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Performance Monitoring, Poliner and P4P: Addressing Quality and Utilization While Avoiding Peer Review Litigation

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Overview

• Payors and accrediting agencies are placing much greater importance on measuring quality outcomes and utilization and tracking and reducing medical errors
  – Affects bottom line
  – Impacts reimbursement
  – Failure to address substandard patterns of care can increase Hospital’s liability exposure
Overview (cont’d)

- Average length of stay of patients at many hospitals exceeds the Medicare mean rather substantially
- Significant dollars are lost due to length of stay and inefficient case management
Overview (cont’d)

• Payors, including Medicare and Blue Cross/Blue Shield, are adopting Pay for Performance standards as a way to incentivize providers to meet identified goals and measures so as to increase reimbursement

• Costs and outcomes are becoming subject to public reporting and being used by private parties
  – CMS
  – Leapfrog
  – Joint Commission
  – Unions
Overview (cont’d)

• Provider Performance – Creating Standardization among Payors
  – Health plans are providing standardized measurements with potential for bonuses in following areas:
    • Asthma
    • Breast Cancer Screening
    • Diabetes
    • Childhood Obesity
    • IT investment/use
    • Adverse Drug Reaction
Overview (cont’d)

• Hospital and Medical Staff leaders must prepare to address the significant increase in utilization, cost and quality data which will be generated through external and internal sources
  – Need to find a way that enhances efficiencies and deals with “outliers” in a constructive manner so as to increase quality
  – Increased transparency is a double-edged sword
Overview (cont’d)

- CMS and certain accrediting bodies are also concerned about whether Medical Staff physicians are truly qualified and competent to exercise all of the clinical privileges granted to them
  - CMS quite critical of how many hospitals grant “core privileges” without determining current competency
  - CMS wants to see criteria developed for each clinical privilege and an evaluation as to whether the physician is qualified to perform each
  - Joint Commission has followed suit with its emphasis on evidence-based privileging requirements
Overview (cont’d)

- How can Hospital and Medical Staff determine a physician’s competency when they do nothing or very little at the Hospital?
  - Physicians tend to accumulate privileges
  - Reappointment tends to be a rubber stamp process
## Variance Between Medicare Geo. Mean and Actual ALOS by Top 20 DRG’s at Example Hospital

### MEDICARE ONLY

<table>
<thead>
<tr>
<th>DRG #</th>
<th>DRG DESCRIPTION</th>
<th>ADMITS</th>
<th>ALOS</th>
<th>GEO. MEAN</th>
<th>VARIANCE</th>
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<tr>
<td>127</td>
<td>HEART FAILURE &amp; SHOCK</td>
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Example by Major Dx
- Heart Failure
- Card. Arrhythmia
- Percut Cardiovasc w/o AMI
- Angina

This physician’s overall performance is
In line w/the peer group
Example by Major Dx
• Heart Failure
• Card. Arrhythmia
• Percut Cardiovasc w/o AMI
• Angina

This physician’s overall performance is significantly worse the peer group.
Joint Commission Standards

- Standard 3.10
  - Performance improvement. Medical Staff is actively involved in measurement, assessment and improvement of the various TJC PI standards
Joint Commission Standards (Cont’d)

- Standards MS.4.10 through MS.4.45
  - MS. 4.10 through 4.45 have been significantly rewritten
  - The purpose of these Standards is to establish additional evidence-based processes to determine a practitioner’s competency.
  - With request to privileging, the new Standard imposes a higher burden in determining whether the applicant or existing physician has the degree of training education and experience required to perform each of the requested privileges and procedures.
Joint Commission Standards (Cont’d)

- Emphasis is on three new concepts
  - General Competencies
    - Patient Care
    - Medical/Clinical Knowledge
    - Practice-Based learning and Improvement (Is physician obtaining CMEs)
    - Interpersonal and Communications Skills
    - Professionalism
    - Systems-Based Practice (Is physician abiding by all policies, participating in EHR initiatives, modifying behaviors based on physician profiling data)
  - Focused Professional Practice Evaluation
  - Ongoing Professional Practice Evaluation
Joint Commission Standards (Cont’d)

