

Negligent Credentialing

Credentialing Concerns and Pitfalls

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Agenda and Objectives

Agenda:

- Understand the bases for negligent credentialing claims
- Appreciate the risks and responsibilities in credentialing providers and sharing information
- Discuss why all hospitals should be wary
- Strategies to avoid negligent credentialing claims

Speaker



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What is Negligent Credentialing?

- A type of corporate negligence that has been widely adopted
- Sometimes referred to as corporate negligence, negligent selection and negligent peer review
- The failure to perform “diligent inquiry” into a practitioner’s credentials to ensure that only qualified and competent professionals are selected and retained to treat patients.
 - Initial appointment and reappointment
 - Ongoing requirement to supervise, monitor, and continuously assess the practitioner’s performance (e.g., OPPE/FPPE)

What is Negligent Credentialing?

- Dependent tort – physician on staff commits malpractice and injures a patient
- Patient sues the physician, alleging medical malpractice
- Patient also sues the hospital, alleging that the hospital was negligent in either:
 - credentialing the physician and placing him on staff, or
 - in retaining the physician on staff (e.g. they should have kicked him off staff before the underlying case)

Theory of Liability

- The hospitals (and their peer review members) who credential and privilege practitioners owe a duty of care to patients to exercise reasonable care in the selection, retention, and assessment of the practitioners who treat them
- When that duty is breached and the patient is injured by an incompetent or unqualified practitioner, the patient has the right to sue the hospital and persons who were responsible for the credentialing and privileging of that practitioner at the hospital

Legal Claim

Elements of the claim:

1. the hospital failed to exercise reasonable care in granting staff privileges (or maintaining privileges);
2. the physician breached the applicable standard of care while rendering medical care and treatment to the plaintiff; and
3. the hospital's negligence in granting privileges was a proximate cause of the plaintiff's injuries

Frigo v. Silver Cross Hospital & Medical Center, 377 Ill. App. 3d 43 (1stDist. 2007)

Darling v. Charleston Community Memorial Hospital

- Landmark negligent credentialing case – 1965
- Illinois Supreme Court
- General practitioner who was on emergency call improperly set a cast on a patient's broken leg. The cast was wrapped too tightly, restricted the patient's circulation, resulting in necrosis
- After numerous surgeries, doctors at another hospital ultimately amputated the patient's leg

Darling v. Charleston Community Memorial Hospital

- General practitioner insisted that he had set between 200 and 300 legs
- The only fractures he had set personally since admission to the hospital's medical staff involved two ankle injuries, one of which resulted in a nonunion
- The physician couldn't recall studying any orthopedic procedure textbooks in medical school or within the past 10 years
- No one at the hospital had ever questioned or examined him concerning his knowledge of fracture treatment

Darling v. Charleston Community Memorial Hospital

- Physician did not know about current procedures used to set a broken bone, and the hospital never questioned his lack of knowledge
- Two competent and qualified board-certified orthopedic surgeons were on staff, but the doctor did not consult with either of them
- Hospital did not require consult, *nor did they even peer review* the physician's operative procedures or require him to bring them up to date

Darling v. Charleston Community Memorial Hospital

- Patient sued the doctor for malpractice
- Patient sued the hospital, arguing that the hospital should have (1) prohibited the doctor from performing orthopedic work, (2) required the doctor to bring his operative procedures up to date, (3) trained its nurses to supervise the care and treatment provided to the patient, and (4) required the physician to consult with a specialist
- The jury sided with the plaintiff and held the hospital liable for \$150,000 (approximately \$1,450,000.00 in inflation-adjusted 2023 terms). The hospital actually ended up paying \$110,000 (approximately \$1,064,165.38 in 2023 terms)

Johnson v. Misericordia Community Hospital

- Wisconsin – 1980
- A physician botched a hip surgery, causing paralysis
- Patient sued the physician and the hospital, alleging that it failed to properly investigate the physician's credentials prior to appointing him to the medical staff
- The physician settled out of court, but the negligent credentialing lawsuit against the hospital continued

Johnson v. Misericordia Community Hospital

- It was discovered that no one at the hospital had ever verified any of the information provided by the physician on his application
- The hospital did not have a credentials committee at the time the physician applied, its MEC was in charge of handling applications
 - Remember, MEC is the only committee required for the hospital
 - Still common for smaller hospitals, rural locations, ASCs, etc.

