Recent Trends and Developments in Negligent Credentialing

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Outline of Presentation

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I. Credentialing

- Required by Federal and State law

  - Medicare CoPs for Hospitals:
    • Require periodic appraisals of medical staff members.
    • Medical staff must examine credentials of all eligible candidates for medical staff membership.

  - California Regulations:
    • Medical staff must establish controls that are designed to ensure the achievement and maintenance of high standards of professional ethical practices.
    • All members of the medical staff must demonstrate their ability to perform surgical and/or other procedures competently and to the satisfaction of an appropriate committee or committees of the staff, at the time of application for appointment to the staff and at least every two years thereafter.
Required by Accreditation

- **Joint Commission:**
  
  - Process of obtaining, verifying, and assessing the qualifications of a practitioner to provide care or services in or for a health care organization.
  
  - Hospital required to develop and maintain credible process to determine competency through diligent data collection/evaluation and actions by governing body and medical staff.
Credentialing

- Oversight of professional practices in the hospital.
- Provides objective information collection process and ensures uniform treatment of all practitioners.
- Part of Medical Staff self-governance.
  - Does an applicant meet the requirements of the hospital?
  - Is an applicant qualified to provide health care services for the hospital?
- Involves review of 3 parameters:
  - Current licensure and certification
  - Education and relevant training
  - Experience, ability, current competence
Credentialeding

- Granting Medical Staff Membership
  - Bylaws Art. III, Sect. 2: Qualifications for Membership
  - Bylaws Art. III, Section 3: Conditions and Duration of Appointment

- Granting Clinical Privileges
  - Bylaws Art. VIII
  - Proctoring Policy

- Medical Staff leaders must ensure consistent implementation of credentialing requirements.
II. Developments in Credentialing

- Negligent Credentialing Origins
- Best Practices in Credentialing
- Privileging Criteria Development
Negligent Credentialing Origins

Negligence in screening the qualifications and competency of practitioners. A few seminal cases:

- **Darling v. Charleston Cmty. Mem’l Hosp.** (Ill. 1965)
  - First case in U.S. where court held that hospital had an independent duty to ensure quality care is rendered in the hospital.

  - First case in California.
  - Hospital has duty to exercise reasonable care in selecting, reviewing, and periodically evaluating competency of practitioners it allows to treat patients at the hospital.
Negligent Credentialing Train Wreck Story


- 16 year old patient died following surgery; mother sued hospital for renewing surgeon’s privileges.
- Alleged hospital consciously disregarded safety of its patients by granting privileges to surgeon without investigating warnings of possible incompetence.
- Chief of Surgery, Chief of Staff, Medical Executive Committee reviewed and approved reappointment application.
- Appellate court concluded that hospital’s negligence in evaluating the surgeon was a legal cause of patient’s death.
Negligent Credentialing Avoidance

- Identify and address credentialing issues on the front end.
- What are the areas and issues to look out for?
Credentialing Red Flags

- Failure by any hospital medical staff, health care entity, training program, or professional society with which the applicant or member has been affiliated to respond completely to any written or oral reference inquiry.

- “Off the record” (but credible) reports of problems relating in any way to the professional practice of the applicant or member.

- Difficulty in verifying compliance with general requirements, such as training and education, professional liability insurance coverage, patient coverage arrangements, and establishment of office practice in the hospital’s geographic service area.
Credentialing Red Flags

- Any resignation or withdrawal of an application for appointment or reappointment from any hospital medical staff, health care entity, or professional society at any time in the career of an applicant or member.

- Any gaps in education or work history.

- Past disciplinary action by another hospital medical staff, health care entity, or professional society.

- Pending investigations by any hospital medical staff, health care entity, or professional society.

- Past or present investigation by state licensing board in any state.
Credentialing Red Flags

- Settlement of any professional liability claims (whether or not they resulted in litigation) within the past five years.

- Pending professional liability actions.

- Other civil litigation relating to professional practice or qualifications of the applicant or member (e.g., claims of sexual misconduct with patients or claims of insurance fraud).

- Investigations or disciplinary actions by any third-party payor (including Medicare, Medicaid, or private insurance).

- Criminal investigations, charges, and/or actual convictions of a misdemeanor or felony.

- Participating in the last five years in any treatment or diversion program relating to drug use, alcohol dependency, or psychiatric problems.
Credentialing Red Flags

- Any discrepancy in the responses provided by the applicant and verification information received from primary sources.

