# NPDB Guidebook revision would clarify investigation reporting issues

Physicians always have been justifiably concerned about reports to the National Practitioner Data Bank (NPDB) regarding malpractice payments and adverse peer review actions. Two areas of frequent uncertainty have been:

1) Reporting malpractice payments made on behalf of entities, typically hospitals, when the individual physicians have been dismissed from the malpractice actions; and

2) Determining whether physicians should be reported if they have resigned while a peer review action or investigation is underway.

The Health Resources and Services Administration (HRSA), the division of the Department of Health and Human Services (HHS) responsible for administering the data bank, has just proposed a revision to the NPDB Guidebook. The current version of the Guidebook was published in September 2001, so it is past due for an update.

As an American Health Lawyers Association appointee to the NPDB Executive Committee, I have been afforded the opportunity to review and comment upon the proposed revisions. The two issues mentioned above have generated significant controversy over the past years, particularly from activists who have suggested health care providers are using these potential loopholes to avoid reporting malpractice payments and adverse peer review actions.

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## Entity-only malpractice payments

The Healthcare Quality Improvement Act (HCQIA), which is the federal statute passed in 1996 establishing the NPDB, and the NPDB regulations require reporting of payments for malpractice settlements. Each entity that makes a payment for the benefit of a health care practitioner in settlement of, or in satisfaction in whole or in part of, a claim or judgment for medical malpractice against an entity or physician must report the payment information to the NPDB. Payments made as a result of a suit or claim solely against an entity, typically a hospital, but also the group practice, that does not identify an individual physician should not be reported to the NPDB.

Physicians should not be reported unless the physician was named in both a written complaint or claim demanding monetary payment for damages and in the final settlement, release or other final adjudication.

The question of whether a physician should be reported arises when the physician is initially named in the demand or legal pleadings but is dismissed from the lawsuit prior to a final settlement. This is how the proposed NPDB Guidebook deals with that situation:

"If a defendant healthcare practitioner is dismissed from a lawsuit prior to settlement or judgment, the payment made to settle a medical malpractice claim or action should not be reported to the NPDB for that defendant healthcare practitioner. However, if the dismissal results from a condition in the settlement or release, the payment must be reported to the Databank. In the first instance, there is no payment for the benefit of the healthcare practitioner because the individual has been dismissed from the action independently of the settlement or release. In the latter instance, if the practitioner's dismissed from the lawsuit in consideration of the payment being made in settlement of the lawsuit, the payment can only be construed as a payment for the benefit of the healthcare practitioner and must be reported."

## Resignations to avoid investigations

The HCQIA and the NPDB regulations state that hospitals and other eligible health care entities also must report the following:

- Professional review actions that adversely affect a physician's clinical privileges for a period of more than thirty days; and
- Acceptance of a physician's surrender or restriction of clinical

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privileges while under investigation for possible professional incompetence or improper professional conduct, or in return for not conducting such an investigation or not taking a peer review action that would otherwise be required to the NPDB.

The difficulty in the situation also has arisen from two basic issues:

1) Everyone agrees that hospitals regularly engage in routine peer review, and those routine peer review activities are not "investigations." This is exemplified by the categories for peer review evaluations established by the Joint Commission:

- OPPE – Ongoing Professional Practice Evaluation; and
- FPPE – Focused Professional Practice Evaluation

2) When did their investigation actually start? Critics of the "system" have maintained that the ambiguity regarding the trigger event for an investigation allows hospitals to threaten reporting if a physician resigns and would actually be inappropriate or avoid reporting when a report would be appropriate. The proposed NPDB Guidebook states as follows:

"A routine, formal peer review process under which the healthcare entity evaluates, against clearly defined measures, the privilege-specific competence of all practitioners is not considered an investigation for the purposes of reporting to the NPDB. However, if the formal peer review process is used when issues related to professional competence or conduct are identified or when a need to monitor a physician's performance is triggered based on a single event or pattern of events related to professional competence or conduct, this is considered an investigation for the purposes of reporting to the NPDB."

## Conclusion

Determining whether a payment is made on behalf of a physician or whether an investigation has or has not been commenced should be relatively

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easy if the rules are determined before the action is taken.

In the case of an investigation, the medical staff bylaws and policies should define when an investigation has started and when the physician is to be made aware of the investigation.

The NPDB requires that health care entities that report peer review actions based upon the surrender or resignation of a physician's privileges should have evidence of an ongoing investigation at the time of the surrender. The reporting entity should be able to produce evidence that an investigation was initiated prior to the surrender such as minutes, excerpts from committee meetings, communications to the physician, etc.

The NPDB Guidebook offers the following guidelines for investigations:

- The existence of investigation is not controlled simply by how that term may be defined in the bylaws policies or procedures.
- The investigation must be focused on the practitioner in question.
- The investigation must concern the professional competence and/or conduct of the physician in question.
- The investigation should generally be a precursor to professional review action.
- An investigation is considered ongoing until the health care entities' decision-making authority takes a final action or formally closes the investigation.
- A routine or general review of cases is not an investigation.
- A routine review of a particular practitioner is not an investigation.

I recommend that the bylaws define this process, define how an investigation is commenced, define how the investigation is closed, and provide that the physician be "warned or educated" about the standards, usually as part of the medical staff introduction process, and receive specific notice of when an investigation will commence in any individual peer review action.

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Many employment laws provide that employees may not be retaliated against for exercising their right to make a claim, even if the original claim is not successful. This opens up a can of worms as to whether an employer terminated an employee because he/she exercised the right to make a prior claim. Again, understanding what it takes to make a retaliation claim is key to navigating through these issues.

This is not to say that employers should never terminate a physician out of fear of one of these claims or that all terminated physicians have valid claims outside their contract; these are issues to be explored in order to better protect one's interests. The law is often structured in such a way that employers acting on assumptions or ego greatly magnify the potential for such claims. What you think is the law may not be so.

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