Med-Staff Newsletter

QUARTERLY NEWSLETTER FROM THE MEDICAL STAFF PRACTICE GROUP

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Group Vice-Chair

Sherri Alexander has been named the new Chair of the Health Care Litigation Practice Group.

Sherri has served as the Vice Chair of the Health Care Litigation group for a number of years and has been instrumental in the success of our national medical staff/peer review group. She will continue her role as the Chair of the Medical Staff Group.

Congratulations to Erin Muellenberg and Ann McCullough as the new Vice Chairs of the Medical Staff Group!

Don't Text and Credential: Wisconsin Surgeon's Defamation and Tortious Interference Claims Against Former Physician Colleagues Survive Summary Judgment

Rebecca M. Lindstrom
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Chicago

In 2012, Dr. Robert Love ("Dr. Love") started working as a professor and Section Chief of Adult Cardiac Surgery for the Medical College of Wisconsin ("MCW") and was granted surgical privileges at a nearby hospital that serves as a primary teaching site for MCW ("Hospital").[1] Shortly after his arrival, conflict arose between Dr. Love and others in the cardiothoracic surgery department.

Many providers were purportedly upset with the changes Dr. Love had implemented, including accepting higher-acuity cardiac patients and performing more complex, cardiac surgical procedures.[2] A surgeon who had practiced at MCW for many years resigned less than a year after Dr. Love's hire. The surgeon noted in subsequent letters to MCW that he felt certain members of the

[1] *Love v. Med. Coll. of Wis.*, et al., No. 2:15-CV-0650, 2020 WL 3489651, at *1 (E.D. Wis. June 26, 2020). MCW is a major academic medical center and large research institution in Wisconsin.
[2] *Id.* at 2.

CONTINUED ON PAGE 2 ▸

CONTINUED FROM PAGE 1

Table of Contents

- Don't Text and Credential: Wisconsin Surgeon's Defamation and Tortious Interference Claims Against Former Physician Colleagues Survive Summary Judgment
- "Baseless Accusations and Innuendo:" Court Rejects Physician's Claims that Hospital's Bias Made Peer Review "Unreasonable" Under HCQIA
- No Shortcuts to Federal-Question Jurisdiction: *Patel v. Hamilton Medical Center, Inc.*
- Peer Review Sharing Agreement and Release Protect California Hospitals from Damages
- Close, but No Cigar: Physician's Testimony That He Failed to Meet the Standard of Care Is Insufficient for Negligent Credentialing Claim in Ohio
- The Devil Is in the Details: Pennsylvania District Court Holds Even When a Credentialing File Is Not Protected by the State's Peer Review Privilege, Information in the File Might Be

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heart surgery program were conducting substandard and unethical surgical practices, and he described several episodes where he felt Dr. Love made poor and unethical decisions in the course of surgery and in the administration of the heart surgery program.[3] Several cardiac anesthesiologists also expressed concern, and a report was compiled regarding surgical mortality outcomes for MCW's four cardiothoracic surgeons in a four-month period.[4] The report reflected 18 total patient deaths, five of which were patients of Dr. Love.[5] The Chief of Cardiothoracic Surgery of MCW stated in a report to the Hospital's Quality Committee that while the patients who died were moderate to high risk, there were concerns related to technical performance and surgical decision-making that appeared to be isolated to Dr. Love and another surgeon.[6]

Dr. Love Placed on Leave of Absence

Less than two years after joining MCW, Dr. Love was removed from MCW's cardiac surgery program. A memorandum prepared by the Chief of the Department of Surgery listed several reasons for Dr. Love's removal, including, among others, "mortality and morbidity which are unacceptable for a high performing program" and "inability to build and lead a multidisciplinary cardiac program manifested by poor interpersonal relationships at multiple levels[.]"[7] Pursuant to a separation agreement between Dr. Love and MCW, Dr. Love was to be placed on a leave of absence but remain employed by MCW until his resignation the following year.[8]

The day Dr. Love was removed from MCW's cardiac surgery program, the Hospital sent an email to various physicians advising that Dr. Love was on a leave of absence and would no longer perform cardiac surgery at the Hospital.[9] Two weeks later, the Hospital sent another email clarifying that while Dr. Love was on a leave of absence, he remained a member of the Hospital's medical staff and that "no hospital action had been taken with respect to his privileges."[10] While Dr. Love remained on a leave of absence, the Hospital did not revoke, limit, or suspend his surgical privileges.[11]

Dr. Love Seeks Subsequent Employment and Alleged Improper Communications Begin

Dr. Love subsequently applied for a position at St. Mary's Hospital ("SMH"). An SMH anesthesiologist who previously worked with Dr. Love at MCW reached out to Defendant Dr. Paul Pagel ("Dr. Pagel"), a MCW employee, via text message to obtain information to be shared with SMH in their consideration of Dr. Love's application.[12]

Dr. Pagel's texts included, among others:

> "Tell them that he lost his privileges at MCW cuz of incompetence and that there r [sic] multiple malpractice cases pending."

> "I'll be happy to tell them that he's a threat to public health."

> "17 dead in 4 months. That's more than John Wayne Gacy and Jeffrey Dahmer combined during any 4 month period of their serial murders."[13]

[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Love*, at 3.
[7] *Id.*
[8] *Id.* at 4.
[9] *Id.* at 3.
[10] *Id.*
[11] *Love*, at 3.
[12] *Id.* at 4.
[13] *Id.*

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At least one of the text messages was shared with SMH anesthesiologists and surgeons, who believed the texts meant that Dr. Love had lost 17 patients in four months, when, in reality, only five of Dr. Love's perioperative patients, and eight patients in total, had died during that time.[14]

SMH did not hire Dr. Love.[15]

Dr. Love also sought employment with the University of Kentucky College of Medicine ("UKCM").[16] Around the same time, Defendant Dr. Larry Lindenbaum ("Dr. Lindenbaum"), a former MCW anesthesiologist, was interviewing for a position at UKCM.[17] When informed by a UKCM critical care specialist that Dr. Love was coming to UKCM, Dr. Lindenbaum shared information about Dr. Love and allegedly encouraged UKCM to probe further.[18] During a deposition, the critical care specialist testified that while he did not remember details of the conversation, his impression was that Dr. Lindenbaum raised issues with Dr. Love's operating ability, operating room credentials, and that "there was something amiss with Dr. Love's privileges."[19] Dr. Lindenbaum, however, testified that he only told the critical care specialist Dr. Love was on administrative leave and could not operate at the Hospital.[20]

