

Defending Negligent Credentialing and Supervision Claims
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Negligent Credentialing

A claim against a hospital for granting privileges to a member of the Medical staff that is beyond their training or skills. The claim may also allege the procedure is experimental or not standard practice.

Negligent Supervision

A claim that alleges a hospital has failed to adequately supervise a practitioner's care. The claim generally alleges that the hospital/medical staff should have curtailed the physician's current practice/privileges due to prior history of substandard care, to prevent negligence in the instant action.

Independent Negligence Claims Against Hospital

- Both claims allege an action for independent negligence against the hospital.
- However, they are derivative of the claims against the practitioner. If the practitioner was not negligent, they cannot establish negligence against the facility.

Hospital Duty

- A hospital has a duty to its patients to ensure that only professionally competent physicians are on staff.

Purcell v. Zimbelman

"Zimbelman's theory against the hospital was that the hospital had a duty to the public to allow the use of its facilities only by such independent staff doctors as are professionally competent and who treat their patients in full accordance with accepted and established medical practices. The hospital breached its duty when it failed to take any action against Purcell when it knew, or should have known, that he lacked the skill to treat the condition in question. The hospital claimed that it could not be liable for Purcell's malpractice since he was an independent contractor and there was no reason to believe that a specific act of malpractice would take place."

Purcell v. Zimbelman, 18 Ariz. App. 75, 500 P.2d 335 (1972).

Purcell: Obligations of Facility

The Court cited to the obligations of the facility under the American Osteopathic Association for accreditation of the facility:

'The governing authorities of the hospital have a responsibility of selecting its professional staff to assure the community that the physician to whom it extends the privilege of the use of its facilities are professionally competent and will offer optimum patient care. . . .'

Purcell v. Zimbelman, 18 Ariz. App. 75, 500 P.2d 335 (1972).

Purcell: Hospital Governing Documents

The court also used the hospital's own governing documents to argue that the hospital acknowledged this responsibility to overseeing the competence of its medical staff:

"Pursuant to the requirements of the association, a professional staff was created at the hospital. By-Laws, approved by the board of trustees of the hospital state:

'Fully recognizing that the governing authority of any hospital serving the public has not only the right, but, also the responsibility in selecting its professional Staff to assure itself, and through it the public, that the doctors to whom it extends the privileges to the use of its facilities are professionally competent and ethically sound, and that such governing authority of the hospital has a moral, as well as a legal, obligation toward the patient, the recognition of which enables the person requiring hospital care to enter the institution confident that the treatment he or she will receive there will be in full accordance with accepted and established practice, the Professional Staff of the Tucson General Hospital, Osteopathic, sets out the following purpose: . . ."

Purcell v. Zimbelman, 18 Ariz. App. 75, 500 P.2d 335 (1972).

Duty of Competence of Medical Staff

A hospital has a duty to its patients to assure the competence of its medical staff through its privilege, selection and review process.

Peterson v. Tucson General Hospital, 114. Ariz. 66, 559 P.2d 186 (App. 1976), Tucson Med. Center Inc. v. Misevch, 113 Ariz. 34, 545 P.2d 958 (1976).

Negligent Credentialing-Duty to Investigate

A hospital has a duty to investigate and verify an applicant's references and to confirm his or her qualifications to perform the procedures for which staff privileges are sought.

• Humana Hospital Desert Valley v. Superior Court, 154 Ariz.a 396 (App. 1987).

Credentialing Process

The hospital must be able to establish that it has a process for the credentialing of physicians. Witnesses will generally be able to testify about how this process works.

The hospital will be required to produce materials that discuss the process, but not the specifics of what occurred during the credentialing of the physician involved in the medical negligence lawsuit. The parties are entitled to know the dates of the credentialing, and the privileges granted and if negative action was taken.

Recommended Discovery Documents

The hospital should consider providing the following types of documents in discovery to assist in their defense of the case and in response to the requests from Plaintiff:

- blank copies of all forms used by the physician to request privileges;
- lists of the type of documents requested, and received by the physician during credentialing;
- copy of the Medical Staff Bylaws and Rules and Regulations;
- any policies, plans or other documents that show the facility complies with rules and regulations related to credentialing.

Witnesses to Testify Regarding Processes

The hospital should expect to call witness that can generally discuss the following topics to prove a process existed or was generally followed for the physician involved in the alleged negligence:

- an individual from Medical Staff Services that understands the documents outlined above;
- Chief of the Division that the physician is a member of;
- Chief of Staff or someone from the MEC;
- Member of hospital administration that can discuss how the hospital keeps track of the credentialing process through its Medical Staff.

Examples of Negligent Credentialing Actions

The hospital fails to adequately investigate the physician's background before granting privileges on its medical staff.

