting experts' reports. Hearing panels rely heavily on these reports in peer review cases. They sometimes clinch the decision. If a hospital goes to the trouble of getting one and it doesn't come out as hoped, it risks immunity loss for failing to bring it to light.

Judge Barrett's ruling could be applied broadly to many types of exculpatory evidence that the hospital either willfully or negligently keeps out of the hearing room. The search for the truth, he implies, includes putting all the hospital cards on the table – including the bad ones – and letting the hearing panel decide.

How far this thinking reaches is for another day. In the meantime, hospitals will have to decide in each case how much information to add to the short list of "reasons" and "witness lists" that has to be disclosed to physicians.

Editor's note: The case was tried to a jury in November 2007. After several days of trial, the parties settled. Terms of the settlement are confidential.

Quick Hits:

- On February 12, the Agency for Healthcare Research and Policy published proposed regulations under the Patient Safety and Quality Improvement Act of 2005. The Act allows entities to set up "Patient Safety Organizations" to confidentially store, analyze and report data to improve patient safety. The notice of proposed rulemaking and text of the proposed regulations appears at http://www.setterberglaw.com/hottopics/assets/PSQIA%20regs.pdf. The statute is at http://www.setterberglaw.com/hottopics/assets/PSQIA.pdf. Watch for the next issue for an analysis of the PSQIA and how it might help you.

- The Joint Commission has commenced yet another study on the impact of Medical Staff Standard 1.20. The new standard, published last year, will require most hospitals to make substantial changes to their medical staff documents. On January 3, the Joint Commission appointed a task force to study the "practical implementation issues" of MS 1.20. Read the press release at http://www.setterberglaw.com/hottopics/assets/Task%20Force.pdf. The Joint Commission expects the task force's report by the end of this month. Meanwhile, the standard goes into effect July 2009. Tick, tick, tick . . . .

McCullough-Hyde Litigation Fallout

Lawyer May Be Liable For Withholding Expert Report

As detailed in the accompanying article, the hospital failed to qualify for federal immunity, in part because it had withheld an expert's report favorable to Dr. Wilkey.

After learning of the report, Dr. Wilkey commenced a separate lawsuit against the hospital's lawyer, Greg Hull, for Hull's alleged part in withholding the report. Hull moved to dismiss the case shortly after filing. On January 3, 2008, Judge Sandra Beckwith denied the motion and sent the case into discovery. See *Wilkey v. Hull*, http://www.setterberglaw.com/hottopics/assets/Hull.pdf.

Unlike the hospital case, your editor has not been involved in this matter.

The complaint in the action claims that the lawyer participated in a "coverup" of the favorable report. The hospital lawyer had prepared the exhibit books for the hearing panel but excluded the report, according to the complaint. The various claims in the complaint are all premised upon Hull's alleged concealment of the report.

The complaint against the hospital's lawyer was that he allegedly concealed the expert report.

The Court dismissed most of Dr. Wilkey's claims. Left for further proceedings, however, were his claims that the report was either negligently or fraudulently withheld.

Non-lawyers sometimes misunderstand motions of this kind. Defendants make them early in a case. The parties have not yet developed or proved any facts. No judge or jury has said anything final. It is far too early to say how the facts will develop. These motions simply test whether the claims, if true, can be a legal basis for recovery.

The legal precedent here may be significant, particularly for health care lawyers.

On this motion, the lawyer has said, in effect, "Judge, even if Dr. Wilkey proves that I did what he says I did, the law of Ohio does not allow him to recover. I have no relationship with him. The hospital was my client. I owe him no duty."

The Court has said, in effect, "No, that's wrong. If he proves you did this, he may recover the damages you caused. Even though he is not your client, he said you did this to him with malice. That's enough under Ohio law."

How did Judge Beckwith reach this conclusion? Basically, she turned to Ohio law and found Ohio Supreme Court cases that do, indeed, hold lawyers liable to people other than clients.

"I'm not your lawyer. You can't sue me."

"Not so fast," said the judge.

The kind of case that makes this sort of liability easier to see is the "lawyer got grandma to change her will" cases. Such a case was the principal basis for Judge Beckwith's ruling. Let's see what happened there.

Grandma held stock in a newspaper company. Her three kids, A, B and C, were heirs. Grandma held some of the stock; the kids had the rest.

At some point, Kid A hires grandma's lawyer (also the lawyer for the newspaper company) to get her to transfer all of her shares to A's son. A also gets grandma to change her will in some way presumably beneficial to either A, the grandson or both. Neither B nor C learns of these changes until grandma's death a few months later.