Dr. Lindenbaum subsequently met with the Chairman of the Department of Anesthesiology at UKCM, Dr. Edwin Bowe ("Dr. Bowe"), and allegedly made statements about Dr. Love's surgical abilities.[21] At Dr. Lindenbaum's suggestion, Dr. Bowe reached out to Dr. Pagel to obtain additional information. While Dr. Bowe and Dr. Pagel testified that no negative statements were made about Dr. Love during the call, Dr. Bowe subsequently sent an email stating that "Dr. Pagel was extremely informative" and that "[t]he information I acquired from Dr. Pagel was almost as chilling (actually maybe more chilling) than the possibility of having different heart rates in different parts of the body."[22]

UKCM did not hire Dr. Love.[23]

Dr. Love Claims Defamation and Tortious Interference with Contracts

Dr. Love filed suit against Dr. Pagel, Dr. Lindenbaum, and MCW alleging defamation and tortious interference with contracts.[24] Following the close of discovery, Defendants filed motions for summary judgment, which were granted in part and denied in part by a United States District Court in the Eastern District of Wisconsin in June 2020.

Defamation Claims Relating to UKCM Communications

Regarding the defamation claim pertaining to Dr. Pagel's phone conversation with UKCM employee Dr. Bowe, the court granted summary judgment to Dr. Pagel, concluding that there was no evidence of any false statements.[25] The court noted that while a jury could conclude that Dr. Pagel made negative comments to Dr. Bowe based on the subsequent email describing the conversation as "very informative" and "chilling," without any evidence of the actual substance of that conversation, the jury would need to speculate that an untrue statement had been made.[26]

As for Dr. Love's defamation claim against Dr. Lindenbaum, the court found that, through implication, Dr. Lindenbaum gave a false impression to the critical care specialist regarding Dr. Love's privileges and professional standing.[27] The court, however, concluded that a conditional privilege applied and granted summary judgment to Dr. Lindenbaum, concluding that the public's interest in safe and competent surgeons is a "sufficiently important public interest" and that the information was shared to a "private individual" who was "authorized to take action if the defamatory matter was true[.]"[28]

Tortious Interference Claims Relating to UKCM Communications

On the tortious interference claims regarding the UKCM communications, the court held that Drs. Pagel and Lindenbaum were not entitled to summary judgment. Dr. Lindenbaum argued there was no prospective contractual relationship between Dr. Love and UKCM at the time of his communications and that his conduct was privileged under Wis. Stat. § 895.487(2), which provides civil immunity to employers providing references to prospective employers so long as there is no evidence of bad faith.[29] The court disagreed with Dr. Lindenbaum, finding that a jury could conclude that, but for his actions, a

[14] *Id.*
[15] *Id.*
[16] *Love*, at 5.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Love*, at 5.
[22] *Id.* at 6.
[23] *Id.*
[24] Specific to the defamation and tortious interference claims, Dr. Love named MCW under a theory of vicarious liability, claiming Drs. Pagel and Lindenbaum were acting within the scope of their employment with MCW at the time of the alleged conduct. Dr. Love also filed suit against several other defendants, including the Hospital, on various other causes of action. The Hospital was dismissed from the lawsuit in 2018.
[25] *Id.*
[26] *Id.*
[27] *Love*, at 7.
[28] *Id.*
[29] *Id.* at 8.

CONTINUED ON PAGE 4

CONTINUED FROM PAGE 3

prospective employment contract would likely have been made.[30] The court also found that the statutory privilege did not apply because the allegations pertained to Dr. Lindenbaum's recruitment of persons he knew disliked Dr. Love and would dissuade UKCM from hiring him.[31]

Dr. Pagel argued he was entitled to summary judgment on the tortious interference claim because his statements to Dr. Bowe were true (an affirmative defense to the tortious interference claim) and that his conduct was privileged under Wis. Stat. § 895.487(2).[32] The court disagreed, concluding that because neither Dr. Pagel nor Dr. Bowe could recall the substance of their call, Dr. Pagel could not demonstrate his statements were true.[33] The court also found that there was evidence of a history of ill will between Drs. Pagel and Love, which was sufficient to support a finding that Dr. Pagel acted in bad faith.[34]

Claims Relating to SMH Communications

As for Dr. Love's defamation and tortious interference claims against Dr. Pagel regarding his application to SMH, the court denied Dr. Pagel's request for summary judgment. The court concluded that the following two text messages could form the basis of a defamation claim: (1) "Tell them that he lost his privileges at MCW cuz of incompetence;" and (2) "there r [sic] multiple malpractice cases pending."[35] The court concluded the remaining texts were either an expression of opinion ("I'll be happy to tell them he's a threat to public health") or substantially true ("17 dead in 4 months"), and, therefore, not actionable.[36] The court rejected Dr. Pagel's argument that his statements were privileged, concluding that there was evidence that Dr. Pagel gave the reference in bad faith.[37] The court also rejected Dr. Pagel's argument that he was entitled to summary judgment on the tortious interference claim because his text messages were substantially true, concluding that a jury must decide whether the statements were, in fact, substantially true.[38]

The case remains active, and, on October 30, 2020, Dr. Pagel filed a motion to reconsider the court's summary judgment ruling as to Dr. Love's tortious interference claims against Dr. Pagel. As of the date this article was written, the merits of that motion had not been decided.

Key Takeaways

This decision highlights the importance of establishing official lines of communication between credentialing entities and employers, as opposed to informal, quickly drafted, discoverable text or email messages. Through formal communications, the verifying entities and the hiring/credentialing entities can share factual, privileged information to support accurate decision-making and patient safety.

The underlying facts of the case also demonstrate the unique relationship between academic medical centers (and other non-hospital/independent entities) that employ physicians and the hospitals where those physicians have privileges. The entities should ensure formal mechanisms are in place to allow for the sharing of essential information and clear pathways as to how various matters will be handled and by which entity (e.g., employment-related decision versus medical staff action). The decision also provides a helpful refresher on how courts analyze whether a communication or conduct is privileged or justified in relation to defamation and tortious interference claims.

Through formal communications, the verifying entities and the hiring/credentialing entities can share factual, privileged information to support accurate decision-making and patient safety.

[30] *Id.*
[31] *Id.*
[32] *Id.* at 9.
[33] *Love*, at 9.
[34] *Id.*
[35] *Id.* at 9-11.
[36] *Id.* at 9-10.
[37] *Id.* at 11.
[38] *Love*, at 11.

