



Credentialing Exposures Intensify in a Challenging Healthcare Environment

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Chronic conflict and disruptive behavior between providers and leadership staff can expose organizations to significant liability and the threat of multi-million dollar lawsuits.

In response to an array of new economic realities, hospitals are rapidly merging with other health care entities and acquiring large numbers of physicians along with physician-extenders. While consolidation of medical providers hold the promise of more efficient and better coordinated care, current reform measures can invite unwanted tension. Tension arises between cost-conscious hospital leaders and safety-minded providers who advocate for quality patient care. A certain level of resistance is inevitable in a reform environment, and may even serve as a catalyst for necessary change. However, chronic conflict and disruptive behavior between providers and leadership staff can expose organizations to significant liability and the threat of multi-million dollar lawsuits.

In the context of health care reform, certain adverse factors are accelerating credentialing-related exposures. When medical staff leaders restrict privileges, harass, or terminate employees for voicing their opposition to reform measures, those actions may give rise to physician retaliation claims, which represent the fastest growing segment of credentialing and employment practice liability.ⁱ In addition, as hospitals dominate the physician practice market, preferential and anti-competitive agreements are spawning economic credentialing decisions. These decisions take the form of privilege suspensions, restrictions, or denials for under-performing employees, thereby opening the door to credible antitrust challenges. Moreover, hastily executed mergers place high demands on medical staff departments to grant membership to greater numbers of providers, tempting many to alter their credentialing strategy and forego a thorough vetting of professional merits.

All of the exposures cited above have the potential to multiply in a health care environment where patient care is increasingly dictated by corporate-imposed parameters for employee performance. From a risk mitigating perspective, stakeholders in the credentialing process – which include hospital and medical staff leaders, risk managers, and legal counsel – must ensure that risk management strategies remain responsive to a host of liability exposures. Partnering with a knowledgeable insurer that has experience in understanding the complexities and challenges surrounding credentialing is an essential step towards ensuring the right coverages exist and potential losses are sufficiently mitigated.

Severity of Actions

Regardless of their origin, credentialing-related lawsuits are burdensome both in terms of damage awards and expense costs. Consider briefly the negative impact of the following lawsuit scenarios which involve wrongful suspension of privileges, negligent selection, and economic credentialing, respectively:

A \$7.6 million jury award was granted in a retaliation lawsuit to a physician whose medical staff privileges were suspended after the physician complained about substandard hospital policies and the poor care that patients were receiving. The award represents damages for back pay, future compensation, lost pension benefits, and pain and suffering.ⁱⁱ

An \$8.5 million jury verdict was upheld against a hospital that had permitted a physician of limited neurosurgery experience to perform spinal surgery involving “off-label” use of surgical rods, resulting in significant brain and spinal injury to the patient. The court stressed that the hospital failed to document the physician’s proficiency in the specific procedure.ⁱⁱⁱ



Council for Graduate Medical Education and the American Board of Medical Specialties. Certain risk factors in an applicant's history must warrant prompt investigation, including lack of response to reference inquiries, resignation from prior medical staffs, claims of fraud, unverified insurance coverage, and pending investigations or claims.

A growing number of lawsuits center on provider behavior. Many lawsuits allege failure to properly address disruptive tendencies or known complaints that have been filed by peers and patients. Implementing a comprehensive conflict management program, with express provisions for handling difficult providers, is fundamental to thoroughly document adverse events and to enforce appropriately fair remedial actions.

Allegations of poor executive oversight and supervision of employee performance can haunt organizations that fail to comply with their medical staff bylaws, rules, and regulations. Therefore, any decision to terminate a provider's appointment or restrict his or her privileges should undergo top-level review by the governing board. This safeguard helps ensure that underlying provider performance evaluations remain objective, due process is rendered, and the basis for the decision is accurately documented.

Lastly, in an environment where traditional roles for physicians are expanding and an ever-increasing number of physician extenders seek privileges, allegations concerning inappropriate scope of practice can flourish. Prior to granting or renewing specific clinical privileges, organizations should review evidence-based performance markers, such as comparative practice patterns, morbidity and mortality data, and peer review records. Organizations must ensure providers meet established benchmarks for scope of practice.

A \$70 million settlement was paid by a multi-hospital health system that allegedly engaged in improper financial relationships with doctors in violation of federal anti-kickback laws. In particular, specialty physicians were hired at inflated salaries in return for lucrative patient referrals. The health system reportedly tracked the value of the referrals and pressured physicians during their performance review to increase volume if they failed to meet a financial target.^{iv}

These multi-million dollar damage awards underscore the catastrophic impact that lawsuits relating to inappropriate provider selection, appointment, and retention can have upon organizations and providers in terms of financial loss and reputational damage. The severity factor associated with lawsuits of this kind is further compounded by their tendency to be fact-intensive proceedings that often require costly discovery and tedious preparation. In addition, the factual questions that reside at the center of a credentialing-related challenge typically preclude a prompt dismissal or judgment through motion practice.