Johnson v. Misericordia Community Hospital

- If someone had vetted the application, they would have discovered the following:
 - Physician's privileges were restricted – and then revoked – at other hospitals due to “flagrant bad practices”
 - He was never on the staff at some of the hospitals listed in his application
 - He was not board-certified or board eligible as an orthopedic surgery (despite stating he was board certified)
 - 10 malpractice suits filed against him, seven of which occurred prior to his appointment on the hospital's medical staff
 - The majority of his peer references were of the opinion that he was not qualified to practice orthopedic surgery

Johnson v. Misericordia Community Hospital

- The jury awarded the patient \$315,000 (approximately \$1,222,086.63 in 2023) for past and future personal injuries and \$90,000 (approximately \$349,167.61 in 2023) for past and future impairment of earning capacity
- Supreme Court of Wisconsin upheld the verdict, holding the hospital responsible for its failure to scrutinize the credentials of a medical staff applicant

Frigo v. Silver Cross Hospital

- Illinois 2007
- Dr. Kirchner performed a bunion surgery on Jean Frigo's foot despite the presence of an infected ulcer
- Complications arose and required amputation of the patient's foot
- Patient filed a medical malpractice suit against the physician and alleged the hospital improperly managed and maintained the hospital (e.g. *not* negligent credentialing)

Frigo v. Silver Cross Hospital

- Patient later learned through discovery that the hospital gave the physician Category II surgical privileges in 1992 despite not meeting the hospital's requirements for such privileges
- Patient filed an amended complaint alleging the hospital was negligent by granting Category II surgical privileges despite the fact that physician had not completed a 12-month podiatric surgical residency and was not board certified, as required the bylaws

Frigo v. Silver Cross Hospital

- Hospital bylaws were amended in 1993 and instituted more stringent requirements for Category II surgical privileges
- Physician recredentialed in 1998
- Hospital conceded that the podiatrist did not meet the amended requirements but claimed he was “grandfathered.” However, the hospitals bylaws did not provide for "grandfathering"
- The court concluded there was sufficient evidence for the jury to conclude that the standard was breached by the hospital

Frigo v. Silver Cross Hospital

- The court also found that the claim was not barred by the statute of limitations and that the Medical Studies Act did not prevent the introduction of evidence about what the hospital's Credentials Committee reviewed when deciding to grant privileges
- Jury awarded Frigo approximately \$7.8 million in damages against the hospital (\$11,631,100.31 in 2023)
- Hospital appealed. In a case of first impression, the First District upheld a claim for negligent credentialing

Frigo v. Silver Cross Hospital

The appellate court held:

- (a) Frigo's negligent credentialing claim was not barred by the statute of limitations;
- (b) hospital's credentialing requirements were not peer review protected;
- (c) the Hospital Licensing Act did not protect the hospital from negligent credentialing claims; and
- (d) there was sufficient evidence to establish a negligent credentialing claim against the hospital, as it breached its duty of care when it granted Dr. Kirchner Category II surgical privileges

Elam v. College Park Hospital

- California 1982
- Hospital held liable for podiatrist's negligence
- Physician applied for appointment to Hospital's medical staff in 1974
- After verifying his doctor of podiatric medicine degree, state podiatric license, and prior surgery privileges, governing board granted privileges
- California case precedent previously was clear that a hospital may be held liable for a doctor's malpractice when the physician is actually employed by the hospital or is ostensibly the agent of the hospital