Practical Tips:
- Know what questions to ask.
- Carefully review all verification information.
- Know how to follow up.
- Document verification and clarification efforts.
"Nurse, get on the internet, go to SURGERY.COM, scroll down and click on the 'Are you totally lost?' icon."
Credentialing Scenarios A and B

- During the credentialing process, a Medical Staff leader learns that an applicant had a recent surgical procedure.
  - **Requirement:** Practitioners must document their current and adequate physical and mental health status to exercise requested clinical privileges.

- During the credentialing process, the Medical Staff Office cannot verify completion of formal training.
  - **Requirement:** An applicant must have completed the formal training (e.g., residency and/or fellowship) required by any applicable specialty or sub-specialty American Board within the area in which the applicant seeks privileges.
  
  - **Reminder:** Confirm that training requirements are consistent in all documents—Bylaws, policies, privilege form.
During the credentialing process, the Medical Staff Office
- identifies missing requested supplemental documents
- gaps in professional practice
- misrepresentation in application questions about actions/pending actions
- additional misrepresentations when provided the opportunity to explain the prior misrepresentation

**Requirement:**
- Applications are considered incomplete until sufficient information has been obtained to the satisfaction of the Departmental Committee, Credentials Committee, and the Medical Executive Committee.
During the credentialing process,
- the applicant discloses, in response to application questions about actions/pending actions, that he/she was the subject of an investigation at another hospital.
- the applicant provides an explanation of the other hospital’s concern and scope of investigation that is not accurate.
- the Medical Staff discovers that the investigation and subsequent hearing occurred over a year prior to disclosure in the application.

**Requirement:**
- Applicants’ specific acknowledgement in application to notify the Medical Staff Office of all formal investigations and/or disciplinary actions taken against their medical license or by another health center within 7 days of notification.
Credentialing Scenario E

- During the credentialing process, the Medical Staff Office discovered applicant’s
  - Criminal conviction for driving under the influence
  - Medical Board Accusation related to driving under the influence
  - Medical Board Accusation related to quality of patient care

- Does it matter whether applicant truthfully disclosed the conviction or the Medical Board Accusation?
“I fully understand and agree that any significant misrepresentation or misstatement contained in this application and accompanying documentation, whether intentional or not, shall constitute cause for denial, modification, or revocation of requested membership and clinical privileges.”

“I understand and agree that as an applicant for Membership and Clinical Privileges that I have the burden of producing adequate information for the proper evaluation of my professional competence, character, morals, ethics, health status, other qualifications, and for resolving any doubts about such qualifications, including copies of patients’ records from another health facility or my private office upon request. I agree to make myself available for interviews with regard to my application and any peer review related matters during the time that I hold Membership.”
Best Practices in Credentialing

- Address all discrepancies and inconsistencies.
- Keep the burden on the applicant.
  - Application: Specific consent to conditions of consideration for appointment
  - Bylaws, Art. VI, Section 1(e)
- Only process complete applications.
QUESTION: Who gets clinical privileges to perform procedures?

ANSWER:
(a) Only the best
(b) Only the most recently trained
(c) Only the ones with the most experience
(d) All of the above
What are the requirements?
- What formal training must be completed?
- Performance of a minimum number of procedures?
  - How many?
  - What types of procedures?
- Specialized training courses?
- Are there any conflicting requirements in privilege forms?
- Who proctors whom?
Privileging Criteria Development

- Work through privileging issues before there is a problem.
- If needed, have interdisciplinary teams study privileging criteria issues.
- Obtain current information on training programs.
- Obtain current information on practices at other facilities—be aware of community needs and practices.
- Establish privileging criteria fairly but clearly.
- Be flexible to accommodate new technology.
- Build consensus for new criteria through education.
- Apply criteria uniformly.
- Make well-documented decisions to minimize legal risks.
Recognize when the creation of a new clinical privilege is being requested.

Process and Procedure for Creating New Clinical Privileges:
- All appropriate Medical Staff committees and departments need to review and recommend the creation of the privilege.
- MEC needs to approve the recommendation.
- Board needs to approve the addition of the new privilege.
- Thereafter, the application of an individual practitioner requesting the newly approved privilege may be considered.
A Credentialing/Privileging Train Wreck

- **Columbia/JFK Med. Ctr. Ltd. v. Sangounchitte**

- **The Perfect Storm**
  - Neurosurgeon performs cervical fusion.
  - No demonstrated competence.
  - Not proctored.
  - “Off-label” use of rods.
  - First time surgeon did this procedure!

