



Credentialing & Peer Review

LEGAL INSIDER

A graduated discipline policy can boost procedural compliance

Busy physicians often focus on accomplishing particular goals, and, as a result, they may not always follow their organization's specific procedures to reach those goals. Yet, when physicians fail to adhere to established processes, it can create inefficiency, engender interpersonal squabbles, lower employee morale, and, ultimately, adversely affect patient care.

For their part, medical staff leaders face a challenging task—to ensure that physicians comply with the hospital and medical staff's rules and regulations. To be successful, leaders must communicate effectively, take a proportional approach to discipline, and promote physician growth and well-being.

Understand the risks of noncompliance

A hospital can handle a physician who poses a danger due to subpar clinical skills or judgment through the

peer review process. It can try to improve the physician's performance through mentoring, additional training, or other remedial methods. Hospitals tend to handle a disruptive physician through the hearing-and-discipline process, generally after failed attempts to correct the problematic behavior through less-drastic means, says **Stephen Auer, Esq.**, of the Pasadena, CA, law firm of Christensen and Auer.

But dealing with a physician's less-severe behavioral problems—such as failing to complete records in a timely manner, refusing to adhere to operating room (OR) scheduling procedures, or disobeying hospital rules in other ways—requires the hospi-

“Personal persuasion by authority figures such as department chairs can aid tremendously in bringing recalcitrant physicians into line.”

—David C. Harlow

tal to walk a fine line. Hospitals may be reluctant to take serious steps to force the physician to change behavior, fearing that the action may be reportable to the National Practitioner Data Bank (NPDB) or may trigger the physician's due process rights. Many hospitals are unwilling to risk the consequences of these outcomes for the sake of procedures that do not directly affect patient care.

However, if the hospital is too lenient, nonphysician staff morale may suffer. Or, when the organization finally subjects a physician to discipline, the physician may feel singled out and believe the response is unfair. Such scenarios may escalate into a reportable situation, and the physician may be more likely to request a hearing. Ultimately, and most importantly, continual violations of procedures that promote the efficient and effective operation of the facility will inevitably affect patient care.

The hospital must create an environment in which the hospital staff can work effectively and provide the



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Questions? Comments? Ideas?

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Discipline policy

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best possible patient care, but that also supports the physicians' need for flexibility and encourages retention of the best physicians. Doing so requires "a combination of skilled, empowered medical staff leaders with the assistance and support of the administrative leadership," says **Timothy B. Caprez**, an attorney at Whyte Hirschboeck Dudek in Milwaukee.

Effectively communicate your policy

Hospitals should have clear policies and procedures in place and must communicate them to the medical staff upon appointment and reappointment, says **David C. Harlow**, an attorney at the Harlow Group, a Boston law firm specializing in healthcare. These policies should

articulate that the hospital does not tolerate certain behaviors and should note the proscribed behaviors with as much specificity as possible.

Physician buy-in regarding the value and effectiveness of these rules and procedures is essential. In an ideal scenario, the medical staff leaders and department heads will have had a part in developing the rules, regulations, policies, and procedures and will take the lead in educating the physicians on their service about the need for compliance, Harlow says.

Caprez adds that an effective system will include a code of conduct that:

- Is in writing
- Applies to everyone, including nonphysician employees and governing board members
- Is promulgated and endorsed hospitalwide
- Establishes consequences for violations

Establish a proportional response mechanism

The most effectively managed hospitals develop a thoughtful system of graduated, meaningful discipline to respond to physician violations of the code of conduct or noncompliance with administrative procedures. A disciplinary structure that gains the support of the medical staff must be reasonably designed to accomplish the stated intention and should not lead to overly harsh consequences for an occasional lapse.

Harlow suggests that a demerit system can work well for administrative violations. These can be formal or informal, hospitalwide or departmentwide.

A physician will earn demerits for every rules violation, such as a failure to abide by OR scheduling procedures. Once the physician earns a certain number of demerits, he or she is subject to discipline that relates to the violation. An organization may temporarily preclude a physician who repeatedly breaks the OR scheduling rules and accumulates a given number of demerits from scheduling the OR during the most desirable time slots.

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A less formal and labor-intensive option involves medical staff leaders directly confronting the violator. “Personal persuasion by authority figures such as department chairs can aid tremendously in bringing recalcitrant physicians into line,” says Harlow.