• MS.4.30 – Focused Professional Practice Evaluation
  – Standard expects the medical staff to identify and implement a method of evaluating practitioners without current performance documentation at the hospital, whether the physician is new or is an existing physician seeking new privileges, including processes where quality of care concerns arise, criteria for extending the evaluation period, and for communicating and acting on the results of the evaluation.
Joint Commission Standards (Cont’d)

– Would require “performance monitoring” particularly for those new physicians who have yet to establish a track record with the hospital or when questions about competency or ability are raised.

– Methods of focused professional practice evaluation can include, but are not limited to chart review, monitoring, clinical practice patterns, simulation, proctoring, external peer review, and discussion with other individuals involved in patient’s care. (Rationale for MS.4.30)
Joint Commission Standards (Cont’d)

- All accumulated information from focus evaluation process must be integrated into performance improvement activities. (Id.)
- Effective January 1, 2008, a period of focused professional evaluation is implemented for all initially requested privileges.
Joint Commission Standards (Cont’d)

• MS.4.40 – Ongoing Professional Practice Evaluation
  – Under the ongoing professional practice evaluation, here is a heightened emphasis on evaluating a physician’s practice so as to identify trends that impact on quality of care and patient safety such criteria can include but are not limited to, the following:
    • Review of operative and other clinical procedures performed and their outcomes;
Joint Commission Standards (Cont’d)

- Pattern of blood and pharmaceutical usage;
- Request for test and procedures;
- Length of stay patterns;
- Morbidity and mortality data;
- Practitioners usage of consultants;
- Other relevant criteria.

- Ongoing evaluation must be factored into any decisions to maintain, revise or revoke privileges.
Joint Commission Standards (Cont’d)

- Problems identified during ongoing review should trigger a focused review.
- “Ongoing” does not mean once a year.
- Medical Staff Bylaws must evidence how the staff will valuate and act upon a report of concerns relating to a practitioner’s clinical practice and/or competence and further, that the concerns are uniformly investigated and addressed.
Golden Rules of Peer Review

• Physicians need to be able to say “I made a mistake” without fear of retribution or disciplinary action
• Everyone deserves a second or third chance
• Medical staffs and hospitals should strive to create an intra-professional versus adversarial environment
• Steps should be taken to de-legalize process
• Develop alternative remedial options that do not trigger hearings and use them — medical staff leaders need to be willing to implement
• Comply with bylaws, rules and regulations and quality improvement policies
Golden Rules of Peer Review (cont’d)

- Apply standards uniformly
- Take steps to maximize confidentiality and immunity protections
- Know what actions do and do not trigger a Data Bank report and use this knowledge effectively
- Determine whether physician may be impaired
- Be fair and reasonable while keeping in mind the requirement to protect patient care
Other Forms of Remedial Action

- Retraining/Re-education as revealed by performance monitoring and physician data surveys
- Retrospective or concurrent audits
- Monitoring
- Proctoring
- Probations
- Reprimand
Other Forms of Remedial Action (cont’d)

- Voluntary relinquishment of clinical privileges at the time of reappointment
- Removal from ER call duty
- Mandatory consultations which do not require prior approval
- Conditional Reappointments
- Reduction in staff category
- Administrative suspensions, i.e., medical records
The Performance Pyramid

- Appoint excellent physicians
- Set and communicate expectations
- Measure performance against expectations
- Provide periodic feedback
- Manage poor performance
- Take corrective action

Source: The Greeley Company
What Can You Do With Over-Utilizers and Poor performers When Non-reportable Remedial Actions Fail?