Texas example of physicians with history of prior complaints or criminal backgrounds

"According to records with the Texas Medical Board, three male psychiatrists have been punished for inappropriate sexual relationships. One of them pleaded no contest to sexual indecency with a child in the late 1980s. The other two were sanctioned by medical boards in the 2000s after they were accused of having sexual relations with adult patients they treated before working at the state hospitals.

- "They were hired because they were qualified candidates whose licenses were in good standing at the time they were hired," said Carrie Williams, spokeswoman for the Department of State Health Services, which runs the hospitals.

"They have good work histories with us."

The Statesman, Dec. 5, 2011.

Duty to Verify Training

Hospitals have a duty to ensure the doctor's training is valid. There are cases in which applicants lied about graduating from medical school.

A former Western Michigan University researcher and former United Airlines pilot, who claimed credentials as a cardiologist, has been exposed as a fake physician.

Hired in 2004, William Hamman was on the WMU's payroll through this past February when he had concluded his work for the university's Center of Excellence for Simulation Research... The **Associated Press** found that the 58-year-old has no medical residency, fellowship, doctoral degree or the 15 years of clinical experience he has claimed. He attended medical school for a few years but withdrew and didn't graduate.

BY PAULA M. DAVIS, Kalamazoo Gazette
and Marilyn Marchione, AP Medical Writer

Examples of Stolen Identity

A Georgia man was arrested after a friend said the man stole his identity and used it to practice medicine illegally.

Ernest Osei Addo, 48, is accused of treating as many as 500 patients in South Carolina without a license, the newspaper The State reported.

He was hired by Agape Senior, which operates 23 nursing and assisted living facilities throughout the Midlands area, in February. Lexington County Sheriff James Metts said he presented the company with a medical license.

But an Orangeburg, S.C., doctor told police that Addo had stolen his identity. In addition to practicing medicine under his name, the doctor said, Addo was running up his credit card bills.

Read more:
<http://www.nydailynews.com/news/national/fake-doctor-accused-practicing-medicine-friend-stolen-identity-article-1.1145228#zZZ2LYXTO900>

Doc in a Box?

Dr. Harry Dorsey, an internist in Albany, had his medical license stolen. In 2010, someone using a Buckhead UPS store mailbox as an address set up a fake corporation to obtain a National Provider identifier.



M.B. Pell, The Atlanta Journal Constitution

Arizona Credentialing Law

The credentialing process is generally considered privileged and confidential under Arizona law.

Arizona Statutes

ARS § 36-445.01. Confidentiality of information; conditions of disclosure

A. All proceedings, records and materials prepared in connection with the reviews provided for in § 36-445, including all peer reviews of individual health care providers practicing in and applying to practice in hospitals or outpatient surgical centers and the records of such reviews, shall be confidential and shall not be subject to discovery except in proceedings before the board of medical examiners, or the board of osteopathic examiners, or in actions by an individual health care provider against a hospital.... No member of a committee established under the provisions of § 36-445 or officer or other member of a hospital's or center's medical, administrative or nursing staff engaged in assisting the hospital or center to carry out functions in accordance with that section or any person furnishing information to a committee performing peer review may be subpoenaed to testify in any judicial or quasi-judicial proceeding if such subpoena is based solely on such activities.

Arizona Statutes

B. This article shall not be construed to affect any patient's claim to privilege or privacy or to prevent the subpoena of a patient's medical records if they are otherwise subject to discovery.... In any legal action brought against a hospital or outpatient surgical center ... claiming negligence for failure to adequately do peer review, representatives of the hospital or center are permitted to testify as to whether there was peer review as to the subject matter being litigated. *The contents and records of the peer review proceedings are fully confidential and inadmissible as evidence in any court of law.*

When Are Documents Privileged?

All documents included in a credentialing file are not covered by the privilege.

You cannot make a document privileged just because it is placed in a credentialing file. It must be a document that was created as a function of the credentialing or peer review process.

Exception to the Claim of Privilege

"We note, though, that evidence possessed by the credentials committee which is not otherwise privileged may be discovered; the mere fact that a committee has obtained evidence does not render that evidence privileged if it was not previously privileged. *Lipschultz v. Superior Court*, 128 Ariz. 16, 623 P.2d 805 (1981). To hold otherwise would result in such evidence being more protected than it was before being obtained by the committee. *Lipschultz*. Personnel, administrative and other hospital records regarding Dr. Blumberg which do not contain references to proceedings before medical investigative committees are not immune from discovery. *Schulz v. Superior Court*, 66 Cal.App.3d 440, 136 Cal.Rptr. 67 (1977)."

Humana Hospital Desert Valley v. Superior Court, 154 Ariz. 396 (App. 1987).