"Baseless Accusations and Innuendo:" Court Rejects Physician's Claims that Hospital's Bias Made Peer Review "Unreasonable" Under HCQIA

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A Pennsylvania appellate court's decision to affirm entry of a judgment notwithstanding the jury's verdict speaks to the broad statutory immunity available under the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. § 11101, et seq., and demonstrates the burden a plaintiff must overcome to rebut the presumption that a peer review process was reasonable.[1]

Hospital Suspends Doctor's Privileges Due to Inappropriate Behavior

Dr. Fred Teichman, a board-certified obstetrician and gynecologist, practiced at Central Penn Women's Health and also enjoyed unrestricted clinical staff privileges at Evangelical Community Hospital ("Hospital") for more than 30 years. The Hospital claimed that while working at the Hospital Dr. Teichman displayed problematic behavior, including viewing pornographic material on his office computer, inappropriately touching a nurse during a case, making lewd comments to a physician's assistant student, failing to communicate during surgery, and prescribing the abortion-inducing medication Cytotec to a pregnant patient and discharging her home from the Hospital when she allegedly did not have access to a car or telephone.[2] In addition to these issues, one of Dr. Teichman's post-partum patients allegedly nearly bled to death, prompting the Hospital to suspend his clinical privileges on June 19, 2012, pursuant to the Hospital's Bylaws.[3]

Hospital Ends Suspension, but Imposes Proctoring Requirement

Following a meeting of the Hospital's Medical Executive Committee ("MEC"), the Hospital reinstated Dr. Teichman's clinical privileges on July 3, 2012, subject to the condition that a proctor oversee his patient care at the Hospital. Dr. Teichman refused to be proctored. Instead, he unsuccessfully pursued administrative remedies, including an appeal to the Hospital's Board of Directors.[4]

Doctor Sues Hospital and Claims Hospital Is Too Biased to Perform Reasonable Peer Review

After his attempts to obtain administrative relief failed, Dr. Teichman and his medical practice, Central Penn Women's Health (collectively, "Dr. Teichman"), filed a complaint against the Hospital and various Hospital executives (collectively, the "Hospital").[5] The crux of the complaint was that the Hospital allegedly "engaged in a campaign based on baseless accusation and innuendo" to remove Dr. Teichman from the Hospital's staff, and "destroy his professional practice" while violating provisions of HCQIA and the Hospital's Bylaws.[6] In response, the Hospital argued that because its peer review activities complied with HCQIA, it was entitled to statutory immunity.

The jury delivered a split verdict. The jury determined that HCQIA's statutory immunity did not apply to summary suspension of Dr. Teichman's privileges and membership on June 19, 2012, but did apply to the Hospital's proctoring requirement imposed on July 3, 2012, prompting the Hospital to move for a judgment notwithstanding the jury's verdict ("JNOV"). The lower court subsequently entered the JNOV in favor of the Hospital, finding that the Hospital was entitled to statutory immunity under HCQIA for both the initial suspension of Dr. Teichman's privileges and the reinstatement of his privileges with the proctoring condition.[7]

On appeal, the court addressed several key issues impacting peer review activity, including the bounds of reasonableness under HCQIA and the role of alleged bias in a HCQIA reasonableness analysis.

An Objective Standard of Reasonableness Under HCQIA

The court considered the Hospital's peer review conduct and determined that it fell within HCQIA's expansive reasonableness standard. The reasonableness requirements of HCQIA "create an objective standard."[8] The inquiry is "whether a person presented with the same information that was placed before the peer review body would reasonably have concluded that their actions would restrict incompetent behavior or would protect

[1] *Teichman v. Evangelical Cmty. Hosp.*, No. 1706 MDA 2018, 2020 WL 3469186 (Pa. Super. Ct. June 25, 2020).
[2] *Id.* at *1 n. 1.
[3] *Id.* at *1.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.* at 4.
[8] *Id.*

CONTINUED ON PAGE 6

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patients," based on the "totality of the circumstances."[9] Under HCQIA, peer review activity is presumed reasonable and therefore deserving of immunity. The plaintiff bears the burden of rebutting this presumption by a preponderance of the evidence.[10]

The Hospital primarily based its June 19, 2012, decision to suspend Dr. Teichman's privileges on the risk of harm to patients and others. In summary, the suspension was based on:

- His poor decision-making, as evidenced by the post-partum bleeding issue and Cytotec incident.
- His failure to communicate with Hospital physicians and other staff.
- His inappropriate comments toward and touching of Hospital employees in a sexual manner.[11]

In addition to receiving information directly from Hospital physicians who became involved in the patient care incidents, the MEC obtained a third-party evaluation of Dr. Teichman's care and conduct and gathered statements from his colleagues about his inappropriate behavior and threat to patient safety.[12] Accordingly, the lower court did not abuse its discretion in concluding that "no two reasonable minds could disagree" that the Hospital made reasonable efforts to obtain information before suspending Dr. Teichman's privileges on June 19, 2012.[13] As such, the court determined the Hospital was entitled to statutory immunity for their actions against Dr. Teichman, contrary to the jury's finding.

Pennsylvania Court Says Bias Has No Relevance to a HCQIA Reasonableness Analysis

The court also addressed whether the lower court's preclusion of evidence of the Hospital's alleged "bias" prevented Dr. Teichman from undermining the credibility of witnesses and exposing the Hospital's alleged lack of reasonable efforts to obtain the relevant facts.[14] Under HCQIA, however, a party's motivation is "irrelevant to the objective test of whether the professional review action was reasonable."[15] Accordingly, plaintiffs in a HCQIA action "are not permitted to introduce evidence of bad faith of the participants in the peer review process."[16] As evidence of a party's bias is inadmissible under HCQIA without exception — not even for impeachment purposes as Dr. Teichman inaccurately argued — the lower court did not abuse its discretion in precluding witness testimony about the Hospital's alleged bias or animus towards Dr. Teichman.