- **The Result:**
  - $8.5 million Florida jury verdict upheld on appeal.
Best practices always benefit the patient—not the practitioner!
Most States Recognize Negligent Credentialing as a Cause of Action in Litigation.

Case Law is the Typical Source of This Cause of Action.

Some State Courts and Legislatures Disagree:
- Utah 2011
- Colorado 2012

Insurance Carriers and Multi-State Health Systems Are Familiar with This Tort in Various Jurisdictions.
Recent Negligent Credentialing Cases

- **Frigo v. Silver Cross Hospital**, Illinois, 2007
- **Barblitz v. Peninsula Regional Medical Center**, Maryland, 2010
Recent Negligent Credentialing Cases

- **Hall v. Jennie Edmundson Memorial Hospital, Iowa Supreme Court, 2012**
  - Board Certified General Surgeon performed Whipple procedure in 2007 at the hospital.
  - He had been on the medical staff for 10 years.
  - He only performed 4 Whipples in 10 years; none in prior 3 years.
  - District Court recognized claim for negligent credentialing, but denied recovery.
  - Supreme Court assumed that tort of negligent credentialing was actionable in Iowa, but upheld lower court decision.
Recent Negligent Credentialing Cases

- **Brookins v. Mote**, Montana Supreme Court, 2012

  - OB/GYN and hospital sued for bad baby.
  
  - Court formally recognized tort of negligent credentialing, noting “by our count at least 30 states currently recognize” it.

  - Court set forth elements of cause of action.

  - Court required expert testimony to establish whether standard of care was met by the hospital.
Jane Doe 30’s Mother v. Bradley, Delaware Superior Court, 2012

- Child sexual abuse by pediatrician.
- Court approved a class action settlement against pediatrician and hospital.
- Pediatrician had worked at hospital from 1994 to 2002.
- Hospital alleged to be “grossly negligent when it hired, credentialized, supervised, and retained” MD, “first as an employee and then as a member of its medical staff.”
- Hospital required to pay $6 MILLION in cash plus $100,000 per year for 5 years and provide free medical services to class members up to $1 MILLION.
- Hospital insurance carriers required to contribute $111,786,541 to the settlement fund.
Recent Negligent Credentialing Cases


  - Orthopedic surgeon and hospital sued by patient who was assigned to surgeon through ER.
  
  - Court recognized that negligent credentialing is similar to “negligent hiring or retention” tort that is recognized in Massachusetts.
  
  - Duty owed to patient is premised on the “special relationship” and a hospital could reasonably foresee that it should protect patients from incompetent or careless surgeons.
Mohan v. Orlando Health, Inc.
Florida Court of Appeal, 2015

- Surgeons removed Patient’s ureter instead of his appendix.
- Orlando Health was parent of Hospital where surgery occurred.
- Court concluded that parent could be held liable for negligent credentialing of hospital and allowed the claims of direct liability for negligent credentialing to proceed.
STOTTLEMYER v. GHRAMM

Virginia Supreme Court, 2004

- Abdominal hysterectomy at Winchester Hospital performed by Dr. Ghramm.
- Negligent credentialing claim bifurcated from malpractice claim.
- July verdict in favor of MD on malpractice claim.
- Appeal based on denial of cross examination of MD on prior bad acts.
- Supreme Court affirmed judgment, noting negligent credentialing issue was moot.
And....In Virginia?

- But Just This Year We Have:
  - Martin v. Salvaggio

Negligent credentialing claim allowed
LYNCHBURG CIRCUIT COURT
February 2016

Judge Burnette denied demurrer and motion to dismiss by the Centra Health Hospital. He ruled that:

“...this tort action is based on corporate negligence in the credentialing and privileging process of physicians,” and is NOT within the scope of the Virginia Medical Malpractice Act.
CONCLUSIONS FROM TODAY

- Most states allow negligent credentialing claims
- Most are judicially approved, not created by statute
- Damage caps under Med Mal laws are an issue
- Experience of other states is instructive
- Expert testimony is the key to presenting and defending claims of negligent credentialing
SO BE CAREFUL OUT THERE !!