Settled the Case for a Physician-Client? Not So Fast!

by Theresamarie Mantese and Fatima M. Mansour

You have settled a dispute between your physician-client and a health care entity or business entity over billing issues, payment issues or standard-of-care issues. You think you are ready to sign the deal, but STOP! Because physicians work in a highly regulated industry, there are some important factors to consider before you execute the settlement agreement. Specifically, have you considered what reporting requirements might remain under federal and state law? Or licensing issues that could arise?

Even after settlement of a dispute with an employer, group or hospital, a physician should still be concerned with the fact that he or she may face the possibility of an adverse report being filed with the National Practitioner Data Bank (NPDB). There also may be other credentialing issues or a licensing complaint arising from the underlying litigation even though the case has been settled. This article will address peer review reporting requirements and recent case law in this area. We will then present some practical suggestions to avoid the risks associated with triggering a peer review and potential reporting after the settlement of a case.

Overview of Peer Review Reporting Requirements

Peer review is a process in which professional health care providers examine the quality of care provided by physicians to ensure that the medical facility and individual physicians are providing the highest level quality of care to patients. The goal of peer review is to identify potential violations of a standard of care by medical staff, and to eliminate these issues as quickly and effectively as possible. State and federal statutes establish reporting requirements, and have led to the creation of databanks by which health care facilities can obtain information on reported disciplinary action.[1]

Federal Reporting Requirements. Federal reporting requirements are codified in the Health Care Quality Improvement Act of 1986 (HCQIA).[2] Pursuant to the statute, health care entities are required to report certain "reportable events" to the Board of Medical Examiners. These events include: 1) a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days; 2) the surrender of clinical privileges of a physician (i) while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or (ii) in return for not conducting such an investigation or proceeding; or 3) in the case of an entity that is a professional society, takes a professional review action that adversely affects the membership of a physician in the society.

The HCQIA created the NPDB. The NPDB receives and maintains records of adverse actions taken by health care entities against physicians and makes these reports available to all health care entities for background checks and credentialing.

Michigan Reporting Requirements. Michigan reporting requirements are codified in MCL § 333.20175, and are broader than those found in the federal statute. Pursuant to the Michigan statute, the health facility must report: 1) disciplinary action based on the health professional's competence; 2) disciplinary action that results in a change of employment status; or 3) disciplinary action that adversely affects the professional's clinical privileges for a period of more than 15 days. The health facility must also report its restriction or acceptance of a professional's surrender of his/her clinical privileges, if the professional is under investigation by the health facility or if there is an agreement in which the health facility agrees not to conduct an investigation. Lastly, the health facility must report a case in which the professional resigns or whose contract is not renewed instead of the facility's taking disciplinary action. Such reporting must take place within 30 days of the disciplinary action.

Immunity. The HCQIA grants broad immunity to professional review bodies and their members, along with anyone who assists or provides information to those bodies, with respect to "professional review actions."[3] If the professional review action meets specific standards, then certain individuals "shall not be liable in damages ... with respect to the action."[4] These standards require that a peer review action must be taken: 1) in the reasonable belief that the action was in furtherance of quality health care, 2) after a reasonable effort to obtain the facts

of the matter, 3) after adequate notice and hearing procedures, and 4) in the reasonable belief that the action was warranted by the facts.[5] Importantly, the "plaintiff has the burden of overcoming the presumption of immunity created by the HCQIA by showing that the review process was not reasonable."[6]

Confidentiality and Privilege. Currently, there is no federal peer review privilege statute or federal cause of action for breach of fiduciary duty. The Michigan statute, codified in MCL § 333.20175, provides for both confidentiality and privilege. Pursuant to MCL § 333.20175, "records, data and knowledge collected for or by individuals or committees assigned a professional review function" are confidential, are not public records, and are not subject to court subpoena.[7] Michigan courts have interpreted the privilege provided by the statute broadly.