HCQIA Reasonableness Analysis Does Not Require Consideration of a Hospital's Bylaws

The court also rejected Dr. Teichman's argument that the lower court improperly excluded references to the Hospital's Bylaws, even though such Bylaws may have provided context for understanding Dr. Teichman's conduct. The court noted that the parties agreed prior to trial that the Bylaws were not admissible "to show compliance with or violation of" HCQIA and, as such, Dr. Teichman was deemed to have waived the issue on appeal.[17]

Importance of Considering the Totality of the Circumstances

The court dismissed Dr. Tecihman's challenge to the lower court's evidentiary ruling that allowed for the admission of evidence relating to Dr. Teichman's viewing of pornography on his office computer in 2006, six years prior to the initial suspension. The evidence Dr. Teichman sought to exclude had been included in the binder of information compiled by the Hospital and submitted to the MEC for its consideration, and therefore it was "clearly relevant" to the Hospital's "reasonable beliefs that their actions were warranted."[18] Moreover, because the pornography viewing was considered as "part of the totality" of Dr. Teichman's misconduct, "its probative value outweighed any prejudice."[19] The lower court therefore did not abuse its discretion in allowing the admission of such evidence.

Take-Away

As courts are hesitant to disrupt the will of a jury, the court's decision here to affirm entry of a judgment notwithstanding the jury's verdict signals the steep burden a plaintiff must overcome to establish a peer review committee's lack of reasonableness under HCQIA. While this case cannot be cited as precedent, it serves as a reminder that hospitals and health care entities may argue that perceived or alleged bias against a sanctioned physician is irrelevant to the objective standard governing a reasonableness analysis. Removing bias from the equation provides even more protection for peer review activity and should be a top-of-mind defense argument for health care providers faced with accusations that its peer review process was improperly motivated.

Hospitals and health care entities may argue that perceived or alleged bias against a sanctioned physician is irrelevant to the objective standard governing a reasonableness analysis.

[9] *Id.* at 6.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 7.
[13] *Id.*
[14] *Id.* at 8.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 9.
[19] *Id.*

No Shortcuts to Federal-Question Jurisdiction: *Patel v. Hamilton Medical Center, Inc.*

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In July 2020, the 11th Circuit Court of Appeals issued a decision confirming that physician-litigants cannot establish federal subject matter jurisdiction by seeking a declaratory judgment against a health care entity under the Health Care Quality Improvement Act of 1986 ("HCQIA").[1] HCQIA does not create a private right of action for physicians, but rather provides an affirmative defense from damages for health care entities that meet HCQIA requirements for immunities.[2]

Dr. Hasmukh Patel ("Dr. Patel") is a gastroenterologist in Dalton, Georgia, who held privileges at Hamilton Medical Center ("Hospital").[3] Dr. Patel's privileges at the Hospital were suspended in November 2014, for allegedly failing to provide call coverage over Thanksgiving, in violation of the Hospital's policies.[4] Two Hospital peer review committees recommended Dr. Patel's privileges be suspended for more than 30 days.[5] Dr. Patel requested a hearing and the hearing panel upheld the suspension. Dr. Patel appealed the hearing panel's decision to a review panel, which reduced his suspension to 29 days, but otherwise upheld the hearing panel's finding that the suspension was warranted.[6]

Thereafter, even though HCQIA does not create a private right of action for physicians, Dr. Patel sued the Hospital in federal district court, seeking damages under state law causes of action and for a declaratory judgment that the Hospital was not immune from paying him damages under HCQIA.[7] Dr. Patel alleged that the district court had federal-question jurisdiction over his declaratory judgment request under HCQIA and that the district court could exercise supplemental jurisdiction over his state law claims.[8] The Hospital sought summary judgment on the basis of HCQIA immunity, which the district court granted, dismissing all of Dr. Patel's claims.[9] Dr. Patel appealed the district court's ruling to the 11th Circuit Court of Appeals, but only as to his request for declaratory relief.[10]

The 11th Circuit ultimately vacated the summary judgment in favor of the Hospital and remanded the case to the district court with instructions to dismiss Dr. Patel's complaint for lack of federal subject matter jurisdiction.[11] In its opinion, the 11th Circuit held that the federal Declaratory Judgment Act[12] does not enlarge the jurisdiction of the federal court system.[13] Rather, federal question jurisdiction only exists over a declaratory judgment action if a plaintiff's complaint alleges facts demonstrating that the defendant could file a coercive action arising under federal law.[14] In this case the federal statute in question was HCQIA. Because HCQIA does not create a private right of action, but rather provides an affirmative defense for health care entities from damages, the Hospital could not file a coercive action under the statute.[15] As such, the 11th Circuit held that Dr. Patel's suit lacked federal-question subject matter jurisdiction and could not be brought in the federal courts.

This case confirms prior case law that a physician-litigant cannot attempt to create a backdoor federal cause of action under HCQIA by requesting declaratory judgment in federal court. This ruling by the 11th Circuit confirms that a peer review litigant cannot trigger federal court jurisdiction without a substantive underlying federal law claim, such as an antitrust action under the Sherman Antitrust Act or a discrimination claim under 42 USC Section 11111. Without an appropriate federal claim, a peer review litigant's proper venue is state court.

> *This ruling confirms that a peer review litigant cannot trigger federal court jurisdiction without a substantive underlying federal law claim.*

[1] 42 USC Sec. 11101 et seq.
[2] *Id.*
[3] *Patel v. Hamilton Medical Center, Inc.*, 967 F.3d 1190, 1193 (11th Cir. 2020).
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Patel*, 967 F.3d, at 1193.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 1195.
[12] 28 U.S.C. Section 2201(a).
[13] *Patel,* 967 F.3d, at 1194 citing *Household Bank v. JFS Grp.*, 320 F.3d 1249, 1253 (11th Cir. 2003).
[14] *Id.* citing *Household Bank*, 320 F.3d at 1259.
[15] *Id.*

Peer Review Sharing Agreement and Release Protect California Hospitals from Damages

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The California Court of Appeal affirmed judgments in favor of two hospitals seeking to protect the process of sharing information regarding a disruptive physician and the related peer review proceedings. In these companion cases (one published and one not published), the court supported the sharing of peer review information.

The Court of Appeal determined that a physician's damages action against the hospital for the medical staff's credentialing and peer review action cannot survive because California law has established that the medical staff is a separate legal entity from the hospital. As such, a California hospital will not be held liable for a medical staff action until its governing body has adopted the medical staff's decision.

Dr. Bichai's Medical Staff Status

Dr. William Bichai is a specialist in nephrology and internal medicine who held privileges at both Mercy Hospital ("Mercy") and San Joaquin Community Hospital ("San Joaquin"). In 2012, Dr. William Bichai surrendered his medical staff privileges at Mercy. In 2013, he took a leave of absence from San Joaquin. He did not request reinstatement from the leave of absence, which resulted in the expiration of his privileges and membership at San Joaquin.

