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How to navigate National Practitioner Data Bank reports effectively

Legal experts offer tips for medical staffs and practitioners

Nothing grabs a credentials committee's attention like a National Practitioner Data Bank (NPDB) report. It's a serious, career-long mark against a practitioner and a substantial action for a hospital to take.

To ensure that both sides know how to navigate these reports effectively and repeal them when necessary, read the following tips from **Shirley P. Morrigan, Esq.,** a partner at Los Angeles–based Foley & Lardner, LLP, and **Frances Cullen, Esq.,** an Atlanta-based attorney who specializes in healthcare issues.

Advice for the medical staff

➤ **Talk to your legal counsel sooner rather than later about problem practitioners.** Most problems that medical staffs identify in practitioners have developed over time, such as impairment due to substance abuse or mental or personality disorders. Therefore, it's important that the medical staff take progressive disciplinary action and avoid trying to fix a series of problems with one action that leads to an NPDB report.

Along the way, the medical staff should communicate with its legal counsel to ensure that the actions it is taking meet legal standards.

"What I see sometimes is that people tolerate bad behavior for 20 years, and then they want to take action today," Morrigan says. In situations such as these, the response from the practitioner is usually, "If you're mad at me for 20 years of actions, why did you reappointment me 10 times?"

> **"I think it's a good idea for people to know what's on their data bank report and check it periodically because then they can correct any inaccuracies."**
>
> *—Frances Cullen, Esq.*

It's a valid point from the practitioner and one that the courts will likely listen to, especially if the medical staff didn't follow the corrective action steps outlined in its bylaws. Keeping your legal counsel regularly updated about these problem practitioners will help avoid hastily made reports to fix years of problems.

➤ **Meet about final disciplinary actions and the NPDB report.** Morrigan recommends spelling out summary suspension language in the bylaws. Such language should state that within a week after the MEC's meeting during which it discusses a potential practitioner suspension, it should meet face-to-face with the practitioner. The MEC should notify the practitioner of this meeting in advance so the practitioner can consult his or her legal counsel.

However, when the MEC and practitioner meet, neither side should have legal counsel present. The pur-

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pose of the meeting is for the MEC to state why it wants to suspend the practitioner, and the practitioner has a chance to state his or her case.

Afterward, the MEC meets again and formally decides whether to uphold or rescind the suspension. If the MEC upholds the suspension, it should also decide what definitive action it wants to recommend, such as termination or permanent restriction. Keep in mind that, with the exception of summary suspension, a practitioner on a hospital's medical staff is entitled to a hearing and appeal before an NPDB report is filed.

➤ **Take targeted actions and suspend privileges as needed.** Medical staffs shouldn't hastily suspend all privileges if the practitioner only has problems performing a few of them, says Morrigan. For example, if a practitioner has OB/GYN privileges and only has problems performing obstetrical procedures, Morrigan would advise the medical staff not to terminate the gynecological privileges.

If a medical staff uses this targeted disciplinary action, it may be possible for a practitioner to continue working at an organization while he or she goes through a hearing and appeal. The practitioner may file a dispute against the organization for the NPDB report it filed. This could create a tense working situation between the medical staff and the practitioner, and the involved parties need to consider ways to manage this.

➤ **Consider alternative disciplinary actions.** When a practitioner derails the medical staff's goal of providing quality patient care, there are several options to get the practitioner back on track. These options include recommending termination or restriction, which are NPDB-reportable suspensions.

There are also nonreportable options, such as monitoring and counseling. (Some of these nonreportable disciplinary actions may be why studies question medical staffs' NPDB reporting rates. Read more about this issue in the sidebar on p. 3.)

➤ **Ask counsel about legal standards.** A recent study in California found that medical staff leaders may not know when they are required to report peer review actions to the state licensure board. "I don't think they should be required to know; that's what the medical staff lawyer is around for," says Morrigan.

Advice for practitioners

Note: MSPs can pass along the following section of the article to medical staff members and leaders as an educational tool.

➤ **Know your rights and options.** Practitioners spend years training for their clinical responsibilities, but not nearly as much time is spent learning about the legal

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or administrative aspects of their careers. "I think it's a good idea for people to know what's on their data bank report and check it periodically because then they can correct any inaccuracies," says Cullen.The NPDB details practitioners' options for disputing submitted reports on its Web site *(www.npdb-hipdb.hrsa.gov/dispute.html).*

➤ **Ask the organization to consider revising its report before it's submitted to the NPDB.** If you are concerned that a potential NPDB report is inaccurate, discuss those concerns with the medical staff and legal counsel before the medical staff submits the report. "If clients come to me early enough, we first try to resolve the case or work with the reporting entity so the circumstances will not trigger a data bank report or try to obtain more favorable reporting language," says Cullen. She notes that hospitals and licensing boards are often amenable to changing the language in an NPDB report as long as the facts remain accurate.