Hospitals and health care systems that face litigation must also contend with the impact of an emerging risk exposure as the industry moves towards greater

transparency in quality and peer review processes. If data indicates a pattern of intentional and malicious acts with disclosed data on hospital outcomes, utilization information, and performance review may well result in escalating punitive damage awards. Taken collectively, these various adversities contribute to a prolonged defense cycle, mounting costs, and ultimately to an expensive claim.

Trends in Allegations and Safeguards

Quite often a plaintiff's attorney will assert poor documentation of the medical staff credentialing tiers (i.e., verification of an applicant's credentials and granting of medical staff privileges). To prove the allegation, an expert witness must convince the jury that the defendant hospital lacks a basic foundation for its decision-making capacity. It's therefore essential that medical staff departments revamp their vetting templates and appointment protocols to fully align with industry standards regarding competency verification.

Failing to verify an applicant's ability to meet basic medical staff requirements can invite further allegations of inadequate review. In addition to education, training, and licensure, overall competence should be assessed and documented using established criteria, such as that developed by the Accreditation

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Root Causes of Credentialing-related Lawsuits

As noted earlier, health care reform is fueling a rise in credentialing-related lawsuits. These legal challenges stem from a variety of sources, each posing its own threat to health care organizations in terms of financial and reputational damage. The following origins of liability collectively represent a formidable risk exposure for hospital and medical staff leaders, risk managers, and their insurance partners. Taking proactive steps to secure appropriate insurance coverages for the myriad of risks posed is highly recommended.

Physician retaliation lawsuits.

Physicians and other providers who find their medical staff privileges restricted or terminated because of escalating and menacing behaviors may seek remedy through “whistleblower” pleadings. These claims essentially argue that an adverse medical staff action was taken in retaliation for grievances filed by a provider against the hospital as a result of unsafe patient care, regulatory non-compliance, or other sources of wrongdoing.

Cases involving “disruptive” physicians are garnering industry attention as an increasing number of providers vocally oppose health care system takeovers or medical practice buyouts. Oftentimes, hospitals apply a more liberal definition of the term to deny a provider his or her privileges, rather than impose a form of discipline as would otherwise be directed by the governing rules and regulations. Historically, providers who sought to challenge adverse medical staff actions were first required to exhaust administrative remedies set forth in the governing documents. Retaliation lawsuits now offer the disgruntled employee an alternative (and sometimes faster) track for remedy.

Hospitals and health care systems should remain vigilant against these red-flag actions that may subject an organization to a retaliation lawsuit:

- Demotions without a fair hearing
- Denial of advancement opportunities without just cause
- Verbal harassment or false accusations
- Excessive warnings or suspensions without documented rationale
- Repeated relocations to other health care system sites
- Unfair severance packages

Ultimately, confronting the problem of disruptive behavior and the conflict that fuels it requires more than prescriptive actions. Leadership must employ a comprehensive dispute management program that embraces a more open and transparent governing approach. Such a program affords a framework within which critical decisions are fairly reached and a record is preserved for future defense purposes.

To read more about this trend and the potential implication it has for peer review proceedings, see “Whistleblowers and the California Supreme Court’s Decision in Fahlen v. Sutter Central Valley – Toward a Workable Balance for Promoting Advocacy for Patient Care.”

Tortious interference with practice.

As organizations jockey to achieve maximum savings under the Medicare Shared Savings Program, executive leaders face mounting pressure to account for provider care that is not only safe and within prescribed standards of care, but also economically efficient. The controversial practice of using economic criteria (e.g., patient readmission rates and length-of-stay averages) to remove an under-performing provider may induce lawsuits by disgruntled physicians.

These claims can allege any number of wrongdoings, ranging from tortious interference with patient and business relationships to violation of due process, defamation, and wrongful infliction of emotional distress.

Antitrust challenges.

Mergers, joint ventures, and other methods of corporate structuring present certain complexities with regard to provider practice arrangements and medical staff membership. When acquisition activity results in agreements that unreasonably restrain competition, the door to potential liability is opened. For example, if a health care system negotiates an agreement with a cardiac surgery group to refrain from granting privileges to a competitor group, a subsequent suit against the system might well ensue based upon the anti-competitive effect of being unfairly excluded from the system's provider network.

Negligent selection.

The claim of negligent provider selection is the most traditional form of credentialing-related liability and has intensified in the current reform environment. The increasing integration of physicians, advanced practitioners, physician assistants, and other credentialed providers into a health care system presents certain challenges for medical staff departments. By thoroughly vetting applicants and carefully documenting their appointment, scope of practice, and performance review, organizations can minimize the liabilities associated with improper and negligent selection practices.