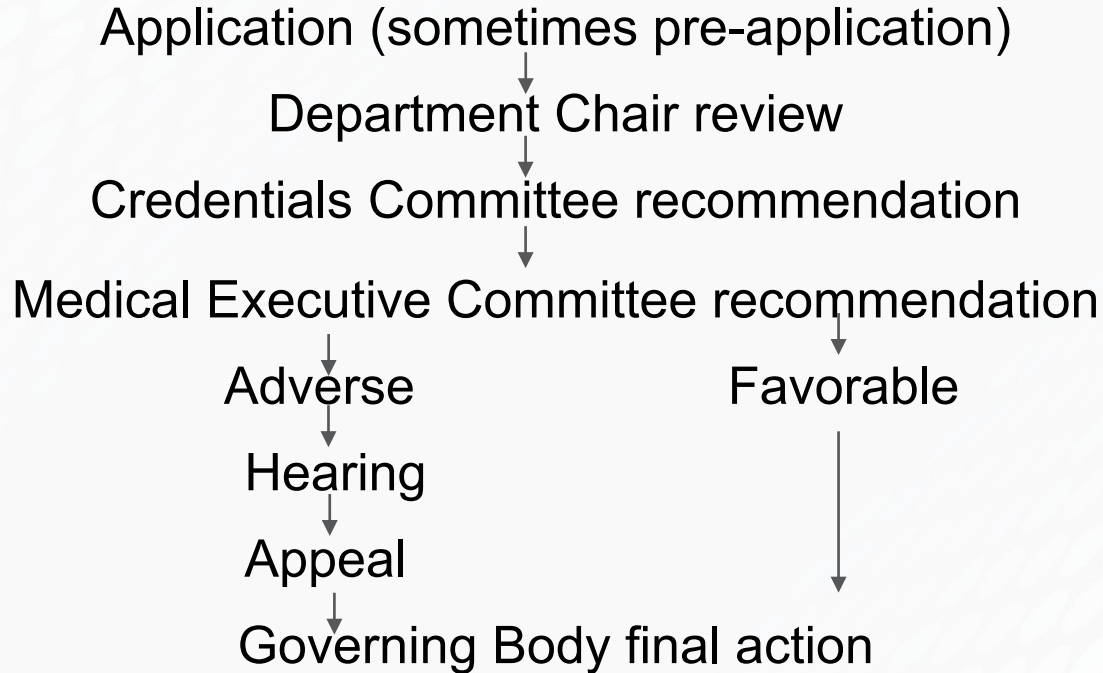
Elam v. College Park Hospital

- “The pivotal question presented by this appeal is whether a hospital is liable to a patient under the doctrine of corporate negligence for negligent conduct of independent physicians and surgeons who, as members of the hospital staff, avail themselves of the hospital facilities, but who are neither employees nor agents of the hospital.”
- *Elam* was the first published opinion in California to: (1) recognize hospital corporate negligence; that is, a hospital’s liability for breach of its duties directly owed to its patients; and (2) extend this responsibility to whatever harm these doctors may cause
- Affirmative duty by hospitals to ensure the quality of care rendered by the physicians practicing within that hospital

Elam v. College Park Hospital

- Hospitals are responsible to exercise reasonable care in selecting and periodically evaluating the competence not only of their employees but of all medical staff physicians (including independent contractors)
- Hospitals can be held liable for negligent selection, supervision, or oversight or evaluation of the doctors who practice at that hospital to use the hospital's medical facilities

Credentialing and Privileging



Credentialing Tips

- Create an up-to-date, well-documented credentialing process that is followed by the medical staff. It is better to avoid appointing a physician than to remove him later (and much easier)
- Ensure that the medical staff leaders who perform the reviews have appropriate training and understand that issues that arise (e.g., malpractice judgments)
- Drill down on unusual circumstances and red flags – ask follow-up questions. If the hospital is not satisfied with the answer, keep asking questions and pressing for information

Credentialing Tips

- A complete application is the *physician's* responsibility – not yours
- Require the applicant to sign third-party authorizations that allow for full explanation
 - require a response from both the physician and the entity
- Physician's burden to establish competence
- Be prepared to mark applications incomplete – it is important and an extremely valuable tool
- Push for responsive information

Credentialing Tips

- If you have a physician with a “colorful past,” document why privileges were still granted
- If information arises while the physician is on staff, vet the information before or during recredentialing – and remember it is still the physician’s responsibility to prove he should be recredentialed
 - *Tip: have an ongoing requirement to meet eligibility criteria, and a consequence for failing to do so*
- “In God We Trust – All Others We Credential”

Credentialing Tips – Receiving a Response

“Dr. Johnson has submitted an Application for membership and privileges at the Hospital, which indicates previous affiliation with your facility, University Hospital (UH). The Hospital previously sent a request for information to UH’s medical peer review committee in order to assist Hospital in its evaluation of Dr. Johnson’s Application. The Hospital still has not received a response from UH.