In April 2016, Dr. Bichai submitted a reapplication for medical staff membership at Mercy and was required to complete a fitness for duty evaluation before his application would be approved. Dr. Bichai completed the University of California San Diego Physician Assessment Clinical Education ("PACE") Program. In January 2017, the PACE Program issued its findings that he was fit for duty without accommodation. Dr. Bichai interviewed with the Mercy Medical Executive Committee ("MEC") and was granted privileges.[1]

Later that year, even though Dr. Bichai did not hold privileges at San Joaquin, Dr. Bichai was in a verbal altercation with doctors at San Joaquin regarding the treatment of a patient he had previously cared for at Mercy. This patient had been taken by ambulance to San Joaquin and while under evaluation in the emergency room, Dr. Bichai contacted the treating physician at San Joaquin and vigorously voiced his opinions on how the patient should be managed. This conversation was later characterized by San Joaquin as Dr. Bichai interfering in the patient's care.

> *In filing his lawsuit, Dr. Bichai contended his call was not interference, but instead argued he was advocating for the patient's care.*

When Dr. Bichai came up for reappointment, Mercy requested information from San Joaquin regarding the incident. The two hospitals shared information after establishing an Information Sharing Agreement and receiving an Authorization and Release of Liability signed by Dr. Bichai. After receiving information from San Joaquin about the verbal altercation, Mercy's MEC recommended Dr. Bichai's reapplication for privileges be denied. The Mercy MEC's recommendation was based on its own conclusions, but the MEC noted Dr. Bichai's reported conduct at San Joaquin reflected

[1] *See Bichai v. Health* (Cal. Ct. App., Feb. 25, 2021, No. F078658) 2021 WL 948647, at 1 – 2.

CONTINUED ON PAGE 9

CONTINUED FROM PAGE 8

faulty judgment and an inability to follow rules, regulations, policies, and medical ethics. The Mercy Chief of Staff notified Dr. Bichai of the MEC's recommendation and his right to request a hearing before a judicial review committee of the medical staff. Dr. Bichai requested the administrative hearing and then sued both Mercy and San Joaquin in 2018.[2]

The Lawsuit

Dr. Bichai's lawsuit against San Joaquin alleged intentional and negligent interference with prospective economic relations, unfair competition, conspiracy, and retaliation in violation of California Business and Professions Code sections 2056 and 510, and California Health and Safety Code section 1278.5. The causes of action asserted against Mercy alleged (1) unfair competition in violation of California Business and Professions Code § 17200, and (2) a conspiracy with San Joaquin to retaliate against Dr. Bichai in violation of § 1278.5. Dr. Bichai alleged both hospitals acted together as part of a scheme to deny Dr. Bichai reappointment to Mercy's medical staff. He argued that the alleged scheme was perpetrated by communications from San Joaquin to Mercy, falsely accusing Dr. Bichai of interfering with the medical care provided by another physician at San Joaquin.[3]

Mercy asserted that Dr. Bichai failed to exhaust his administrative remedies and did not state a valid claim because his complaint rested on the conduct of Mercy's medical staff, not the hospital. The trial court rejected Mercy's failure to exhaust administrative remedies argument, but ruled that Mercy had not taken any adverse action against Dr. Bichai because the medical staff hearing and appeal process had not been concluded and Mercy's governing body had not taken a final action. Dr. Bichai appealed the finding in Mercy's favor.

As to the action he filed against San Joaquin, Dr. Bichai alleged the sharing of negative peer review information was retaliation for advocating for medically appropriate health care. Dr. Bichai contended that San Joaquin incorrectly told Mercy that he had interfered with another physician's care of that patient.[4] In its defense, San Joaquin challenged the complaint through demurrer and an anti-SLAPP motion.

California's anti-SLAPP statute exists to provide for early dismissal of meritless lawsuits filed against people for the exercise of First Amendment rights. The acronym "SLAPP" stands for "Strategic Lawsuit Against Public Participation." In 2006, the California Supreme Court extended anti-SLAPP protections to protect from lawsuits brought by a hospital staff physician and arising out of a disciplinary recommendation by the hospital's peer review committee.[5] The anti-SLAPP protection is used as a basis to defeat actions brought against medical staffs who have acted in accordance with their bylaws and Business and Professions Code §809, which mirrors the Health Care Quality Improvement Act. If a defendant hospital and medical staff can show a cause of action — or even an entire complaint — arises from "protected activity" which includes peer review activity, the plaintiff practitioner is immediately required to provide admissible evidence sufficient to support their claims.[6] If the practitioner is unable to produce the evidence, the claim will be dismissed. The entire process of physician oversight conducted by the hospital and medical staff — from an initial application for medical staff membership and privileges, to an application for additional privileges, to reappointment, to internal investigations or outside review of cases, to active disciplinary procedures and its quasi-judicial proceedings, such as medical staff hearings — are "official proceeding[s] authorized by law" under the California Code of Civil Procedure § 425.16(e)(2).[7]

San Joaquin's anti-SLAPP motion argued that its communication with Mercy was "protected speech made in connection with (1) an official proceeding authorized by law, (2) an issue of public interest, or (3) both."[8] San Joaquin also argued that Dr. Bichai "could not establish a reasonable probability he would prevail on any of his claims against [San Joaquin] because he signed a document authorizing peer review communications with Mercy and waiving his right to sue [San Joaquin] on any ground related to such communications."[9]

In 2018, the trial court held a hearing on San Joaquin's anti-SLAPP motion, Mercy Hospital's demurrer, and other matters related to the case. The court made a tentative ruling to "grant the anti-SLAPP motion, strike the causes of action asserted against [San Joaquin], sustain Mercy Hospital's demurrer[10] on the ground Dr. Bichai failed to state a cause of action, and grant leave to amend the claims against Mercy Hospital by October 15, 2018."[11] Again, Dr. Bichai appealed.