Errors and omissions.

In order to achieve operational cost-savings under the Patient Protection and Affordable Care Act, health care entities are creating a more efficient medical staff composition, inclusive of advanced practitioners, physician assistants, and new physician-provider types, such as hospitalists and tele-medical consultants. Medical staff leaders and hospital executives who fail to appropriately credential may be subject to lawsuits premised upon errors and omissions. Full compliance with expectations requires these individuals to adhere to the following fundamental duties:

- i) vet the core competency levels of *all* provider types,
- ii) enforce provider-specific selection criteria,
- iii) monitor credentialing procedure compliance, and
- iv) audit peer review procedures and review decisions.

Mitigating the Risk

Claim experience underscores the major sources of credentialing-related risk. Without supporting rationale, issuing adverse privileging decisions effectively cause major sources of exposure. It is essential that primary stakeholders mitigate this risk by providing a consistent channel of communication and establish a robust process to monitor and respond to certain credentialing situations.

The process of provider selection and retention should be an integral part of a health care system's enterprise risk management program. Decisions of the medical staff executive committee should be subject to oversight by the governing board in order to ensure that physician practice acquisitions, staff appointments, retention decisions, and disciplinary actions comport with medical staff bylaws, rules, and regulations.

Today's rapidly changing credentialing environment calls for a team of certified professionals to handle all matters relating to provider selection, privileging, performance review, and retention. It also warrants appointing a risk manager and legal counsel to the medical staff executive committee in order to help optimize data management and privacy under the Health Care Quality Improvement Act and other statutory-based protections. In the event of litigation, retaining an attorney who is well-versed in discovery and state peer review privileges offers a strategic advantage.

Because credentialing actions are indiscriminate of provider types, it befits health care organizations to develop tools that align with specific privileges. By delineating the training and resource requirements to support each privilege – such as licensure and certification requirements – organizations can better gauge whether an applicant will safely perform the service. With respect to advanced nurse

For a more comprehensive look at risk mitigating strategies, see:

- American Medical Association, <https://www.ama-assn.org/>
- Center for Connected Health Policy – The National Telehealth Resource Center, <http://www.cchpca.org/credentialing-and-privileging>
- National Association Medical Staff Services, <http://www.namss.org/About/ResourceLinks.aspx>
- The Joint Commission, <https://www.jointcommission.org/>

practitioners and physician assistants, health care organizations can expect to see increased legal scrutiny of their scope of practice in the years to come, especially in practice situations with less physician presence.

Finally, health care organizations should be collecting and analyzing data according to an established system known as on-going professional practice evaluation (OPPE). OPPE allows organizations to capture a more balanced view of provider strengths and weaknesses using set criteria, inclusive of the following markers, among others: drug usage, laboratory test requests, appropriateness of procedures, and morbidity and mortality data.

At a time when the health care industry is undergoing dramatic change, effective leadership requires that every organization adopt a sound credentialing program and take ownership of the vital matters pertaining to provider appointment, retention, and performance review. It also calls for taking appropriate risk management measures to manage and contain interpersonal conflict and disruptive behavior, which are significant liability threats for all health care settings. Anything less than a coordinated approach to credentialing providers may introduce certain risks, including lapses in patient care, critical communication gaps, and spiteful retaliatory actions. In light of the challenging exposures at hand, hospitals and health care systems are encouraged to conduct a comprehensive coverage analysis in order to determine what coverages exist in their portfolio and whether they are sufficient.

About the Author

Caroline Clouser is Executive Vice President, Chubb Healthcare, one of the company's industry segments dedicated to serving health care organizations. Ms. Clouser is responsible for bringing the full capability of the Chubb organization to health care customers as well as overseeing the underwriting execution of the company's medical professional liability business unit. Ms. Clouser has more than 25 years of health care insurance and underwriting management experience, specializing in medical professional lines both in the U.S. and around the world, having worked for several years in Europe to expand legacy ACE's global medical malpractice platform. Ms. Clouser can be contacted at Caroline.Clouser@chubb.com.

Endnotes

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- iii *Columbia/JFK Medical Center v. Sangounchitte*, 977 So.2d 639 (Fla.App. 4 Dist. 2008)
- iv Hancock, J. "Whistleblower Doctor Warns About Hospitals Hiring Physicians." *Kaiser Health News*, October 7, 2015. Available at: <http://khn.org/news/whistleblower-doctor-warns-about-hospitals-hiring-physicians/>

To learn more about Chubb's Healthcare Industry Practice and view a medical provider credentialing checklist, visit:

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