When licensure boards and organizations file their reports, there are codes that describe the action that triggered the report. Sometimes, boards or organizations are willing to change these codes. For example, the difference between a patient abandonment and patient neglect code may make a difference in how a future employer evaluates a practitioner with that code on his or her record.

➤ **Determine the level of interaction you want your legal counsel to have with the medical staff.** The way a practitioner presents himself or herself to a medical staff during disciplinary disputes can affect the outcome. For example, if the practitioner seems willing to work with the medical staff and compromise on actions, the medical staff may reciprocate that mind-set.

Cullen says clients have approached her with questions about a case, explaining that they don't want to

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Are hospitals reporting enough practitioners to the NPDB?

Hospitals are not reporting practitioners to the National Practitioner Data Bank (NPDB) as often as they should, claims a May 2009 study by Health Research Group, a branch of the consumer advocacy organization Public Citizen *(www.citizen.org/documents/1873.pdf).*

The study compared the number of reports the NPDB expected to receive to the number of reports it actually received. "Prior to the opening of the NPDB in September 1990, the federal government estimated that 5,000 hospital clinical privilege reports would be submitted to the NPDB on an annual basis, while the healthcare industry estimated 10,000 reports per year. However, the average number of annual reports has been only 650 for the 17 years of the NPDB's existence," the report states.

What does the low number of incoming reports compared to initial estimates say about physician reporting? Some lawyers dispute the conclusion that medical staffs aren't meeting their reporting obligations.

"I don't believe that there is a huge number of practitioners who aren't being reported," says **Shirley P. Morrigan,** a partner at Los Angeles–based Foley & Lardner, LLP. "There was no way in 1990 to predict how many reports hospitals would file. The reporting requirements are technical and have never contemplated any alternative ways that medical staffs could deal with their members. Medical staff review is done by peers, and short of intense governmental oversight of the process, there is no way to assess whether an individual medical staff is meeting its reporting obligations."

Frances Cullen, Esq., an Atlanta-based attorney, agrees with Morrigan's assessment that medical staffs aren't overly negligent in reporting.

"There are ways to avoid data bank reports, which I don't think is necessarily bad," Cullen says. "It certainly depends on the severity of the situation."

For example, instead of a hospital suspending a practitioner's privileges for more than 30 days as a disciplinary action, which the medical staff would be obliged to report to the NPDB, Cullen suggests an alternative. The medical staff could require the practitioner to undergo monitoring or attend an educational course, which the NPDB does not require the medical staff to report.

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appear to the medical staff as though they are aggressively pursuing legal action. In those cases, she tells them what actions to take and what to say during medical staff hearings, but she will not directly contact the medical staff on behalf of those clients.

➤ **Stick to the facts when disputing a case.** NPDB reports focus on the black-and-white facts of a case and don't provide supplemental information, such as character references. Because of this, Cullen focuses on the facts when she works with a client to petition an organization to revise the report.

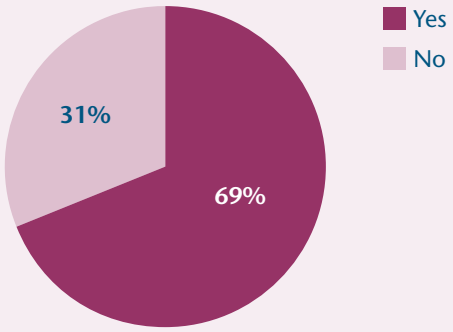
Character assessments contain qualitative information that may be interpreted differently by different people. However, quantitative information is easier to provide as evidence. For example, if a report claims that a practitioner performed nine surgeries and made the same error each time, but patient records show errors only occurred during three surgeries, the organization is more likely to revise its report.

➤ **File a statement with the report.** If a practitioner is unsuccessful in getting an organization to revise its report and the NPDB denies the requests to repeal the report, physicians have one other option: They can file a statement to the NPDB that gets attached to the original report. Think of this statement as the dissenting opinion in a Supreme Court ruling. Although the main NPDB report outlines the facts of a case as the reporting organization sees them, this statement allows the practitioner to tell his or her side of the story.

The medical staff and individual practitioners should consider these tips to help ease what is often a grueling process. With the help of legal counsel, accurate reporting, and careful communication, both parties can help smooth NPDB reporting and peer review in general. ■

Poll results: NPDB reporting

A poll question on the Credentialing Resource Center Blog asked HCPro readers whether they've ever worked at an organization that reported a practitioner to the National Practitioner Data Bank (NPDB) while they were working there. More than 200 readers answered.



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