The Appeals

In Mercy's case, the Court of Appeal affirmed in favor of Mercy, holding that Dr. Bichai's claims against Mercy were not ripe. A lawsuit is ripe when a cause of action has accrued, and a cause of action accrues when there is wrongdoing, causation, and harm. The court determined there was no wrongdoing by Mercy because it had not made a final

[2] *Id.* at 3.
[3] *Id.*
[4] *See Bichai v. Health*, No. F078599 (Cal. Ct. App. Feb. 25, 2021), at 6.
[5] *Kibler v. Northern Inyo County Hospital Dist*. (2006) 39 Cal.4th 192, 200 [46 Cal.Rptr.3d 41, 46, 138 P.3d 193, 197], as modified (July 20, 2006).
[6] *See* California Code of Civil Procedure § 425.16(b)(1).
[7] *See Kibler,* 39 Cal. 4th, at 199.
[8] *See* California Code of Civil Procedure § 425.16(e)(2), (4).
[9] *See Bichai*, No. F078599, at 6; *See also* California Code of Civil Procedure § 425.16 (b)(1).
[10] A demurrer is a legal response to a complaint which alleges that even if everything in the complaint is true, it is not sufficient to rise to a legal right of action.
[11] *See Bichai*, No. F078599, at 7.

CONTINUED ON PAGE 10

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decision on the MEC's recommendation to deny Dr. Bichai's reapplication for privileges. Under California law, the medical staff is a separate legal entity from the hospital. Accordingly, the medical staff's conduct is not imputed to the hospital. Mercy asserted "a medical staff makes recommendations regarding staff privileges and disciplinary action and a hospital's board makes the final decision. Here, Mercy Hospital contends it has not made a final decision and, therefore, cannot be subject to liability yet."[12]

The Court concluded that at the time of Dr. Bichai's appeal, any claims Dr. Bichai might have against Mercy had not accrued and thus were not ripe. The Court rejected Dr. Bichai's contention that a prior appellate case, *Armin v. Riverside Community Hospital* (2016),[13] had decided that wrongdoing by a medical staff is also wrongdoing by the hospital. Instead, the court stated that *Armin* did not address the argument that a hospital and its medical staff are two separate legal entities and concluded the *Armin* decision "cannot be read as establishing the principle that wrongdoing by a medical staff is wrongdoing by a hospital."[14]

The Court of Appeal also heard argument from Dr. Bichai on the judgment entered in favor of San Joaquin as a result of its successful anti-SLAPP motion. The Court noted that for purposes of anti-SLAPP protection, the peer review process includes the evaluation of physicians applying for staff privileges, the establishment of standards and procedures for patient care, assessment of the performance of staff physicians, and review of other matters critical to the functioning of a hospital.[15] This process is "essential to preserving the highest standards of medical practice"[16] and is why the statutory scheme in California requires hospitals and medical staffs to include peer review procedures within their bylaws. While this decision remains unpublished, the Court of Appeal affirmed the lower court's judgment, dismissing Dr. Bichai's complaint, and noting that Dr. Bichai's claims arose from statements made in connection with a hospital peer review proceeding, a protected activity.

The Lesson

These two Court of Appeal decisions serve to highlight the protections afforded to information sharing and the importance of information sharing agreements between the medical staffs, which include an authorization and release from the subject practitioner. For those California hospitals that are part of a multihospital system, the entities should establish and implement processes to share designated peer review information between their facilities. The process should include an authorization and release that fully informs the practitioner that information will be used in peer review, along with a release of the right to sue the hospitals and medical staffs for sharing such information. This process of sharing information promotes consistency and, in turn, quality and patient safety, while maintaining confidentiality and operating under the protections of the state peer review privilege.

[12] *See Bichai*, No. F078658, at 3.
[13] *Armin v. Riverside Community Hospital* (2016) 5 Cal.App.5th 810, 815 [210 Cal.Rptr.3d 388, 391, 5 Cal.App.5th 810, 815], as modified (Dec. 15, 2016).
[14] *Bichai,* No. F078658, at 7.
[15] *See Kibler v. N. Inyo Cty. Local Hosp. Dist.* (2006) 39 Cal.4th 192, 200 [46 Cal.Rptr.3d 41, 46, 138 P.3d 193, 197], as modified (July 20, 2006).
[16] *See* California Business & Professions Code § 809(a)(3).

These two Court of Appeal decisions serve to highlight the protections afforded to information sharing and the importance of information sharing agreements between the medical staffs

Close, but No Cigar: Physician's Testimony That He Failed to Meet the Standard of Care Is Insufficient for Negligent Credentialing Claim in Ohio

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Appellant Michael Walling ("Mr. Walling") brought a medical malpractice claim against Dr. Ransford Brenya, Dr. Osama Al-Baweb, and the Toledo Clinic, Inc. ("Clinic") in his capacity as Administrator for the estate of Raeann Walling (the "Patient").[1] Mr. Walling alleged that the Patient died as a result of Dr. Brenya's repeated and incompetent catheter ablation procedures and Dr. Brenya's negligent failure to recognize and address the Patient's pulmonary vein stenosis.[2]

Mr. Walling later amended the complaint to add a negligent credentialing claim.[3] The Clinic requested and the trial court agreed to not review Mr. Walling's negligent credentialing claim until after the outcome of the medical malpractice claim.[4]

During a jury trial regarding the malpractice claim, Dr. Brenya admitted that:

- He did not remember reviewing an x-ray showing a potential pulmonary venous obstruction.
- His failure to review the records sent to him did not meet the standard of care.
- If he had seen the records, the reasonable standard of care would have been to order a CT scan, which he did not do.
- Because he did not order the CT scan, he did not discover or treat the pulmonary vein stenosis.[5]

Before the trial concluded, however, Mr. Walling entered into a settlement agreement with the doctors and the Clinic. In the agreement, Mr. Walling acknowledged that the doctors and Clinic "denied, and continue to deny, any wrongdoing or liability" and the doctors and Clinic acknowledged that Mr. Walling did not admit that the released parties were without fault.[6] The matter was then considered resolved. As a result, the controversy was not given to the jury for its determination of whether the defendants were at fault, and the trial court dismissed the malpractice claims.