B and C then sue the lawyer. The lawyer says, "You're not my client." The court says, "Not so fast."

(Continued next page)

Lawyer May Be Liable . . . (conclusion)

It is true, the court said, that lawyers are not usually liable to people they don't represent. The rule is not true, however, where there are --

> " . . .special circumstances such as fraud, bad faith, collusion or other malicious conduct which would justify departure from the general rule."

The court found that the conflicts of interest inherent in the lawyer representing the grandmother, the newspaper, A and the grandson, together with the claims of bad faith and collusion among all of them, was sufficient to allow the complaint to stand.

Note particularly the role that conflicts of interest play in both the facts of grandma's case and the hospital lawyer case.

Lawyers who represent hospitals in peer review cases face these sorts of conflicts of interest regularly. Hospitals have a right to zealous representation of their interests by their lawyers. On the other hand, the hearing process in general, and the hearing panel in particular, has the truth as its interest, not merely winning. It is frequently impossible to reconcile these two interests. When the two roles are uncomfortably combined under one lawyer, risks soar. The truth suffers. People get sued.

It is now up to the parties in this case to develop in discovery whether the necessary conflict of interest, bad faith or collusion is present. If there is enough conflicting evidence, a jury will have to decide.

It is easy to conclude this is just a lawyer's problem alone. It is not.

Hospitals face serious fallout from conflicts. The lawyer may be temporarily disabled from representing the hospital. Lawyer litigation may force the hospital and its people into nasty fights ("The lawyer made me do it!"). A lot of dirty laundry gets aired in a public court fight. Malpractice claims between hospital and lawyer may bubble up. In the end, a good attorney-client relationship may suffer irreparable damage.

And none of this directly addresses the fundamental point: Divided loyalties often force the hospital's lawyer to make choices that, in the end, just make for bad advice.

Lawyers and hospitals alike would be wise to look for conflicts and avoid them. How? This issue's Commentary has some thoughts.

Special circumstances such as fraud, bad faith, collusion or other malicious conduct may justify a non-client's suit against a lawyer.

Failure To File Report . . . (continued)

Dr. Stenson, an OB/GYN, was on the faculty and staff of Beth Israel, a New York teaching hospital. There was a contract between Beth Israel and Englewood hospital, across the river in New Jersey. Because of this contract, Dr. Stenson was also on the affiliate staff at Englewood.

Trouble developed at Beth Israel based on Dr. Stenson's quality of care. In late 1997, Jacobs, his department chair, gave Stenson a long letter detailing the problems. Jacobs said, "Resign from the faculty or be fired." Stenson refused. So Jacobs fired him. Stenson still kept his privileges, but with limitations.

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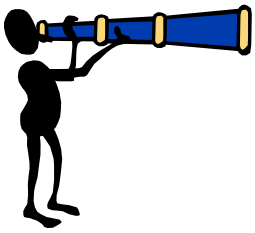
The boss said quit or I'll fire you. He wouldn't. So the boss fired him.

Later, "Can I change my mind about quitting . . . ?"

Failure To File Report (conclusion)

A few days later, Stenson asked if he could reconsider the offer to resign. Jacobs agreed and withdrew the firing letter in return for a resignation. Limitations on Stenson's privileges remained.



Out of favor at Beth Israel, Stenson went across the river and applied in 1998 to change his status at Englewood from affiliate to full membership. During the process, Englewood checked the data bank. Finding nothing, they granted the change in status.

Now things get fuzzy. Roughly two years go by, during which the same patterns of quality problems crop up at Englewood. They conduct peer review, they investigate, they monitor. But otherwise they do nothing. On May 22, 2000, Kathy Fazaldin dies during Stenson surgery.

At trial, Fazaldin's estate claimed that the death was "caused" by Beth Israel's failure to report the firing from the faculty, the subsequent resignation and the limitations on Stenson's privileges at Beth Israel. Had it reported, Englewood would not have allowed Stenson to continue to practice there.

The jury found for Beth Israel. The appellate court, however, reversed and held that the trial judge's instructions to the jury on the reporting requirements were faulty.

Basically the mistake came down to this. New York has a scheme much like the National Practitioner Data Bank. In New York, you also have to report firings from employment or resignations to avoid firing. It was clear to the appellate court that Stenson's firing from the faculty was a reportable event. So was the resignation-for firing swap. It wasn't clear that New York would pass that information on to the NPDB. So it sent the case back to find out. If it would, then a new trial might be necessary.

The trial court also rejected plaintiff's contention that Beth Israel had a duty to report directly to the NPDB. Because plaintiff's attorney had not raised this argument until the day of trial, it refused to consider it, and the appellate court agreed.