Whether the hospital chooses to implement some type of demerit system or relies on the personal intervention of hospital leaders, it must be clear to physicians that there are significant consequences associated with continued violations of the code of conduct, rules and regulations, or policies and procedures.

“While the goal of the hospital leadership will be, in the short term, to enforce compliance with the rules . . . for reinforcement, the process should provide for the big stick in the background—temporary suspension of privileges,” Harlow says.

Temporary suspension of privileges for less than 30 days for administrative reasons is not reportable to the NPDB, Harlow says. As an even bigger stick, the hospital can impose a longer suspension on physicians who incur too many violations over a two-year period. He suggests a three-strike rule, in which a physician who has amassed three administrative suspensions over one appointment period may be subject to longer, reportable suspensions.

Caprez says that regardless of what system is implemented, “whether a physician’s conduct is reportable should be an after-the-fact determination and, generally,


should not impact the need for or the degree of corrective action.”

Rely on wellness committee when appropriate

Auer advocates for the use of the physician health and well-being committee to intervene with physicians who pose chronic behavior problems. “Sometimes these physicians need help with anger management, and sometimes repeated rules violations are the result of a substance abuse problem,” he says. The physician health and well-being committee is uniquely positioned to address these issues appropriately and effectively.

In other cases, the physician’s problem may be a result of poor interpersonal skills or time management issues. Members of the health and well-being committee may be able to assist physicians in resolving their issues to become more productive and effective members of the medical staff.

Referring chronic violators to the physician health and well-being committee offers the physicians the opportunity to work on their problems in a confidential, supportive atmosphere, without the involvement of the medical executive committee or other medical staff members, Auer explains. Allowing the recalcitrant physician to confront his or her difficulties under the guidance of the members of the health and well-being committee will afford the physician the best opportunity to continue to be a valued member of the medical staff, he says. ■

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Sample disruptive staff member policy

It is the policy of this hospital to treat all individuals within its facilities with courtesy, respect, and dignity. The board requires that all individuals, employees, physicians, and other independent practitioners conduct themselves in a professional and cooperative manner in the hospital.

HR policies address matters involving employees who fail to conduct themselves appropriately. The following policy addresses matters that involve physicians or allied health practitioners (AHP) with privileges at the hospital who fail to conduct themselves appropriately. The hospital intends to enforce this policy in a firm, fair, and equitable manner.

The board of trustees will address disruptive behavior by physicians and other AHPs with privileges. A single egregious incident, such as physical or sexual harassment, assault, a felony conviction, a fraudulent act, stealing, damaging hospital property, or inappropriate physical behavior, may result in immediate termination of employment or medical staff membership. The board may, at its discretion, refer such issues to the medical executive committee (MEC) for investigation and recommendation.

The objective of this policy is to ensure optimum patient care by promoting a safe, cooperative, and professional healthcare environment and to prevent or eliminate (to the extent possible) conduct that:

- ▶ Disrupts the operation of the hospital
- ▶ Affects the ability of others to do their jobs
- ▶ Creates a hostile work environment for hospital employees or other medical staff members
- ▶ Interferes with an individual's ability to practice competently
- ▶ Adversely affects the community's confidence in the hospital's ability to provide quality patient care

Documentation of each incident of disruptive conduct is critical because it is ordinarily not one incident alone that leads to disciplinary action, but rather a pattern of inappropriate conduct. Any physician, AHP, employee, patient, or visitor may report potentially disruptive conduct. Individuals may submit a report to the medical director or a facility administrator, who will then forward the document to the CEO, medical director, or president of the medical staff.

Once it is received, the medical director, in consultation with the president of the medical staff, will investigate the report. The medical director may dismiss any unfounded report and will notify the individual who initiated the report of his or her decision. A confirmed report will be addressed as follows.

It shall be made clear to the offending individual that attempts to confront, intimidate, or otherwise retaliate against the individual who reported the behavior in question is a violation of the policy and grounds for further disciplinary action.

A single confirmed incident will warrant a discussion with the offending individual. The medical director or designee shall initiate such a discussion and emphasize that such conduct is inappropriate and must cease. The medical director or designee will provide the offender with a copy of this policy and inform the individual that the board of trustees requires compliance with this policy. The approach during such an initial intervention should be collegial and helpful to the individual and the hospital.