Privileged Documents-Examples

Examples of these types of documents include:

- Incident reports
- Evidence of training (medical school diploma)
- State licensing information from public file from AMB
- DEA certificates

Privileged Documents-Examples

Examples of items that are privileged:

- Letters of recommendation from training or from practitioners;
- Information obtained from other institutions;
- Statistics regarding their practice at the facility;
- Supervision reports.

Defending Negligent Credentialing Cases

- The hospital should retain an expert in the area of speciality of the physician involved to address general training and competency issues.
- The hospital should retain an expert that focuses on the credentialing and medical staff process to testify that hospital's process followed regulations and was standard practice in the hospital industry;
- Experts should be provided with all of the documents outlined above so they can use them as foundation for their opinions;

Defending Negligent Credentialing Cases

- Obtain a copy of all public files of licensing agencies for the doctor to show he has been in good standing without a negative history;
- Question the doctor extensively about his background during the deposition to "create the background information you cannot use from the peer review file".

Be Prepared

- Your attorney will want to conduct discovery/investigation to your compliance with State, Federal and Joint Commission Credentialing Criteria or Regulations:
- Arizona has regulations/statute that relate to the activities required for credentialing;
- Be prepared to address CMS and other federal requirements related to credentialing;
- Make sure the facility can establish that they follow Joint Commission standards related to the medical staff if they participate in the survey process;
- Does that hospital have a history of state or CMS action related to credentialing of supervision?;
- Expect to discuss prior claims for errors in credentialing.

Credentiaing Errors |||

Credentiaing Errors for New or Innovative Procedures, Treatments or Techniques

- Hospitals can also be sued for allowing a physician to provide care that is not considered standard practice. This may include techniques that are considered "experimental" or beyond the training of the physician.
- Hospitals should be encouraged to have a mechanism for all research protocols to be reviewed by the Chief of the Division for that specialty or have regular consultation in the types of research being done at the facility.

Hales v. Humana |||

Surgeon begins conducting biliopancreatic bypass procedures at local facility. Plaintiffs' allege this surgery is new and innovative. The procedure should only be completed at academic centers with research programs and not a community hospital. Plaintiffs claim the medical staff should have denied surgeon ability to perform procedures. Also alleged a supervision claim for failing to identify errors in prior patients. Hospital should have taken action before the patient's surgery in this case based upon errors with prior patients.

Negligent Supervision Cases |||

- Once a competent and careful physician has been granted staff privileges, the hospital will not thereafter be liable, unless it has reason to know, through a pattern of incompetence, that an act of malpractice is likely to occur.
- Ziegler v. Superior Court, 134 Ariz. 390, 656 P.2d 1251 (App. 1982)

Failure to Supervise

In Ziegler, Plaintiffs alleged the hospital failed to supervise a cardiologist. The Court of Appeals ordered the hospital to produce 24 prior patient charts for experts to review to determine if their was evidence of incompetency prior to implantation of a pacemaker in Zeigler.

Ziegler v. Superior Court, 134 Ariz. 390, 656 P.2d 1251 (App. 1982)

Hospital Standards of Responsibility

The courts of this state have recognized that hospitals have assumed certain responsibilities for the care of patients and must meet the standards of responsibility commensurate with this trust. Therefore, hospitals and their governing bodies may be held liable for injuries resulting from negligent supervision of members of their medical staffs. *Tucson Medical Center, Inc. v. Misevch*, supra; *Purcell v. Zimbelman*, 18 Ariz.App. 75, 500 P.2d 335 (1972).

Ziegler v. Superior Court, 134 Ariz. 390, 656 P.2d 1251 (App. 1982)

Hospital's Knowledge of Negligent Supervision

If the claim against the hospital is predicated on its negligent supervision of members of the medical staff, an essential factor to be proved by the plaintiff is the hospital's knowledge, actual or constructive. *Purcell v. Zimbelman*, supra. Therefore, medical records of other patients who might have had unnecessary pacemaker implantations are relevant to the notice issue. It is thus readily apparent that a blanket prohibition against examination and use against the hospital of such records would result in an injustice.

Ziegler v. Superior Court, 134 Ariz. 390, 656 P.2d 1251 (App. 1982)

Prior Patient Information

- Hospitals should be prepared to identify prior charts and produce them in a redacted form to exclude identity of prior patients;
- Patients can be identified by a random number during discovery;
- Counsel should request an order from the court to prevent Plaintiff's counsel contacting prior patients based upon receipt of the medical records;
- This should be addressed with the court before records are produced so the hospital can argue it was ordered to produce the records. This will provide a defense if there is a HIPAA violation in the future.

Document Production

Hospital Should Be Prepared to Produce the Following Documents:

- All quality plans in place for the time period in question;
- Criteria for focused reviews in the speciality;
- Criteria for general reviews for all practitioners;
- Areas in which the facility is tracking statistics within the speciality on an annual basis;
- Prior surveys by Joint Commission;
- Any quality initiatives undertaken by the facility;
- Flow charts of the quality process and all forms used in the process.
- The hospital will need a similar set of witnesses as suggested for a negligent credentialing claim.

