

CONNECTICUT SUPREME COURT ISSUES A STERN REMINDER IN MEDICAL STAFF TERMINATION CASES: FOLLOW YOUR BYLAWS OR ELSE!

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The Health Care Group at Murtha Cullina is pleased to provide clients and friends with information about topics of interest.

If you have questions about the issues addressed in this newsletter, or any other matters, please feel free to contact any of our attorneys listed in this newsletter.

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The Connecticut Supreme Court recently issued a stern reminder to hospitals that they must substantially comply with their medical staff bylaws and protect the due process rights of medical staff members.

In *Harris v. Bradley Memorial Hospital and Health Center*,¹ the Court enforced a jury verdict against a hospital for wrongfully terminating a physician's medical staff privileges. In doing so, it affirmed that the standard of review in such cases is whether the hospital acted in substantial compliance with its medical staff bylaws. The Court acknowledged that a reviewing court should not second-guess the quality of healthcare judgments made by the hospital. However, it firmly concluded that the hospital must offer an unbiased investigation and hearing process and comply with its own medical staff bylaws.

The Investigation and Review Process

In *Harris*, a general surgeon was being investigated by the hospital as the result of poor outcomes. While the hospital engaged an independent reviewer, the cases were selected by the Chair of the Department of Surgery, Harris's direct economic competitor. The Court concluded that there was evidence that the Chair did not randomly select the cases, but instead

¹ 296 Conn. 315, 2010 Conn. LEXIS 166, May 18, 2010.

chose only those cases that had had problems. The Chair also produced his own statistical summary of Dr. Harris's cases for presentation to the peer review panel.

The Court further noted that Harris was given only two hours notice to appear before the peer review panel and was not allowed to consult his office records concerning the cases being discussed or otherwise allowed to refresh his memory of the events. Of key importance to the Court, the hospital claimed to have summarily suspended Dr. Harris's privileges in February 2001 under the "immediate risk" standard in the medical staff bylaws, yet the outside review process was begun in November 2000.

The Key Medical Staff Bylaw Provision

The hospital's bylaws had little to say about the process for suspending or terminating medical staff privileges. The only bylaws applicable to the summary suspension process said, in part:

"...the executive committee of either the medical staff or the governing body shall have the right to

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summarily suspend the admitting and/or clinical privileges of a practitioner, *upon a determination that action must be taken immediately in the best interest of patient care in the hospital or when there is a potential immediate risk to the well being of patients, employees or visitors.* In instances where convening the entire committee may be practically impossible, and in the interest of time and immediate action, this right to summarily suspend may be delegated by either such committee to an individual member or representative of such committee....”

[Emphasis in original.]

The hospital argued that since the bylaws themselves did not require any particular procedures in connection with a summary suspension, the due process offered to the doctor was adequate. But the Supreme Court disagreed, and this is where the real import of this case comes in.

The Public Policy “Gloss” on Medical Staff Bylaws

The Court repeatedly discussed the public policy importance of medical staff bylaws, emphasizing the crucial role that doctors and hospitals play in our society. The Court implied that hospital medical staff bylaws must meet certain minimum requirements of fairness and be fairly implemented. And the decision hints that if the bylaws themselves lack certain provisions safeguarding a physician’s rights, the Court will supply them. It’s instructive to hear the Court’s comments:

“The privilege to admit and treat patients at a hospital can be critical to a doctor’s ability to practice his [or her] profession and to treat patients. Both doctors and patients can suffer if

otherwise qualified doctors are wrongfully denied staff privileges.... Consequently, hospitals must treat physicians fairly in making decisions about their privileges because patients need physicians and they, in turn, need hospital privileges to serve their patients. **Therefore, in establishing standards for granting or maintaining staff appointment or clinical privileges, hospitals must ensure that these standards are rationally related to the delivery of quality health care to patients....** The public has an interest that staff decisions are not made arbitrarily. By requiring hospitals to adhere to their bylaws, the risk of arbitrary decisions is reduced.

* * * *

Those interests [of judicial economy], however, are outweighed by the more important public policy of ensuring that hospital decision makers are guided only by a concern for ensuring quality health care.

* * * *

...the procedural protocol of the bylaws provide[s]...a fair method for making decisions concerning staff privileges...[T]he obligation to follow medical staff bylaws is paramount...a hospital must afford its medical staff all of the process and protections encompassed by its bylaws.” [Emphasis added.]

Having established the importance of medical staff bylaws, the Court then took the hospital to task, noting that the hospital did not comply with its rules for summary suspension because the process *was not fairly implemented* and because the hospital took three months, thereby demonstrating that this particular suspension was not really based on any “immediate risk” to patients.

The Court noted that the investigation of Dr. Harris was biased because it was carried out by a competitor who did not select cases at random, but only selected cases with problems. The hospital could not hide behind the fact there was nothing in the bylaws

about how to conduct the investigation. The Court said that the bylaws must be fair and the actual investigation and hearing process must be conducted fairly. For example, the Court noted with displeasure the two hour notice Dr. Harris was given before the peer review meeting, and further concluded that the selection by the Chair – a competitor of Dr. Harris – of only cases with problems showed clear bias.

...”Use summary suspension only for the purpose for which it is intended in your bylaws—usually when there is a reasonable basis for assessing imminent risk.”

Lessons Learned

1. Ensure that the corrective action portion of your medical staff bylaws is sufficiently specific so the bylaws can be followed *to the letter* when it is time to implement an investigation and/or a summary suspension.
2. Ensure that the process outlined in the bylaws conforms with the standards set out in the Health Care Quality Improvement Act 42 U.S.C. § 11101 (“HCQIA”). Compliance with HCQIA’s four standards conveys immunity from liability upon participants in the peer review process. To qualify for immunity under HCQIA, a peer review action must be taken: (1) in the reasonable belief that the action was in the furtherance of quality health care; (2) after a reasonable effort to obtain the facts of the matter; (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements set forth in the third standard. Professional review actions are presumed to meet HCQIA requirements, unless such presumption is rebutted by a preponderance of evidence.

3. Thoroughly document every step in the process. Do not wait until there are a large number of problem cases to evaluate a problematic physician and initiate quality-safety related actions under the bylaws. Have the appropriate departmental peer review group decide whether the physician’s cases warrant further scrutiny, and ask the physician to meet with the peer review committee and/or provide a written response on cases of concern. Give the physician plenty of time to prepare.

4. Having someone who is a competitor involved in the process is not necessarily fatal to HCQIA immunity (if a peer review action is taken in the reasonable belief that the action would restrict incompetent behavior or would protect patients) but it gives the appearance of bias to juries and state courts and should be vigorously avoided. In the Harris court’s view, allowing a competitor to skew the case selection for the independent reviewer went far behind fair and objective.

5. Use summary suspension *only* for the purpose for which it is intended in your bylaws—usually when there is a reasonable basis for assessing *imminent risk*. Having it be the conclusion of a lengthy investigation is hard to explain to a court.

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