Updates in Peer Review in the Last 12 Months

Broadening Peer Review Privilege in Michigan

In 2015, the Michigan Supreme Court broadened the statutory privilege for peer review in *Krusac v. Covenant Medical Center, Inc.*[8] The *Krusac* court considered whether the peer review privilege statutes contain an exception for objective facts contained in an otherwise privileged report. After reviewing the plain language of the statutes, the court concluded that the statutes encompass objective facts, and these facts are, therefore, subject to the peer review privilege.

This overruled a 2014 Court of Appeals decision, *Harrison v. Munson Healthcare, Inc.*,[9] which held that the peer review privilege does not protect objective facts gathered contemporaneously with an event. The *Krusac* opinion thus makes it exceedingly difficult for litigants to obtain information that is classified as peer review materials. However, a litigant may "still obtain relevant facts through eyewitness testimony, including from the author of a privileged incident report, and from the patient's medical record."[10]

Overcoming Peer Review Immunity Under HCQIA

HCQIA grants broad immunity to the reporting entity. As discussed above, in order to obtain protection under the statute's immunity provision, the peer review action must satisfy four requirements: 1) taken in the reasonable belief that the action was in the furtherance of quality health care, 2) taken after a reasonable effort to obtain the facts of the matter, 3) taken after adequate notice and hearing procedures, and 4) taken in the reasonable belief that the action was warranted by the facts. As such, to overcome this immunity, a physician plaintiff must demonstrate that one of these four elements was not met.[11]

Immunity for reporting "exists as a matter of law unless there is sufficient evidence for a jury to conclude the report was false and the reporting party knew it was false."[12] In considering whether the defendant's submission to the NPDB was "false" under § 11137(c), "courts do not evaluate whether the underlying merits of the reported action were properly determined or whether the report contains inaccurate information, but rather they evaluate whether the report itself accurately reflected the action taken."[13]

Conduct in Private Life May Constitute Reportable Event

In *Murphy v. Goss*, the plaintiff physician, while on cardiac call, consumed one or two glasses of wine. The Oregon Medical Board found, in a Final Order, that the plaintiff violated Oregon law by engaging in unprofessional conduct.[15] Specifically, the board found that "consuming alcohol while on cardiac call places the physician at risk of impaired function, and as such, constitutes conduct which does or might adversely affect a physician's ... ability to safely and skillfully ... practice medicine." The board reported the Final Order to the NPDB. *Murphy*, and cases similar to it,[16] demonstrate that hospital or state boards may consider conduct that occurs *outside* the health care facility to constitute reportable conduct.

What Constitutes an "Investigation"?

The HCQIA requires hospitals and health care entities to report to the Secretary of Health and Human Services in the event that a physician surrenders his or her clinical privileges while under an investigation for incompetence or improper professional conduct. What, however, is an investigation? The term is not defined in either the HCQIA or the regulations that implement the act.[17]

In *Doe v. Leavitt*, the court considered the word "investigation" as used in the statute.[18] The court was the first court at the federal appellate level to consider what constitutes an investigation.[19] The court held that an investigation ends "only when a health care entity's decision-making authority either takes a final action or formally closed the investigation." The court explained that steps in an investigation may include: accepting a complaint, deciding to investigate, appointing an investigating committee, conducting fact-gathering, preparing to report, and so on and so forth, up to the point at which a professional review action is taken.[20]

In *Doe v. Rogers*,[21] the court further considered the definition of "investigation." The *Rogers* court concluded that because the statute does not define the term, the court "must presume that Congress intended to give the term its ordinary meaning."[22] The court determined that the term "investigation" is ordinarily understood to mean "a systematic examination."[23] Applying its definition, the court held that an investigation was ongoing where the hospital had gathered relevant documents, conferred with executive officials about the incident, met with physicians who were involved, reported the incident to the state health department, and formed a team to conduct a root cause analysis.

Rogers and *Leavitt* dispense with the notion that in order to qualify as an investigation for the purpose of the mandatory reporting requirements, the hospital's actions must be taken in accordance with its own internal bylaws or policies.[24] As the *Rogers* court explained, the "reportable event is based on an "investigation" as that term is contemplated

by the statute, not as contemplated by a health care entity's individualized and internal governing documents."[25]

Licensing Concerns Under the Public Health Code

Physicians must also be aware that even in a business dispute with a fellow practitioner, such as a dispute over control of a limited liability company (LLC) operating agreement, the practitioner may be required to report the physician to the state Department of Licensing and Regulatory Affairs Board of Medicine. The Board of Medicine is an administrative agency established by MCL 333.1101, *et seq*, and is empowered to discipline licensees under the Public Health Code through its Disciplinary Subcommittee.