Review of Patient Charts by Experts

- The case becomes a claim of multiple medical malpractice cases for each chart that Plaintiff alleges was prior notice to the hospital of incompetency. These cases can be very difficult to defend.
- Must have your expert review all charts to establish prior care was acceptable or that prior complications were within acceptable limits.
- Medical Staff expert will need to discuss that the quality plan for the facility was adequate and the hospital had a process to identify errors. It would be ideal to have someone that is also within the speciality of the physician defendant with expertise in credentialing.

Practitioner Actions

Actions Against Facilities by Practitioners Related to Medical Staff Actions

- Courts generally defer to facilities on their decisions in credentialing members of the medical staff.
- Physicians are generally required through a hospital's bylaws to exhaust their remedies through the fair hearing process before filing suit against the facility for either denying or restricting their privileges.
- Hospitals can usually obtain a dismissal of claims filed in court until the medical staff appeals process is complete.

Credentialing Best Left to Peers

Courts generally recognize that hospitals are best at making credentialing and supervision decisions and will engage in limited judicial review.

Credentialing Best Left to Peers

"The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered *73 **193 with irrelevant considerations, a court should not interfere."

Peterson v. Tucson General Hospital,
114. Ariz. 66, 559 P.2d 186 (App. 1976).

Litigating These Claims in Federal Court

(The agony of being without a peer review privilege)

Arizona's peer review privilege is a state privilege. It is not recognized in federal court if the case involves a federal question.

This can occur with a Federal Tort Claims Act (FTCA) case. If the physician is providing care through a federal funded or insured institution, the claim will be filed in federal court.

No Federal Peer Review Privilege-AZ

- Arizona's Division Nine courts generally do not recognize a peer review privilege in cases involving a federal question. Most Plaintiffs will cite to *Agster v. Maricopa County* as evidence of federal courts not recognizing a privilege of peer review in a hospital setting.


No Federal Peer Review Privilege-AZ

- *Whereas in the ordinary hospital it may be that the first object of all involved in patient care is the welfare of the patient, in the prison context the safety and efficiency of the prison may operate as goals affecting the care offered. In these circumstances, it is peculiarly important that the public have access to the assessment by peers of the care provided. Given the demands for public accountability, which seem likely to guarantee that such reviews take place whether they are privileged or not, we are not convinced by the County's argument that such reviews will cease unless kept confidential by a federal peer review privilege. Accordingly, we are unwilling to create the privilege in this case.*

Agster v. Maricopa County, 422 F.3d 836 (9th Cir. 2005).

No Federal Peer Review Privilege-Other Courts

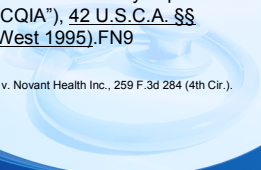
Some District Courts have found that Congress considered, and rejected, the creation of a federal peer review protection when enacting HCQIA. They have chosen not to allow the privilege in federal question cases.



No Federal Peer Review Privilege-Other Courts

We should not recognize a privilege "where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." *University of Pa.*, 493 U.S. at 189, 110 S.Ct. 577. The district court below found that Congress had considered and rejected a privilege for medical peer review materials when it enacted the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C.A. §§ 11101-11152 (West 1995).FN9

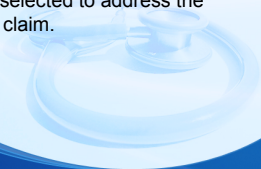
Virmani v. Novant Health Inc., 259 F.3d 284 (4th Cir.)



Trial Bifurcation

A hospital can request a bifurcation of the trial and ask for the doctor's case to proceed first, and determine if the physician was negligent.

If in phase one the physician is determined to be negligent, a second jury can be selected to address the supervision claim.



“...But for the lack of care in selection...”

Bifurcation also allows a negligent-credentialing claim against a hospital to be dismissed if the plaintiff does not prevail on the malpractice claim against the doctor. If the fact-finder determines that negligence of the doctor was not the proximate cause of the plaintiff's injury, then a hospital's grant of staff privileges to a doctor is not the cause of the plaintiff's injury, as required by *Albain*. 50 Ohio St.3d 251, 553 N.E.2d 1038, paragraph two of the syllabus (“a plaintiff injured by the negligence of a staff physician must demonstrate that but for the lack of care in the selection or the retention of the physician, the physician would not have been granted staff privileges, *and the plaintiff would not have been injured.*” [emphasis added]).

Schelling v. Humphrey, 123 Ohio St. 3d 387, 916 N.E. 2d 1029 (2009); See also *Hirons v. Scheffé*, 76 S.W.3d 486 (2002).

Comments? Questions?