If the medical director and/or the president of the medical staff notices a developing pattern of disruptive behavior or identifies such behavior, the medical director or designee shall discuss the matter with the individual as outlined below.

As with the single confirmed incident, the medical director or designee will provide the offending individual with a copy of this policy and inform the individual that the board of trustees requires compliance with this policy. Failure to agree to abide by the terms of this policy shall be grounds for summary suspension.

The medical director or designee will inform the offending individual that if the disruptive behavior recurs, the board will take more formal action to stop it. The MEC and CEO will also receive notification about the recurrence of the behavior.

The medical director designee shall document all meetings in writing through at least a follow-up letter to the offending individual. The letter will document the content of the discussion and any specific actions the offending individual has agreed to perform. The medical director will keep a copy of this letter on file.

The involved physician may submit a rebuttal to the charge. The rebuttal will become a permanent part of the record.

If the offending behavior continues, the medical director, president of the medical staff, and/or CEO will hold a series of meetings with the offending individual until the behavior stops. The intervention involved in each meeting will progressively increase in severity until the behavior in question ceases.

If, in spite of these interventions, the behavior in question continues, the CEO, board chair, or designee shall meet with and advise the offending individual that such conduct is intolerable and must stop. The CEO, board chair, or designee will inform the individual that a single recurrence of the offending behavior shall result in loss of medical staff membership and privileges. This meeting is not a discussion, but rather constitutes that physician's final warning. The offender will also receive a follow-up letter that reiterates that final warning.

If, after this final meeting, the offending behavior recurs, the individual's medical staff membership and privileges shall

be summarily suspended consistent with the summary suspension terms of the medical staff bylaws and policies and procedures. The board will then take action to revoke the individual's membership and privileges. The individual will be ineligible to reapply to the medical staff for a period of at least one year. The board will interpret and enforce this policy as its sole process for dealing with egregious incidents and disruptive behavior, except as designated by the board.

Editor's note: The above text is an excerpt from The Top 30 Medical Staff Policies and Procedures, published by HCPro, Inc., 2005. Hospitals must seek expert legal advice when implementing this policy and procedure. Provisions of this policy may conflict with bylaws or other products. Hospitals must address conflicts with bylaws or fair hearing procedures before finalizing this policy.

Be prepared to scrutinize all privilege requests during reappointment process to comply with regulations

New Joint Commission standards surrounding focused professional practice evaluation (FPPE) that took effect January 1—as well as other physician quality data—related pressures brought to bear by CMS and third-party payers' pay-for-performance systems—force hospitals to collect and evaluate physician performance data to a greater extent than in the past. Although many hospitals are only beginning to come to grips with the fact that their credentialing and reappointment decisions must be based on quantifiable evidence and standards, there are options to consider when the existing data on a physician are insufficient to continue to grant him or her one or more existing privileges.

Michael R. Callahan, Esq., a partner at the Chicago law firm of Katten Muchin Rosenman, LLP, agrees that as facilities begin using evidence-based standards to comply with FPPE, they will find that certain physicians on staff don't meet the hospital's standards for the privileges that they hold. And when such physicians apply for reappointment, the hospital must confront the fact that it

cannot justify the physicians' privileges on the basis of the data it has available.

Navigating this touchy subject with physicians who have provided excellent service to the facility over a period of years may be challenging. There is no one-size-fits-all answer to this dilemma, says **Timothy B. Caprez, Esq.**, an attorney at the Milwaukee firm of Whyte Hirschboeck Dudek. And although many hospitals have begun the process of establishing quality standards and implementing evidence-based decision-making, "few have all the steps in place to fully implement the program," Caprez says.

Review privileges closely at reappointment

Callahan points out the likelihood that many physicians hold privileges they rarely or never use. The primary reason is that privilege request forms often provide a laundry list of procedures, and physicians may simply request all the privileges on the list for their specialty. In hospitals that use a core privileging mechanism,

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Reappointment process

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however, physicians requesting privileges in a particular specialty will, if approved, receive privileges for all the procedures in the core group.