MCL 333.16221 authorizes the subcommittee to investigate and take disciplinary action against a physician licensee if it finds that one of a number of grounds exists. These grounds include: "violation of general duty, consisting of negligence or failure to exercise due care, including negligent delegation to or supervision of employees or other individuals, whether or not injury results, or any conduct, practice, or condition that impairs, or may impair, the ability to safely and skillfully engage in the practice of the health profession," or personal disqualifications such as incompetence, substance use disorder, physical inability, conviction of a felony, lack of good moral character, or fraud or deceit.[26]

An investigation by the board may result in sanctions ranging from a reprimand or fine to probation, suspension or revocation of the physician's license.[27] Pursuant to statute, licensees have reporting requirements to the department. Specifically, a licensee "who has knowledge that another licensee ... has committed a violation under [the statute] shall report the conduct and the name of the subject of the report to the department."[28] In order to encourage reporting, the statute provides that information obtained is confidential, and those providing the information to the department are "immune from civil and criminal liability including, but not limited to, liability in a civil action for damages[.]"[29]Failure to report, however, may lead to administrative action against the licensee.[30]

Suggestions to Avoid the Risks Associated with Triggering a Peer Review

Parties to a settlement agreement cannot agree that the health care facility or physician licensee will refrain from initiating a peer review proceeding or other disciplinary action against a physician. The facility's peer review reporting requirements under federal and state law, and a fellow physician's reporting requirements under state law, may not be contracted away, as contracts in which parties agree to a violation of the law are unenforceable.[31] Further, the facility or physician may face significant penalties if they fail to report a disciplinary event when required to do so.[32] As such, a settlement agreement provision will be invalid if it purports to require the facility or the physician to withhold information from state and federal reporting organizations, in violation of peer review and licensing statutes.

The settlement agreement, however, can include recitals and other mitigating language that the parties may acknowledge as to why peer review issues are not relevant to the dispute. It should be pointed out that sometimes an opposing party may have "buyer's remorse" in a settlement and use peer review as a means to retaliate against a physician-client after the case is resolved. The recitals may provide a window into the reasoning of the parties in resolving the case and provide outside reviewers with information into why reportable events are not relevant to the settled dispute and are in reality retaliatory.

Further, legal counsel may want to consider asking the opposing party whether it intends to file a collateral peer review proceeding after the dispute has been resolved with the physician-client. In this case, the physician-client and his or her counsel could wait until such a determination is made before the settlement agreement is signed. Until that determination is made, legal counsel and the physician-client may want to stay settlement negotiations. Once that determination has been made, the parties could expressly state in the settlement agreement that no disciplinary action was taken, and no other reportable event or violation was found.

Also, in order to preserve confidentiality and privacy, the parties may want to agree to arbitrate the dispute to avoid a public forum to resolve disputes. This will ensure privacy and confidentiality of all documents that may be

Jury Trials

*The following cases have had changes in reporting – the changes are noted in **bold italics***

Date Started	Judge	Case Number Case Name	Attorneys	Type of Case	Disposition	Jury Days
04-11-16	McMillen	15-255036-FC* People v. Vegh	Kelly Collins Pamela Johnson	Criminal Sexual Conduct	***Cts. 1-2 Guilty as Charged***	4
04-11-16	***McMillen***	***15-245514-FH* People v. Vegh***	***Kelly Collins Pamela Johnson***	***Criminal Sexual Conduct***	***Cts. 1-4 – Not Guilty***	***4***
09-06-16	Jarbou	15-256304-FC People v. Williams	Kelly Collins Pamela Johnson	Conspiracy to Commit Armed Robbery	***Ct. 1 – Guilty Cts. 2-4 – Not Guilty***	5

*Cases tried together

Feature Article

exchanged. It is also important to carefully examine the scope of depositions and discovery requests. No extraneous information should be given to the opposing party during the dispute, as it may unwittingly trigger adverse peer review proceedings.

