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Removing the Disruptive Doctor: How to Select Attorneys to Lead the Physician Credentialing and Disciplinary Process

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It's an issue that no hospital or health system is immune from encountering: handling a doctor who is difficult to work with, who struggles with following rules or is prone to making mistakes. Although their behavior might be described as problematic or disruptive, these physicians may not have a history of major incidents, medical mishaps, clinical errors, or egregious conduct. And yet, their behavioral red flags can be early indicators of bigger issues ahead, potentially leading to catastrophic consequences for patients and exposing hospitals and health care systems to the risk of litigation.

Addressing problematic doctors often means withdrawing their medical staff privileges, but doing so is not straightforward. Medical staff leadership must follow a lengthy and elaborate process to the letter—or risk it backfiring.

Two attorneys are integral to this process: an advocate for the hospital/medical staff and a hearing officer who oversees the proceedings triggered by recommended “corrective action.” These two distinct functions require skilled and experienced professionals. Both

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will impact how successful and fair the credentialing and disciplinary processes are, and it's the hospital's responsibility to appoint them. The doctor facing discipline will almost certainly hire a lawyer as well—someone to assert their rights and defend their actions—so it's crucial to select an advocate and hearing officer who can lead the way and ensure compliance.

This article explores the roles of advocate and hearing officer, what to know before retaining them, and how they can impact the credentialing process for better or worse.

Why are lawyers necessary for disciplinary action?

Most credentialing matters¹¹ come and go without the need for a lawyer, but disciplinary action is different. An intricate web of bylaws and rules dictates everything about how the disciplinary process should unfold, including how the doctor should be informed and what evidence should be exchanged, as well as how certain decisions should be made and under what burdens of proof. While federal law does protect hospitals that discipline doctors, that protection only applies if the rules were properly followed from start to finish. Protections also apply in most states under their specific laws. These protections may be even greater than the federal protections, but the state laws must also be followed to take advantage of them.

Medical staff leadership may well have a copy of the applicable bylaws, but it would be unrealistic for them to read it cover to cover on a regular basis. It's somewhat like a medical diagnosis: a patient can read lab results but may not fully understand the implications or next steps. Just as a doctor will walk their patient through their diagnosis, the advocate and hearing officer help medical staff understand and follow the rules of the disciplinary process.

What is the advocate's role?

When going through the physician disciplinary process, hospitals will engage an attorney to act on their behalf. This advocate role is similar to that of a prosecutor.

The advocate will pursue the problematic physician's removal, presenting the hospital's case to a review panel of the physician's fellow doctors (usually three to five), who will make the ultimate decision. This attorney is responsible not only for ensuring the panelists receive all appropriate evidence against the physician but also for making a compelling case for their removal.

What to look for in an advocate

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A good advocate has deep knowledge of the particular health system where the problematic doctor works and applicable state health care and employment laws. A great advocate is someone who can also effectively marshal evidence and identify future potential liability for the health system or hospital to show why it's critical to take action against the doctor.

The review panel typically includes the physician's peers, who might, understandably, see themselves in their colleague's shoes and be reluctant to pass harsh judgment. Because of this, the advocate must be able to present their evidence in a way that will help the panelists make an educated, decisive, unbiased decision without second-guessing themselves.

It's a credentials issue today, but tomorrow, it could be a serious malpractice case that puts the health system at risk. Medical staff leadership should, therefore, choose a decisive and assertive advocate. This attorney should be well-versed in the clinical and legal details so they can provide a compelling review of the problematic doctor's record, pinpoint red flags and their implications, and argue convincingly why the doctor must be removed, including the potential for a corporate negligence action.

What is the hearing officer's role?

The hearing officer presides over the disciplinary action triggered by the recommended discipline to ensure it's fair, efficient, and follows state and federal law. They must guide—but not influence—the panel's decision by allowing everyone to be heard, explaining all the applicable rules, and ensuring no one does or says anything that could lead to judicial nullification.

The hearing officer also helps the panel compile its resulting opinion, ensuring it covers all bases and relies on the correct legal standards. A written conclusion with the bases supporting each will be required, and most physicians are not comfortable drafting such a judgmental legal document. Uninterested in a specific outcome, the hearing officer's role is to simply obtain *a result*.

This attorney should be unassociated with both the hospital and the doctor at issue to ensure objectivity, and they don't necessarily have to be licensed in the state where they're hired.

What to look for in a hearing officer

Like the advocate, the hearing officer must be well-versed in health care and employment law. They should also thoroughly understand the rules governing the hearing process and have significant experience with it. Ideally, they've practiced long enough to know certain things intuitively, so they won't need to stop and research bylaws every five minutes. The

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hearing officer should also have vast knowledge of health care organizations, the rules that apply to them, and how to maintain their immunity from lawsuits. To preserve the integrity of the process and to maintain immunity from damages, look for a hearing officer who is fair and unbiased. They should be free of any ties to the health system or physician that could be construed as a conflict of interest. It's ideal if this attorney has a tolerant, even-keeled personality to manage emotions and tensions effectively and foster a constructive atmosphere. The hearing officer has multiple audiences: the practitioner, the medical staff executive committee, and the hearing panel members. It is not enough to be fair; the hearing officer must work to always appear fair.

Select a hearing officer with a reputation for fairness and ticking all compliance boxes. On rare occasions, they might need to help a split panel reach their decision, though they should never be interested in obtaining a specific result.

Prioritize fairness

Above all, the disciplinary process must be fair. Regardless of how disruptive the physician might be for the hospital, the entire endeavor will fall flat if medical staff fail to adhere to the strict procedural requirements. The physician may even be disruptive in the hearing itself. The hearing officer must be prepared for that and engage the physician's attorney and even the physician to calm the waters and bring the process to a fair and complete ending. Though less formal than a courtroom proceeding, the disciplinary process is designed to give physicians an element of due process.

Remember: Fairness is in the eye of the juror—or, in this case, the panel that will make the ultimate decision. As tempting as it can be to bring in the physicians who disfavor the practitioner to tell the hearing panel about the problematic physician, resist this temptation. The motivation of the witness will quickly become apparent and poison the process. Treat the physician how you would expect to be dealt with in their position to preserve the hospital's immunity against litigation.

Conclusion

Throughout the intricate dance of navigating the credentialing process to remove a problematic physician, every step must be carefully orchestrated to ensure fairness and efficacy. From the initial recognition of red flags and collection of the evidence that will ultimately support corrective action to the final decision rendered by the review panel, the journey is fraught with legal, ethical, and practical considerations and pitfalls. Knowing where the pitfalls and traps lie is the stock and trade of both the advocate and the hearing officer.

Selecting an advocate and hearing officer is not just a procedural formality; it is a critical determinant of a successful process, as these legal professionals are the guardians of due process.

Ultimately, the goal is not merely to remove a problematic physician but to uphold the integrity of the health care system, safeguard patient welfare, and mitigate the risk of costly litigation. Defending against a lawsuit from a disciplined physician can be expensive, but suits for negligent retention are even more costly and damaging. When the stakes are this high and the consequences far-reaching, the importance of a fair and judicious disciplinary process cannot be overstated.

About the Author

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¹¹ The exception is the decision not to appoint or not to re-appoint a physician to a medical staff. This decision will be treated as part of the discussion of “disciplinary” actions. Such decisions carry the same rights for the affected physician and the same responsibilities for the hospital and its medical staff. When the possibility of a denial of an application for appointment or for re-appointment looks like a possibility, the hospital and the medical staff should engage counsel (the eventual advocate) at that early point to make sure that if the ultimate decision is adverse to the physician, all bases are covered.