Historically, hospitals often renewed privileges without further inquiry in the absence of an identified problem; however, the need for evidence-based decision-making now requires scrutiny of every physician privilege request—even when there is no indication of a problem with the practitioner’s skill level or competency. Hospitals should ensure that there is enough recent data available to support the decision to award privileges for each privilege the physician requests.

In the event that there is insufficient data on which the hospital may base a decision to award privileges, the facility should consider conducting an interview between the physician and the credentialing committee, says Callahan.

Most hospital bylaws provide for such interviews as a routine part of the credentialing process, he says.

The meeting’s goal should be to establish whether the physician really needs or desires all of the privileges for

which he or she has applied. If the answer is yes, the parties should discuss:

- ▶ Whether the physician has the qualifications to perform the procedures according to the facility’s quality standards
- ▶ If the physician is qualified, whether sufficient data is available elsewhere to help the facility make a decision based on evidence
- ▶ If the physician does not meet the facility’s quality standards, whether the facts and circumstances merit grandfathering the physician to continue to exercise the privileges at issue, and what safeguards, if any, the facility will impose

If they have not done so already, hospitals should develop minimum qualifications that they will accept before allowing a physician to exercise a particular privilege, says Callahan. The qualifications, which should be developed in consultation with the appropriate department chairs, should relate to the physician’s training and recent experience.

Legal terms every MSP should know

Editor’s note: This series defines a legal term to help readers become more familiar with common healthcare law terms.

Discovery: The pretrial devices used by one party to obtain facts and information about the case from the other party. Tools of discovery include written interrogatories, depositions, and requests for production of documents—also called *subpoenas duces tecum*. Although credentialing files are commonly requested during discovery, certain documents may be considered confidential and thus are protected from discovery. For example, most states have adopted statutes that protect certain privileged and confidential reports, studies, minutes, and other documentation that fall under the statutory definition of peer review materials.

Source: Medical Staff Law: A Guide for Medical Staff Professionals and Physician Leaders, published by HCPro, Inc., 2005.

Consider grandfathering option

Many hospitals will encounter a situation in which a physician who has held a given privilege and performed it competently does not meet the facility’s qualifications for the privilege. This happens most often with older physicians, who may not have the specific training in a particular procedure that the facility has decided to require as a minimum qualification of the privilege.

The hospital may opt to explain the minimum qualification to the physician and deny the privilege unless and until he or she can meet the threshold requirements

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that the facility has established. But there may be a case for grandfathering the physician—that is, the physician would be permitted to continue to exercise the privilege based on past performance. This is an option a facility can consider to retain the services and the referrals of a valued member of the medical staff.

However, if your facility decides to grandfather a physician, it is important to document the specific reasons and the supporting data (see “Use caution when grandfathering privileges” below).

If a physician meets the facility’s training qualifications for the privilege but has not recently exercised the privilege enough to enable the facility to acquire sufficient data about his or her skills, the physician should provide information from other facilities at which he or she practices. The physician has the burden of collecting the information necessary to demonstrate current competence in the

procedure. Facilities may ask the physician to provide some or all of the following, as appropriate:

- Surgical logs
- Statements from department chairs at other hospitals where the physician currently practices
- Proof of volume of procedures performed
- Proof of CME or other additional training

What if the physician is unable or unwilling to provide evidence of current competence that is acceptable to the facility? In that case, everyone’s interests are best served if the physician can be persuaded to withdraw the request for the privilege, Caprez says. A negotiation in which the physician decides to reduce or modify the scope of his or her privilege request can preserve the physician’s status as an active member of the medical staff and limit the need for reporting or other action, he notes. ■

Use caution when grandfathering privileges

If your facility decides to grandfather a physician who has existing privileges for a procedure or specialty/subspecialty area, but who does not meet your amended qualifications for the privilege, document the decision with the care, says **Michael R. Callahan, Esq.**, a partner at the Chicago law firm of Katten Muchin Rosenman, LLP. Callahan advises keeping a record of the decision and, at minimum, a summary in the physician’s credentialing file of the information that led to the decision.

It is critical that this information be available in the event that the facility must demonstrate it made a reasonable decision based on an objective evaluation of adequate data, he says.