Finally, business formation agreements should be reviewed in connection with the settlement of a case. Some operating agreements have a "triggering events" clause, which include peer review issues giving rise to "just cause" termination or possible expulsion from the business entity. Legal counsel should carefully review whether operating agreements or other business agreements have such clauses so they can assess the risks of making certain claims.

Conclusion

Legal counsel for a physician-client should review the entire health care context in which a physician operates when resolving a business dispute. Peer review considerations should always be at the forefront because physicians may face career-jeopardizing implications from the dispute giving rise to the settlement agreement. It is important for physicians and their legal counsel to understand these potential concerns and learn how to handle them during settlement negotiations. With careful planning, legal counsel may help physician-clients avoid these risks and help them resume their career without interruption after the settlement of a case.

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Footnotes

1 Mich. Comp. Laws Ann. § 333.20175(6).
2 42 U.S.C. Section 11101 *et seq.*
3 42 U.S.C.A. § 11111(a).
4 *Id.*
5 42 U.S.C. § 11112(a). *See Shibley v. King County Pub. Hosp. Dist. No. 4*, 194 Wash. App. 1008 (Wash. App. Div. 1 2016); *Nahas v. Shore Med. Ctr.*, unpublished opinion per curiam of the United States District Court, D. New Jersey, issued March 15, 2016 (Docket No. 13-6537).
6 *Reid v. Kentuckyone Health, Inc.*, unpublished opinion per curiam of the Court of Appeals of Kentucky, issued March 18, 2016 (Docket No. 2015-CA-000092-MR).
7 *See* Mich. Comp. Laws Ann. § 333.21515.
8 *Krusac v. Covenant Medical Center, Inc.*, 497 Mich 251; 865 NW2d 908 (2015).
9 *Harrison v. Munson Healthcare, Inc.*, 304 Mich App 1; 851 NW2d 549 (2014).
10 *Krusac*, 497 Mich at 262.
11 *See Miller v. Huron Regl Med Ctr, Inc.*, 145 F Supp 3d 873 (2015) (HCQIA did not provide immunity to the defendants because defendant doctors failed to satisfy element three by providing a hearing or some other procedure to ensure fairness).
12 *Krusac, supra. See* 42 U.S.C. § 11137(c).
13 *Krusac, supra* at *4. *See Elkharwily v. Franciscan Health System*, unpublished opinion per curiam of the United States District Court, Western District of Washington, issued August 15, 2016 (Docket No. 3:15-cv-05579-RJB) (Plaintiff physician could not overcome HCQIA immunity because there was no inconsistency between NPDB report filed by hospital, and actual action taken by the hospital).
14 *Murphy v. Goss*, 103 F Supp 3d 1234 (ED Or 2015).
15 *Murphy v. Goss*, 103 F Supp 3d 1234, 1238 (ED Or 2015).
16 *See also Moore v. Williamsburg Reg. Hosp.*, 560 F3d 166 (CA 4, 2009) (A "physician's competence can be implicated by conduct outside a health care facility if there is a clear nexus between that conduct and the ability to render patient care.").
17 *See Doe v. Rogers*, 139 F Supp 3d 120, 134 (DDC 2015).
18 *Doe v. Leavitt*, 552 F3d 75 (CA 1, 2009).
19 *Id.*
20 *Id.* at 84.
21 *Rogers*, 139 F Supp at 134 (DDC 2015).
22 *Id.*
23 *Id.*
24 *Id.* at 142.
25 *Id.*
26 See MCL 333.16221 for a comprehensive list.
27 MCL 333.16226.
28 MCL 333.16222.
29 MCL 333.16238; 333.16244.
30 MCL 333.16222.
31 *Rory v. Continental Ins. Co.*, 473 Mich 457, 469, 703 NW2d 23 (2005).
32 *See* 42 U.S.C.A. § 11133(c); MCL 333.16222.