The Clinic then filed a motion for summary judgment on the negligent credentialing claim.[7] The Clinic argued that a negligent credentialing claim requires a prior determination that the provider committed medical malpractice, i.e., a jury verdict. The Clinic argued that this requirement was not present for two reasons. First, the parties settled before the jury reached a decision. Second, the settlement agreement explicitly stated that the parties did not agree that medical malpractice had occurred.[8] In response, Mr. Walling argued that Dr. Brenya's testimony met the essential elements of the medical malpractice claim, and as a result, Mr. Walling should be allowed to pursue his negligent credentialing claim against the Clinic.[9] The trial court disagreed and granted the Clinic's motion for summary judgment. The court found that Dr. Brenya's testimony on cross-examination was neither a jury's determination nor an agreement that Mr. Walling's injuries were caused by Dr. Brenya's negligence.[10]

On appeal, the Court of Appeals of Ohio considered whether Mr. Walling could bring a negligent credentialing claim against the Clinic when (1) the doctor conceded the essential elements of a medical malpractice claim on the record and under oath, but Mr. Walling settled the claim for medical malpractice prior to the jury verdict, and (2) the settlement agreement did not state that Mr. Walling's injury was caused by the doctor's negligence.[11] The court found that Dr. Brenya's testimony in the trial was not a determination or an agreement. In its written opinion, the court explained that even if Mr. Walling had not voluntarily entered into the settlement agreement, Dr. Breya's testimony would merely have been evidence the jury would have considered in determining whether Dr. Brenya was negligent and that his negligence caused Mr. Walling's injury.[12] There was no guarantee that the jury would have decided that Dr. Brenya was at fault, even after considering Dr. Brenya's testimony. As a result, the court found that Dr. Brenya's testimony was not a substitute for the jury's

[1] *Walling v. Brenya*, No. L-19-1264, 2021 WL 72375, at 2 (Ohio Ct. App. Jan. 8, 2021).
[2] *Id.*
[3] *Id.* at 3.
[4] *Id.*
[5] *Id.* at 4.
[6] *Walling*, 2021 WL 72375, at 5.
[7] *Id.* at 4.
[8] *Id.* at 6.
[9] *Id.*
[10] *Id.* at 7.
[11] *Id.* at 10.
[12] *Walling*, 2021 WL 72375, at 17.

CONTINUED ON PAGE 12 ▸

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decision. Similarly, the court found that Dr. Brenya's testimony was not an agreement because the issue submitted to the jury for its determination was whether Dr. Brenya committed malpractice.[13]

> *Notably, in the settlement agreement, Mr. Walling acknowledged that the doctors and the Clinic "denied, and continue to deny, any wrongdoing or liability."[14]*

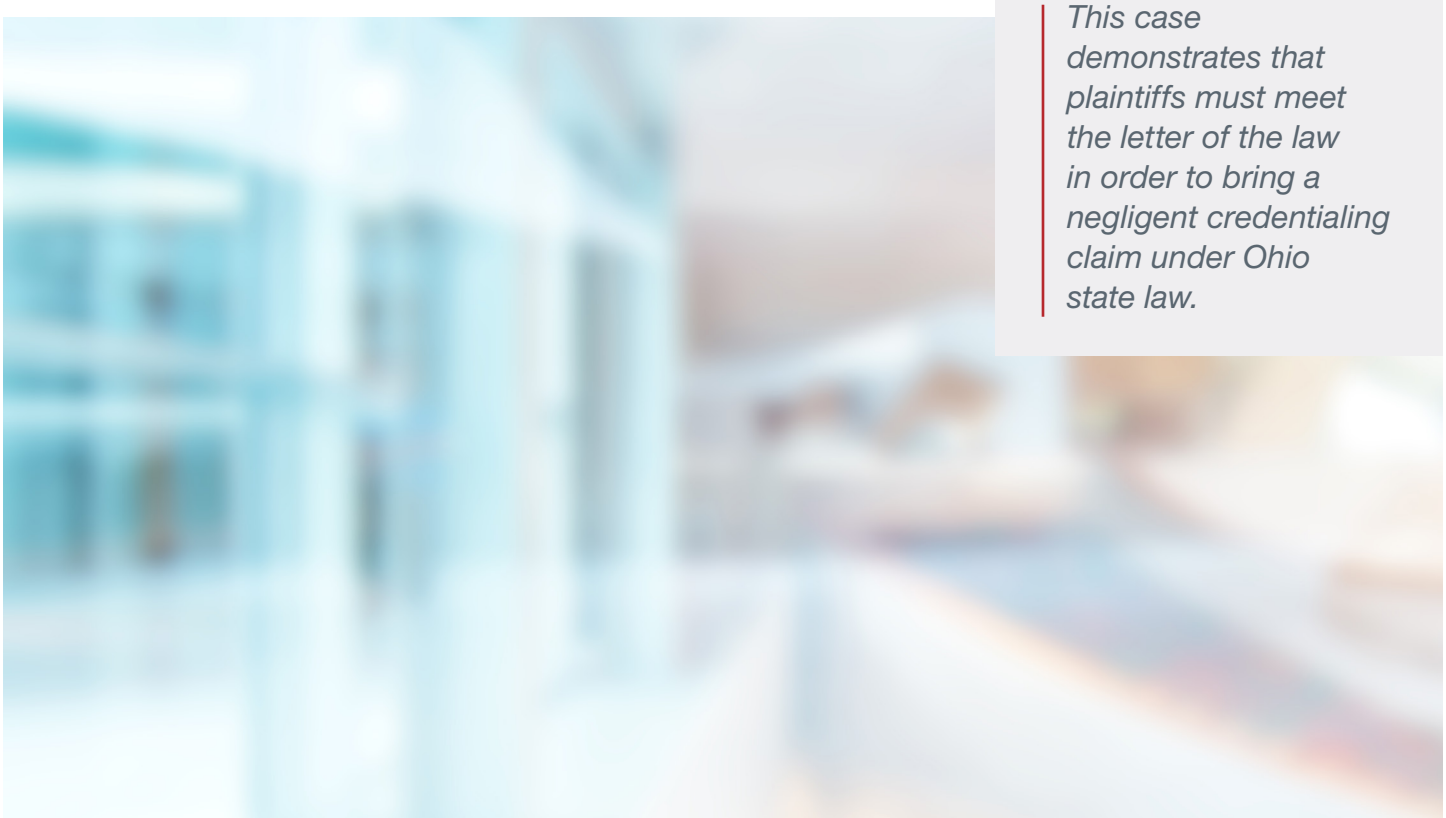
The court was similarly unconvinced by Mr. Walling's argument that he was permitted to bring his negligent credentialing claim under O.R.C. 2307.28, which states that a settlement "does not discharge any of the other tortfeasors from liability for the injury, loss, or wrongful death unless its terms otherwise provide."[15] The court explained that Mr. Walling could not bring his claim because he did not obtain a prior determination that Dr. Brenya's negligence proximately caused the injuries, not because he entered into a settlement with the doctors and the Clinic.[16]

The court also rejected Mr. Walling's final argument that the facts and testimony provided in discovery and at trial presented a likelihood of success on the merits. Again, the court explained that the law requires a prior determination or agreement of medical malpractice in order to bring a negligent credentialing claim. A showing that Mr. Walling would have obtained a determination of medical malpractice had he not, of his own choosing, entered into a settlement agreement with the physician before the jury returned a verdict did not meet the law's requirement.[17] As a result, on January 8, 2021, the Court of Appeals affirmed the trial court's decision granting summary judgment in favor of the Clinic on Mr. Walling's claim for negligent credentialing.[18]

This case demonstrates that plaintiffs must meet the letter of the law in order to bring a negligent credentialing claim under Ohio state law — nothing but an adjudication or agreement that the patient's injuries were caused by the physician's medical malpractice will do. As a result, providers should keep this high bar in mind as a tool for quickly disposing of a negligent credentialing claim.