Failure to report to the Data Bank can be badly misleading to other hospitals that search and take comfort in finding nothing.

Underlying all this is one fundamental point: Failure to report can be badly misleading to other hospitals that search and take comfort in finding nothing. If New York would have passed Stenson's information on to the NPDB (or if the plaintiff had raised the NPDB arguments earlier), that might have made a difference to the jury.

Much in the case suggests it might not make a difference. Two years passed after the failure to disclose. During that time, Englewood knew about problems but did nothing. There is also evidence that Englewood actually knew of the Beth Israel problems but approved Stenson anyway. The OB/GYN chair said if he actually knew of the report, it wouldn't have changed the result.

Yet in the face of this, the appeals court sent it back, with a new trial possible. As in Kadlec, there seems to be bubbling underneath a growing impatience with a lack of effectiveness in Joint Commission and DHHS efforts to police credentialing.

For as much as hospitals worry about Joint Commission surveys, relatively few hospitals lose accreditation for credentialing failures. The Secretary of Health and Human Services has the power to blacklist hospitals that fail to report the NPDB, but no Secretary has yet exercised this power in more than 20 years.

The power to turn failure to report into a tort has taken hold in Louisiana and now in New Jersey. It may be coming to a state near you. If you let it.

Richard A. Setterberg Co., L.P.A.

Commentary

Conflicts Hunts Are A Pain. That Means Do It.

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Richard A. Setterberg Co., L.P.A. publishes and distributes **PEER REVIEW REPORT** free to inform clients and others about issues and developments concerning medical staff matters. It is not legal advice. For further information on issues or topics in this newsletter as they may apply to particular facts, please contact the editor at (513) 733-1759 or rascolpa@cinci.rr.com.

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Looking for conflicts of interest with your lawyer is a lot like colonoscopies, mammograms and other cancer screening. We're afraid of what we'll find. We're not sure what we'll do about a bad answer. And we sure don't like the process.

But screen you must. As the accompanying articles in this issue show, failure to recognize and act upon conflicts can produce bad results, not just for lawyers but also for clients. Lawyers have ethical rules warning against conflicts, and they pay their own price for violation. But this is about you, the non-lawyer.

Conflicts of interest are usually born of innocence. The lawyer tries to keep the client happy and fails to see the perils of a conflict. The client, already unhappy to pay one lawyer, bridles at paying for two. So conflicts remain undetected, until they metastasize into finger pointing, embarrassment and litigation.

The fair hearing system for physician discipline is rife with conflict potential. It grows out of the inherent conflict between a hospital believing in a particular result and the legal requirement for it to be fair as the price for immunity. So instead, hospitals often ask a single lawyer to do both. They can't. I have represented hospitals, hearing panels and doctors. It's a tightrope act at best to juggle the first two.

Rich Setterberg

Here is my short list of things to see and avoid – my "wellness" checklist:

1. **Hire a separate hearing panel lawyer**: This lawyer's first and only duty is to assist the panel and ensure that everyone gets a fair shake. Some states say using the hospital lawyer to help the panel is an unvarnished conflict of interest.

2. **Consider a different hearing panel lawyer each time**: If you hire the same lawyer each time you have a hearing, does that lawyer lean your way in hopes of further employment? At least one state is talking about forbidding this practice.

3. **Insist on a proactive protector of the truth**: Securing immunity sometimes requires more than a baby sitter. It may demand advice to panel members to ask hard questions. Fair hearings should be a doctor's inquiry, but doctors did not go to law school to study fairness. They usually need help. Failure of the panel's lawyer to offer it risks everyone's immunity . . . including his or her own, by the way.

4. **Expand the panel's role to include pretrial management**: Make sure your bylaws allow the panel to deal with "lawyer stuff" – information exchange, scheduling, witness availability, etc. – before the hearing begins. If there are matters that are not strictly entitlement but would promote fairness, deal with it. Bend over backwards in favor of disclosure. If the withheld expert's report in *Wilkey* had been openly and honestly discussed at such a session, this newsletter would have been a lot shorter.

5. **Keep the hospital lawyer at a distance**: Once the panel has competent counsel, the hospital lawyer and the physician's lawyer stand in the same shoes as far as whispering in the panel's ear. Neither the parties nor their lawyers should privately contact the panel or its lawyer.

6. **Cut the panel lawyer some slack**: In their roles as guardians of the process, diligent panel lawyers may do some unpopular things ("And I'm *paying* for this?!!!") that may undercut the hospital's position in the case. Simply remember they are trying to keep you out of the courtroom. If you don't like the panel result, the board still has the final say.