Callahan points to a recent lawsuit¹ in which a hospital changed its standards for granting level II surgical privileges after a podiatrist had joined the staff. The podiatrist had been exercising level II surgical privileges and continued to do so after the change. However, the hospital never officially grandfathered the podiatrist, but it repeatedly renewed his level II surgical privileges.

Eventually, the podiatrist had a case with a bad outcome and the patient sued the hospital, alleging that the facility

was negligent for permitting the podiatrist to perform procedures that the facility’s standards stated he was not qualified to perform. The hospital was unable to demonstrate that it made a reasoned decision to allow the podiatrist to continue to exercise privileges that he had a long history of exercising competently, because that information was contained in his quality file and could not be introduced on behalf of either party. The jury found for the plaintiff and awarded \$7 million in damages. The appellate court upheld the decision, and the state’s highest court declined to review the case.

Give your facility every chance to defend itself against a similar claim.

If the hospital had included in the podiatrist’s credentials file a document setting forth the reasons and data underlying the facility’s decision to allow him to continue to exercise surgical privileges, the hospital would have had an opportunity to explain that its decision to permit the podiatrist to perform surgery was based on experience and evidence and was not negligent, Callahan says.

1. *Frigo v. Silver Cross Medical Center*, App. Ct. Ill., 1st Dist., 4th Div. 377 Ill. App. 3rd 43; 786 N.E.2d 697; 2007 Ill. LEXIS 1014.

Recent court cases

Physician must exhaust administrative remedies before suing hospital

A Colorado court dismissed a physician's lawsuit seeking money damages against a hospital that summarily suspended his privileges in 2004, holding that the court had no jurisdiction over the matter until the hospital's internal peer review process had been concluded.

The surgeon was on call when he allegedly provided negligent treatment to a patient in the emergency department; the patient later died. The hospital launched a review of this case and others and summarily suspended the physician's privileges pending a final outcome of the matter. The physician did not exercise his right to appeal the summary suspension, which remains in effect.

Several hearings have been scheduled to consider termination of the physician's medical staff privileges, but the physician has canceled each of them, claiming that he has not been provided the data he needs to answer the hospital's charges. The hospital asserts that the physician has no right to discovery, and that he may review the necessary records at the hospital.

The physician brought a lawsuit against the hospital, alleging breach of contract and various covenants, seeking money damages for interfering in his business relationships, and requesting an injunction to

prevent the hospital from terminating his privileges. The hospital sought to dismiss the case, asserting that its internal peer review process must be complete before the physician may turn to the courts. The trial court refused to grant the hospital's motion, and the hospital appealed.

The appellate court held that according to Colorado law, a physician must exhaust his administrative remedies before seeking relief in the court. The court rejected the physician's argument that because he was not appealing a final decision of the administrative body, the requirement to exhaust administrative remedies was not applicable.

In rejecting that argument, the court said that the physician's claims were related to the administrative process, and that the process must be complete before the physician's claims were ready for judicial review. The court dismissed the case against the hospital.

Crow v. Penrose St. Francis Health Care System, Case No. 06SA323, Supreme Ct. of Colorado. 169 P.3rd 158; 2007 Colo. LEXIS 912. October 15, 2007.

Physician wins reinstatement to insurer's panel

A New Jersey cardiologist won a lawsuit he brought against an insurance company for improperly terminating him from its HMO panel. The court ruled that the insurer broke its contract with the physician

and ordered him reinstated to the HMO panel immediately.

In 1992, one of the cardiologist's patients committed suicide, and the patient's wife sued him for malpractice for failing to treat the patient's depression.

The physician's malpractice insurer settled the lawsuit, and the New Jersey Board of Medical Examiners opened an investigation of the physician's care of the patient. The board reprimanded the physician for incomplete medical records but took no further action against him and made no finding relating to the clinical care the physician provided.

The HMO dropped the physician from its panel upon receiving notice of the medical board's examination. However, the HMO agreed to reinstate him if the medical board took no action against his license. Accordingly, the HMO reinstated him as a participating provider in 1998, but then dropped him from its panel again in 2000. The physician sued, alleging breach of the reinstatement agreement.

A Superior Court judge agreed with the physician that the HMO breached its agreement when it again terminated the physician as a participating provider. The court ordered that the physician be reinstated to the HMO provider panel immediately.

Nanavati v. Horizon Blue Cross and Blue Shield, NJ Superior Court. ■