The Hospital requests that UH answer the questions below, and provide the responsive documentation, if any, as soon as possible. If UH does not provide complete responses by **April 15, 2024**, Dr. Johnson’s Application will be deemed withdrawn, and Dr. Johnson will be notified that his Application remains incomplete and has been withdrawn due to the failure of UH to provide responsive information. Dr. Johnson has been notified by the Hospital that it is seeking information from UH by letter dated March 14, 2024.”

Peer Review

- Once a physician is on staff, the hospital still has an obligation to peer review the physician
- Implement policies to actively monitor and review performance on an ongoing basis (OPPE), which should include administrative requirements (e.g., timely MRs, patient consent forms, indication of surgery, tracking complication rates)
- Focused evaluations of any deviation or concern involving competence or unprofessional conduct (FPPE)
- Impose appropriate action to address problems identified, including termination, where appropriate

Peer Review

Sources of information (not exhaustive):

- Reports from others
- Incident reports
- Notices from regulatory bodies
- External peer reviews
- OPPE/FPPE
- Investigations

Peer Review

- OPPE
- FPPE
- Collegial Interventions
- Formal Investigations
- Performance Improvement Plan
- Professionalism Agreements
- Behavior Contracts
- Proctoring
- Suspension
- Adverse Recommendations

Negligent Credentialing

- Not recognized in all jurisdictions
- Some jurisdictions still permit peer review immunity to protect against damages
- All hospitals need to be wary of negligent credentialing claims due to allegations of negligent misrepresentation (e.g., third-party responses)

Negligent Credentialing

- Hospitals facing negligent credentialing claims are now looking to bring in responding facilities as third-party defendants or sue them after settlement/judgment with the plaintiff
- Intentional misrepresentation/negligent misrepresentation
- Duty not to make affirmative misrepresentations in the letters
- No duty to disclose, but there is a duty to avoid affirmative misrepresentations in the letters
- In negligent misrepresentation cases, courts have held that even when there is no initial duty to disclose information, once information has been offered by a party, it assumes a duty to ensure that the information offered is accurate

Negligent Misrepresentation

Kadlec Medical Center v. Lakeview Anesthesia Associates - 2008

- Kadlec Medical Center (Plaintiff) sued Dr. Robert Berry (Defendant), an anesthesiologist and former shareholder/employee of Louisiana Anesthesia Associates (LAA) (Defendant) and Lakeview Medical Center (Lakeview) (Defendant) for negligent misrepresentation on the basis that Dr. Berry used narcotics on-duty and nearly caused a patient to die, which was not disclosed
- Kadlec claimed that LAA's and Lakeview's referral letters were misleading as they did not disclose Berry's past negligence and addiction to narcotics

Negligent Misrepresentation

Kadlec Medical Center v. Lakeview Anesthesia Associates – 2008

- November 2000 until March 13, 2001, Dr. Berry was a shareholder of LAA, which was the exclusive provider of anesthesia services to Lakeview
- In November 2000, Lakeview investigated Dr. Berry after nurses expressed concern about his undocumented and suspicious withdrawals of the narcotic Demerol
- Excessive narcotic withdrawals by Dr. Berry and missing documentation

Negligent Misrepresentation

Kadlec Medical Center v. Lakeview Anesthesia Associates – 2008

- Dr. Berry's agreed to account for narcotic withdrawals – he failed to do so
- Three months later, Dr. Berry did not answer a page while on duty at Lakeview and when discovered, he was found asleep, groggy, and unfit to work
- On March 27, 2001, LAA fired Berry “for cause.”
- No report of his impairment to Lakeview's MEC or Board
- No report to Louisiana State Medical Board or NPDB