• Must first ask question of whether patients are being placed at risk, or if problem is simply lost hospital revenue, or both
  – What supportive documentation on quality and costs have been generated?
  – Has information been shared with physician and has he/she been given comparative data as well as a reasonable opportunity to respond and improve?
What Can You Do With Over-Utilizers and Poor performers When Non-reportable Remedial Actions Fail? (cont’d)

- Has the hospital and medical staff implemented progressive, non-reportable remedial actions?
- Has such action resulted in measurable improvement?
- Have remedial efforts and decisions been uniformly applied?

• If sufficient quality issues exist such that patients are or may be placed at risk, formal corrective actions proceedings under the bylaws should be triggered if steps outlined above have been followed
What Can You Do With Over-Utilizers and Poor performers When Non-reportable Remedial Actions Fail? (cont’d)

- First offer physician opportunity to resign in lieu of formal corrective action
- This is a reportable event

- If only cost issues are involved but there is no measurable adverse impact on quality, taking corrective action will be more difficult
  - Physician will argue that this is “economic credentialing” and that disciplinary action is not permitted under the bylaws
What Can You Do With Over-Utilizers and Poor performers When Non-reportable Remedial Actions Fail? (cont’d)

- Hospital/medical staff will need to adopt medical staff bylaws or policy or corporate bylaw or policy to support the imposition of corrective action

- Decision is not reportable

- Could propose a different form of administrative hearing versus traditional medical staff hearing process
What Can You Do With Over-Utilizers and Poor performers When Non-reportable Remedial Actions Fail? (cont’d)

- These decisions are likely to be opposed by the Medical Staff on principle, at least, because of how their decision might be implemented in the future.

- If hospital can propose a carefully designed procedure that incorporates reasonable standards, the Golden Rules, and progressive discipline and can demonstrate concrete adverse input resulting from over-utilization, Medical Staff might support establishment of disciplinary procedures.
Taking Steps to Ensure that Data Collected and Reports Prepared are Treated as Confidential

• Goal is to maximize efforts to keep performance monitoring, quality and utilization data and reports and peer review records as privileged and confidential from discovery in litigation proceedings

• Need to identify the following:
Taking Steps to Ensure that Data Collected and Reports Prepared are Treated as Confidential

- List all relevant reports, studies, forms, reports, analyses, etc., which are utilized by the hospital and medical staff
  - Profiling data and reports
  - Comparative data
  - Utilization studies
  - Outcomes standards and comparisons by physicians
Taking Steps to Ensure that Data Collected and Reports Prepared are Treated as Confidential (cont’d)

• Incident reports
• Quality assurance reports
• Patient complaints
• Cost per patient visit, ALOS, number of refunds and consultants used, etc.
  – Identify which reports and info, if discoverable, could lead to hospital/physician liability for professional malpractice/corporate negligence
Taking Steps to Ensure that Data Collected and Reports Prepared are Treated as Confidential (cont’d)

– Identify all applicable state and federal confidentiality statutes and relevant case law
  - Peer review confidentiality statute
  - Physician-patient confidentiality
  - Medical Records
  - Attorney-client communications
  - Business records
Taking Steps to Ensure that Data Collected and Reports Prepared are Treated as Confidential (cont’d)

- Records, reports prepared in anticipation of litigation
- HIPAA
- Drug, alcohol, mental health statutes
- Identify scope of protections afforded by these statutes, and steps needed to maintain confidentiality, to list of reports to determine what are and are not practiced
- Can steps be taken to improve or maximize protection
Taking Steps to Ensure that Data Collected and Reports Prepared are Treated as Confidential (cont’d)

- What documents are left and how sensitive is the information in the reports
- If sensitive information remains, can it be moved to or consolidated with a confidential report
- Can information be de-identified or aggregated while not minimizing its effectiveness?
Taking Steps to Ensure that Data Collected and Reports Prepared are Treated as Confidential (cont’d)

