

REPORTING TO MBP AND NPDB

1. Reporting to the Md. Board of Physicians
 - A. Md. Health Occ. 14-413
 - a. Semi-annual reports by hospitals and nursing homes of
 - employees
 - those with privileges
 - those who have applied for privileges
 - b. Report, within 10 days, any physicians who were denied, limited, reduced, changed, terminated, or resigned “whether or not under formal accusation” if there were possible grounds for disciplinary action of license
 - *parallel provisions for salaried, licensed physicians, residents (and others in post-graduate training program)
 - *reporting form on MBP’s website, but could use any form that states reasons for action
 - c. Report is confidential, not subject to discovery “by any person”
 - d. Courts are, within 10 days, to report guilty/nolo contendere entries if there is a crime of “moral turpitude”
 - e. Board has subpoena power
 - f. There is immunity for good faith reporting
 - g. Penalty for failure to report: \$5,000
 - B. My observations
 - a. 10-day reporting obligation is not very strict
 - b. MPB policy, often publicly stated, is that report is to be made as soon as action becomes effective, not after appeals are all exhausted--upheld by trial court but no regulations
 - c. Penalties are rarely (ever?) imposed--prefer getting report
 - d. MBP response: issue subpoena for file, practically by return mail
 - e. Md. is a small state--MBP seems to hear everything
 - f. unlike NPDB, report has to be made before appeals are exhausted or investigations can be fully conducted, so limits ability to use “precautionary suspension”
2. Reporting to National Practitioner Data Bank
 - A. Reporting requirements
 - a. 42 USCA 11111 *et seq.* and 45 CFR Part 60
 - also: <http://www.npdb-hipdb.hrsa.gov>, which contains NPDB Guidebook
 - b. reports are to be made: by insurers of malpractice settlements; by licensing boards of adverse licensing actions; and, by “healthcare entities” (hospitals, nursing homes, others that engage in peer review) of “professional review actions that adversely affect clinical privileges of a physician or dentist for longer than 30 days” or the surrender of privileges while under investigation or in return for not conducting an investigation
 - c. Reports can be made for other types of practitioners (rarely done)

ATTORNEYS

- d. Must report identifying information, including a fairly detailed description of the action (will be rejected if too general)
 - e. Unlike MBP, reports are not to be made until action is final (all appeals exhausted), except for summary suspensions
 - f. Failure to make report can result in loss of immunity for peer review under federal law
 - g. Report is to be made within 15 days of final action (again, not strictly enforced)
 - h. Physician gets copy of report promptly and can dispute it
 - i. Withdrawals of initial applications are generally not reportable
 - j. Physician need not be aware of "investigation" but there must be evidence that it exists as a peer review activity for an action to be reportable
 - k. Hospitals can submit revisions to their reports
 - l. All restrictions of privileges must be reported (including mandatory proctoring)
- B. Querying requirements
- a. NPDB is confidential and can only be queried by hospitals and practitioners themselves (also licensing boards, others granting privileges, plaintiffs who can establish that hospital didn't make query, those requesting de-identified information)
 - *periodic political attempts to make it public, but so far ineffective
 - *some get around limitations on access by requiring physicians to submit results of self-query
 - b. Hospitals must query every two years (at reappointment)
 - c. If fail to make query, charged with knowledge of information that could have been obtained
- C. My observations
- a. Query value of NPDB itself
 - b. Sometimes gray as to what is a "professional review action"
 - *medical records suspensions--may depend on whether it interferes with patient care
 - *August 6, 2009 release of exchange with NPDB staff re falsification of application for privileges--depends on whether an action affects or could adversely affect patient health or welfare," which NPDB wants interpreted broadly and thus thinks deliberate lies on application should be reported
 - c. Guidebook is not a regulation--query its enforceability?
 - d. Physicians have, in my view, a disproportionate fear of the NPDB and not enough fear of being reported to MBP

**JUL 30 2009**

Bureau of Health Professionals

Michael R. Callahan
Katten Muchin Rosenman LLP
525 W. Monroe Street
Chicago, IL 60661-3693

Re: June 17, 2009, request for clarification

Dear Mr. Callahan:

This letter is in response to the above referenced letter in which you requested clarification of a National Practitioner Data Bank (NPDB) reporting requirement. Specifically, you asked "whether a physician's competence or conduct, which triggered the adverse credentialing decision, must or could adversely affect patient health or welfare before it can be reported. Stated differently, 'is conduct or competence which does not adversely affect patient health or welfare reportable?'"

Further, you provided a hypothetical scenario of a physician who "misrepresented information on his reappointment form as well as purposeful failure to disclose a reduction of insurance coverage in violation of the particular medical staff by-laws."

Generally, as addressed on page E-17 of the NPDB Guidebook, Hospitals and other eligible health care entities must report:

1. Professional review actions that adversely affect a physician's clinical privileges for a period of more than 30 days; and
2. Acceptance of a physician's surrender or restriction of clinical privileges while under investigation for possible professional incompetence or improper professional conduct or in return for not conducting an investigation or reportable professional review action.

As you correctly noted, the Health Care Quality Improvement Act (42 U.S.C. 11151) defines a professional review action, in pertinent part, as:

... an action or recommendation of a professional review body which is taken or made in the conduct of a professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges ...of the physician.

Please be advised that the aforementioned standard is applied broadly. The definition reaches conduct that not only adversely affects patients, but also actions that have the potential to adversely affect patients. The standard is not whether quality of care issues have been raised about a particular provider. This means that if the physician's competence or conduct, which triggered an adverse credentialing decision, affects or *could* adversely affect patient health or welfare, the adverse credentialing decision is reportable to the NPDB if it is in effect for more than 30 days.

Whether an action affects or could affect patient health or welfare is a factual determination in which the healthcare entity taking the action is in the best position to determine. While it may be hard to determine whether some types of activities could potentially affect patient health or welfare, some types of activities clearly fall within the scope of the definition.

In the hypothetical situation you presented, there was a purposeful failure to disclose information to the hospital. The NPDB views intentional misrepresentations to the hospital body making determinations about the clinical competence of providers almost *per se* as having the potential to adversely affect the health or welfare of a patient. Therefore, if this misrepresentation of information is the basis for an adverse action that affects clinical privileges for more than 30 days, it would be reportable to the NPDB.

In addition, you referenced the NPDB Guidebook, page E-22, which is as follows:

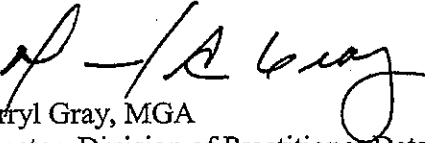
“Example 4: A 31-day suspension is imposed on a physician for failure to complete medical records.

Such a suspension would be reportable to the NPDB if the failure to complete medical records related to the physician's professional competence or conduct and adversely affects or could adversely affect a patient's health or welfare.”

It is the position of the NPDB, that a failure to complete medical records generally is related to a physician's professional competence or conduct and almost always has the potential to adversely affect a patient's health or welfare. This position will be clarified in future editions of the NPDB Guidebook.

We hope this information is helpful. Please contact Shirley Jones at sjones2@hrsa.gov or 301.443.2989 if you have additional questions.

Sincerely,


Darryl Gray, MGA
Director, Division of Practitioner Data Banks