Negligent Misrepresentation

Kadlec Medical Center v. Lakeview Anesthesia Associates – 2008

- Moved to Richland, WA and applied to Kadlec
- LAA Partner (Dennis) stated he had worked with Dr. Berry for four years, that he was an excellent clinician, and that he would be an asset to any anesthesia service.
- LAA Partner Preau's letter said he had worked with Dr. Berry at Lakeview and that he highly recommended him as an anesthesiologist.
- LAA did not disclose the termination of Dr. Berry; his on-duty drug use; the investigation into his undocumented and suspicious withdrawals of narcotics or any other negative information

Negligent Misrepresentation

Kadlec Medical Center v. Lakeview Anesthesia Associates – 2008

- Lakeview responded to the request with a short letter, stating, “Our records indicate that Dr. Robert L. Berry was on the Active Medical Staff of Lakeview Regional Medical Center in the field of Anesthesiology from March 04, 1997 through September 04, 2001.”

Negligent Misrepresentation

Kadlec Medical Center v. Lakeview Anesthesia Associates – 2008

- Defendants lost trial
- Kadlec awarded \$8.24 million
- Reduced to \$5.52 million (33% liability for Dr. Berry)
- Joint liability
- Appeal

Negligent Misrepresentation

Kadlec Medical Center v. Lakeview Anesthesia Associates – 2008

- Court held that LAA's letters, on their face, were "false and materially misleading."
- Note in particular, these letters came only sixty-eight days after Dennis and Preau, on behalf of LAA , signed a letter terminating Dr. Berry for narcotic use while on duty and stating that Dr. Berry's behavior presented a significant risk to patients.
- Furthermore, because of the misleading statements in the letters, Dennis and Preau had a duty to fix these misleading statements by disclosing to Plaintiff that Dr. Berry had been fired for drug use while on the job.

Negligent Misrepresentation

Kadlec Medical Center v. Lakeview Anesthesia Associates – 2008

- Lakeview's letter was more difficult for the court to assess
- The letter does not recommend Dr. Berry and does not comment on his proficiency as an anesthesiologist
- Lakeview did not respond in full to Kadlec's inquiry
- Kadlec presented no evidence that this could have affirmatively misled it into thinking that Dr. Berry had a good history at Lakeview
- Lakeview cannot be held liable on the basis of its alleged affirmative misrepresentations

Sharing Peer Review Information

- Generally, hospitals want the exchange of information to be:
 - (1) Authorized by the physician (to avoid defamation and tortious interference claims), and
 - (2) Remain protected from malpractice plaintiffs
- Two guiding principles for sharing information

Sharing Peer Review Information

- Golden Rule – what would you want to know?
- Be consistent. Develop standards on how you respond, and stick to those standards
- Provide the same information to affiliates that you give to unaffiliated entities (unless there is an explicit sharing agreement, and assuming they asked for the same information)
- Read the request and provide what is *requested*
- Do you fill out the forms or provide a narrative response?

Sharing Peer Review Information

- Stick to the facts!
 - Conduct concerns
 - Quality concerns
- If needed, ask the doctor to sign a special release
 - you can provide the release to the requesting facility and ask them to have it signed
- Two-pronged approach
 - If the release is adequate, provide the response
 - If not, state you will cannot provide information (cont'd)

Sharing Peer Review Information

If the physician will not sign the requested release:

- “The Hospital is in receipt of your request for information regarding Dr. X, dated December 20, 2021. Dr. X is a member of the Hospital’s active medical staff and was initially appointed to the staff on January 31, 2015. The Hospital requested Dr. X sign a special release, authorizing the Hospital to provide additional information requested by you. However, Dr. X refused to sign the release. As a result, no additional information can be provided at this time.”

Practice Tips

- Be thoughtful in credentialing and recredentialing
- Peer review is vital
- Documentation is key
- Develop standards and criteria in sharing peer review information – the information you seek and the information you provide should be similar



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