• Adopt self-serving policies, bylaws, etc, which identify these materials as confidential documents — need to be realistic. A document is not confidential because you say it is. See attached definitions of “Peer Review” and “Peer Review Committee”
  – Need to consult with your legal counsel before finalizing your plan
  – Plan needs to be updated as forms and law changes
Poliner – An Overview of the Case

• Key Facts
  – Dr. Lawrence Poliner is a board certified cardiologist who sought membership and clinical privileges at Presbyterian Hospital of Dallas in 1997.
  – Several questions arose regarding three incidents in the cath lab, one resulting in a patient’s death, that led to a review by two Medical Staff Committees and later by the Department of Internal Medicine.
Poliner – An Overview of the Case (cont’d)

- During the pendency of this review, a fourth case was identified in which it was alleged that an angioplasty was performed on the wrong artery leaving the blocked artery untouched. Director of Lab reviewed this error as potentially life threatening.

- Shortly thereafter, Department Chair met with Poliner after meeting with hospital management, including the CEO and VPMA, and requested that he voluntarily agree not to exercise any cath lab procedures until an ad hoc committee could be appointed to review these cases.
Poliner – An Overview of the Case (cont’d)

• Poliner claimed that he was not told about the fourth case, did not have an opportunity to defend himself against the accusations, was not told which cases were to be reviewed, that he could not consult with legal counsel before signing the “abeyance letter”, and unless he signed within three hours of receiving the letter, he would be summarily suspended.
Poliner – An Overview of the Case (cont’d)

- Committee reviewed 44 cases and found that substandard care had been rendered in 29 cases.
- Cases and findings referred back to the Department which sought an outside review. The review was not conducted prior to scheduled Department meeting.
- Poliner sent a letter one day before the scheduled meeting seeking a one or two day extension in order to prepare. Request was denied.
Poliner – An Overview of the Case (cont’d)

– Poliner was given one hour to discuss the cases. Department Committees unanimously recommended suspension based on:
  
  • Poor clinical judgment
  • Inadequate skills, including angiocardiology and echocardiography
  • Unsatisfactory medical record documentation
  • Substandard patient care
Poliner – An Overview of the Case (cont’d)

- Upon receipt of report, Department Chair summarily suspended Poliner’s cath lab and echocardiography privileges. Admitting, consultation, non-cath lab privileges and echos were unaffected.

- Hearing was held almost three months later based on Poliner’s request.

- Hearing Committee recommended unanimously that Poliner’s privileges be restored, with conditions, and determined that the summary suspension, when imposed, was appropriate.
Poliner – An Overview of the Case (cont’d)

– Poliner sought to appeal the earlier decision which imposed the summary suspension because he wanted his record cleared.

– Poliner was informed that the sole basis for any appeal is whether he had been provided procedural due process.

– Appeals Committee held that Poliner received due process and that it did not have the authority to overturn the suspension. This decision was upheld by the Board.
Poliner – Court Decision

- Poliner filed a multi-count complaint in federal court against the hospital and several physicians based on:
  - Antitrust, both state and federal
  - Breach of contract by failure to follow due process procedures under the bylaws
  - Business disparagement, slander and libel
  - Tortious interference with business and with prospective advantage
Poliner – Court Decision (cont’d)

- Texas Deceptive Trade Practices Act
- Intentional inflection of emotional distress and mental anguish
- A declaration that defendants were not entitled to immunity under HCQIA or the Texas Medical Practice Act
• Court made the following findings:
  – Hospital bylaws which required procedural due process rights in medical staff bylaws created a contract right
  – HCQIA immunity protections did not apply because the court found there were genuine issues of material fact which questioned whether abeyance (summary suspension) was taken imposed on in the reasonable belief that it was taken in the furtherance of quality care and after a reasonable effort to obtain the facts
Poliner – Court Decision (cont’d)

- Was imposed while cases were under investigation which was still pending
  - Poliner was not given information about the cases nor an opportunity to give his side of the story. As per medical bylaws standard, not clear whether there was an imminent threat to patients.
  - Poliner also was threatened with suspension if he did not agree to the abeyance letter.
Poliner – Court Decision  (cont’d)

– There was evidence that the hospital and certain physicians violated bylaws and HCQIA when forcing him to sign the abeyance letter and that some of them harbored animosity.