[13] *Id.* at 17.
[14] *Id.*
[15] Ohio Rev. Code Ann. § 2307.28 (West).
[16] *Walling,* 2021 WL72375, at 18.
[17] *Id.* at 9.
[18] *Id.* at 20.

> *This case demonstrates that plaintiffs must meet the letter of the law in order to bring a negligent credentialing claim under Ohio state law.*



The Devil Is in the Details: Pennsylvania District Court Holds Even When a Credentialing File Is Not Protected by the State's Peer Review Privilege, Information in the File Might Be

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A Pennsylvania court determined that National Practitioner Data Bank ("NPDB") information in a credentialing file was not subject to disclosure, even though credentialing files are not protected by the state peer review statute.[1]

Plaintiff Ralph Morrissey ("Mr. Morrissey"), in his capacity as Executor of the Estate of Kathleen Morrissey, brought nine Pennsylvania state law claims against defendant GCMC Geisinger Community Medical Center ("Hospital") and others.[2] During discovery, Mr. Morrissey requested documents from the Hospital. The Hospital withheld some documents because it claimed they were privileged and protected from disclosure by the Pennsylvania Peer Review Protection Act ("PRPA").[3] The parties confirmed to the court that some of the documents withheld under the PRPA contained NPDB information held in a physician's credentialing file.[4] After hearing the parties' arguments and upon agreement by counsel, the court agreed to conduct an in camera review of the documents in dispute.[5]

The Pennsylvania Supreme Court has explained that (1) reviewing the quality and efficiency of a physician's services is different than (2) reviewing a physician's credentials for purposes of membership on a hospital's medical staff.[6] Category (1) is protected under the PRPA and Category (2) is not. Individuals reviewing the professional qualifications or activities of its medical staff or applicants are not "review committees" entitled to claim the PRPA's privilege.[7]

> *Stated simply, credential committee files are not protected by the state peer review statute.*

Despite the Pennsylvania Supreme Court's holding, Pennsylvania courts have held that disclosing information within NPDB reports is prohibited by the PRPA and federal statute.[8]

Mr. Morrissey cited to a recent Pennsylvania case, *Leadbitter v. Keystone Anesthesia Consultants, Ltd.*, 229 A.3d 292 (Pa. Super. Ct. 2020), to support his argument that NPDB reporting information contained in a credentialing file is not privileged under the PRPA. The case, however, was not persuasive because it is being appealed to the Pennsylvania Supreme Court.[9] We discussed the *Leadbitter* case in a prior volume of the MedStaff Newsletter. The Pennsylvania Supreme Court has stated it seeks to address on appeal whether the lower court in *Leadbitter* erred in ordering a hospital to produce peer review documents solely because the peer review documents were maintained in a credentialing file.[10]

This court ended its analysis by explaining that the only information at issue in the credentialing file was NPDB information and that NPDB information is protected by the PRPA.[11] Further, the court stated that case law supports the conclusion that although the PRPA's protection does not extend to the credential committee's materials, NPDB information contained within a credentialing file is protected by the PRPA.[12]

This case demonstrates that while Pennsylvania case law does not extend peer review protection to credentialing files, Pennsylvania courts are willing to extend that protection to NPDB information within credentialing files.

> *This court ended its analysis by explaining that the only information at issue in the credentialing file was NPDB information and that NPDB information is protected by the PRPA.*

[1] *Id.* at 3.
[2] *Morrissey v. GCMC Geisinger Cmty. Med. Ctr., et al.*, No. 3:19-CV-894, 2020 WL 6877183, at *1 (M.D. PA Nov. 23, 2020).
[3] *Id.* at 1.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 2.
[10] *Id.*
[11] *Id.*
[12] *Id.*

About Polsinelli's Medical Staff Practice

Polsinelli's Health Care attorneys guide hospitals and health systems through the medical staff governance process including credentialing, peer review, bylaws and medical staff and governing body relationships. From practitioner credentialing to hearings and appeals, and defense of litigation, our attorneys are versed in the intricacies involved in the life cycle of hospital-medical staff relationships.

Polsinelli has handled almost every type of matter involving medical staff and mid-level practitioners and has advised client on compliance with accreditation standards, hospital licensing laws, peer review laws, and federal laws governing the conduct of medical staff fair hearings. Specifically, we have extensive experience counseling hospitals on medical staff bylaws and related rules, regulations, policies and procedures, and codes of conduct. We have been active helping clients in implementing processes for effectively managing disruptive and inappropriate behaviors and in developing processes for empowering the well-being committee and managing impaired and aging providers.

Our team has experience advising through the credentialing process, advising peer review committees, representing medical executive committees in hearings and appeals, and interfacing with government entities. We also have defended hospitals and surgical centers in lawsuits filed by affected practitioners, during and after peer review.

Events and Webinars

Medical Staff Leaders and Their Legal Advisors: Managing Today's Challenges

Polsinelli's four-part weekly conference for medical staff leaders, in-house counsel, Chief Medical Officers, and the Medical Staff and Quality Offices. Click here to view more information about this webinar series, including access to past programs.

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Speakers: Sherri Alexander, Erin Muellenberg and Ann McCullough

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Speakers: Blake Reeves, Lori Oliver, Rebecca Lindstrom, Jim Fredman and Jessica Andrade

March 19 - Part 3:
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Speakers: Alexis Angell and John Synowicki

March 26 - Part 4:
Lessons Learned During the Pandemic and Other Disasters
Speakers: Sherri Alexander, Erin Muellenberg and Ann McCullough

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