– Poliner was not given information about the cases nor an opportunity to give his side of the story. As per medical bylaws standard, not clear whether there was an imminent threat to patients

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– There was evidence that the hospital and certain physicians violated bylaws and HCQIA when forcing him to sign the abeyance letter and that some of them harbored animosity
Poliner – Court Decision (cont’d)

• Court’s denial of defendant’s summary judgment on many counts allowed case to go to the jury which reached a verdict in favor of Poliner for $366 million.
  – Department Chair acknowledged that at the time he forced Poliner to sign the abeyance letter he did not yet have enough information to determine whether he posed a present danger to his patients. No such conclusion was reached.

• After mediation failed, trial court reduced award under the maximum recovery rule to $22.54 million.
Impact of Poliner on Correction Action Decisions

• Key Lessons Learned
  – Abeyance letter was treated as a summary suspension. This form of corrective action rarely should be used and only where there is a documented, immediate and real tortious threat to patient care
  – Decision makers need to understand the summary suspension standard under the Medical Staff Bylaws and must make sure that standard clearly has been met before a suspension has been imposed
Impact of Poliner on Correction Action Decisions (cont’d)

- As a general rule, you should always have at least two persons concur that a summary suspension is the only remedial action available to address the actual or perceived threat to patient care

- Make sure that direct competitors or anyone with an actual or perceived bias is not involved in direct decision making
  
  • Not always possible; may need to involve outside parties
Impact of Poliner on Correction Action Decisions (cont’d)

• Sometimes physician wants a physician in same specialty area to be involved at hearing stage – get a waiver
  – You must always follow your Medical Staff and Corporate Bylaws
  – Hearing and appellate review bodies should be able to look at the basis of the decision as a whole to determine if action was appropriate and should not be limited to a question of whether procedures were followed or procedural due process given
Impact of Polinner on Correction Action Decisions (cont’d)

– Unless otherwise required by state or federal law, bylaws should not reference a right to “procedural or substantive due process”
  • Not required
  • Can create a higher standard
  • Courts confuse what is and is not due process
Impact of Poliner on Correction Action Decisions (cont’d)

- Forcing a physician to make an immediate decision under threat of a greater sanction, with no opportunity to consult with a peer or legal counsel and without being advised of the background or right to rebut the charges is ill advised.

- As a general rule, you should bend over backwards to accommodate physician on procedural issues such as extensions of time, access to records, access to counsel and related procedural issues.

- Remember to incorporate HCQIA standards into bylaws.
Impact of Poliner on Correction Action Decisions (cont’d)

• Was action taken in the reasonable belief that it furthered quality care

• Was there a reasonable effort to investigate the facts before disciplinary action was imposed

• You must know the language and standards of state immunity and confidentiality standards so as to guide your procedures and decision
Impact of Poliner on Correction Action Decisions (cont’d)

- Remember the state confidentiality and immunity statutes generally do not apply in federal courts to federal versus state claims, i.e., federal antitrust versus a state defamation lawsuit
  - Remember the Golden Rules of Peer Review
  - Know what actions do and do not trigger a Data Bank report and use this knowledge effectively.
  - Be fair and reasonable while keeping in mind the requirement to protect patient care.
Impact of Poliner on Correction Action Decisions (cont’d)

- Carefully review hospitals insurance coverage as applied to peer review process in order to maximize insurance protections to all peer review participants.

- If necessary, may need to consider formal indemnification of peer review participants, despite state immunity and insurance protection, if medical staff balks at peer review participation in light of Poliner decision.