EMERGING ISSUE #1: REQUIRING REFERRALS

A hospital may require employed physicians to refer to providers, practitioners, or suppliers affiliated with the hospital to effectuate the legitimate business purposes of the compensation arrangement.

STARK [42 CFR 411.354(D)(4)]

(4) A physician’s compensation from a bona fide employer or under a managed care contract or other contract for personal services may be conditioned on the physician’s referrals to a particular provider, practitioner, or supplier, provided that the compensation arrangement meets all of the following conditions. The compensation arrangement:

(i) Is set in advance for the term of the agreement.

(ii) Is consistent with fair market value for services performed (that is, the payment does not take into account the volume or value of anticipated or required referrals).
STARK [42 CFR 411.354(D)(4)]

(iii) Otherwise complies with an applicable exception under § 411.355 or § 411.357.

(iv) Complies with both of the following conditions:

(A) The requirement to make referrals to a particular provider, practitioner, or supplier is set forth in a written agreement signed by the parties.

(B) The requirement to make referrals to a particular provider, practitioner, or supplier does not apply if the patient expresses a preference for a different provider, practitioner, or supplier; the patient’s insurer determines the provider, practitioner, or supplier; or the referral is not in the patient’s best medical interests in the physician’s judgment.

STARK [42 CFR 411.354(D)(4)]

(v) The required referrals relate solely to the physician’s services covered by the scope of the employment or the contract, and the referral requirement is reasonably necessary to effectuate the legitimate business purposes of the compensation arrangement. In no event may the physician be required to make referrals that relate to services that are not provided by the physician under the scope of his or her employment or contract.

EMERGING ISSUE #2: TERMINATION & PEER REVIEW OF EMPLOYED PHYSICIANS

- “Clean Sweep” provisions
  - Allow for automatic termination of privileges upon termination of employment without a hearing
  - Should be included in agreements and medical staff bylaws
SAMPLE LANGUAGE (PART 1)

(i) Upon suspension of your employment for any reason, your medical staff membership and clinical privileges shall automatically suspend. Upon termination of this agreement for any reason, your medical staff membership and clinical privileges shall automatically terminate. You and [hospital] agree that (i) [hospital] has no duty under this agreement or the staff bylaws to provide any notice, hearing, or review in connection with the termination or suspension of your medical staff membership and privileges hereunder as a result of your termination or suspension of employment, and (ii) you hereby waive any notice, hearing, or review regarding the termination or suspension of medical staff privileges due to the termination or expiration of this agreement or suspension of your employment.

“CLEAN SWEEP” PROVISIONS

— Should not be used to avoid investigating and reporting quality-of-care, impairment, patient safety issues
  • The practitioner will move on to an unsuspecting hospital
— Should give the hospital the option of pursuing formal corrective action under the bylaws when the reasons for termination would trigger a report to OPMC and/or NPDB

SAMPLE LANGUAGE (PART 2)

(ii) Notwithstanding Section _____(i), if the reason for the termination of this agreement or suspension of your employment is based on your professional competence or professional conduct which affects or could affect adversely the health or welfare of a patient or patients, [hospital] shall have the option of pursuing formal corrective action under the staff bylaws. If [hospital] pursues such action, you shall be afforded all notice, hearing, and review rights as identified in the staff bylaws.
EMERGING ISSUE #3: THE LOYALTY PROBLEM

- Physicians primarily affiliated with other hospitals (employment relationships or other significant allegiances) joining the staff in order to siphon off patients
- Potential solutions?

EMERGING ISSUE #4: EXCLUSIVE CONTRACTS

- Hospital signs exclusive contract with PC to provide services to a department
- What to do with existing medical staff in that department?
- Bylaws contemplate removal without hearing?

EMERGING ISSUE #5: CONSISTENCY IN HOSPITAL NETWORKS

- Multiple hospitals with different bylaws
- May be difficult to reconcile
QUESTIONS?

THE FAIR HEARING PROCESS

— Medical Staff Bylaws
— Health Care Quality Improvement Act of 1986
— Public Health Law § 2801-b
— Joint Commission Accreditation Standards
— Medicare CoPs
OVERVIEW OF PEER REVIEW MATTER

COMPLAINT → General Review (usually by Chief of Service Department Head Medicaid Director) → Peer Review Investigation

MEC Review Recommendation → Peer Review Fair Hearing

Review/Appeal → Final Determination

PRE-HEARING INVESTIGATION

- Follow Bylaws
- Appoint impartial peers to review/investigate
- Document issues (but be mindful that the documents might be evidence in subsequent litigation)
- Listen/evaluate to both sides
- Consider retaining an outside consultant
- Prepare a balanced, clear report with support for the recommendation

STATEMENT OF CHARGES (A/K/A LETTER OF ADVERSE ACTION)

- Refer to investigatory findings
- Recite the specific adverse action
- Identify the bylaws provision that was violated
- Summarize hearing rights, including time periods for the hearing and the provider’s rights at the hearing
SUMMARY SUSPENSIONS

- Appropriate if imminent danger to health or safety
- Must provide notice within 14 days to obtain HCQIA immunity
- If suspended for more than 30 days, may have to report to Data Bank

THE HEARING PANEL

- Size
- Selection
- Communication
- Education

SELECTION OF CHAIR/HEARING OFFICER

- Chair vs. hearing officer
- Setting tone and controlling process
- Address pro hoc issues
ROLE OF LEGAL COUNSEL AT THE HEARING

A. Counsel to hospitals
B. Counsel to Hearing Committees
C. Counsel to MEC
D. Counsel to physician

COUNSEL PARTICIPATION AT HEARING

Full advocate vs. Silent advisor

ORIENTATION FOR HEARING PANEL

- Responsibility/commitment
- Timeline
- Burden of proof
- Reassurance regarding liability
PRE-HEARING PROCEDURAL ISSUES

- Rule on procedural objections
- Schedule for exchanging exhibits
- Reminder of confidentiality
- Distribution of exhibits
- Maintaining a record

HEARING PROCESS

- Opening statements
- Examination of MEC witnesses
- Cross of MEC witnesses
- Examination of provider’s witnesses
- Cross of provider’s witnesses
- Rebuttal testimony
- Closing briefs

HEARING DECISION

- Written decision
- Reference to statement of charges
- Cite to hearing record/transcript
- Be mindful of timeline
INTERNAL REVIEWS/APPEALS

- May be reviewed again by MEC
- May be reviewed directly by the board

MYTH VS. REALITY: WHEN DOES THE COURTHOUSE DOOR OPEN TO PHYSICIANS AGGRIEVED BY ADVERSE PRIVILEGES DETERMINATIONS?

COMMON LAW AND THE ESTABLISHMENT OF THE LEGISLATIVE SCHEME UNDER N.Y. PUBLIC HEALTH LAW SECTIONS 2801-B AND 2801-C
N.Y. PUBLIC HEALTH LAW SECTION 2801-B

“Improper practice” for hospital to:

- refuse to act on an application for staff membership/privileges;
- deny or withhold staff membership/privileges;
- exclude or expel from staff membership;
- curtail, terminate, or diminish privileges in any way.
- (a) without stated reasons; or
- (b) on the basis of stated reasons that are unrelated to standards of patient care, patient welfare, the objectives of the institution, or the character or competency of the member.

N.Y. PUBLIC HEALTH LAW SECTION 2801-C

“The supreme court may enjoin violations or threatened violations of any provisions of this article. . . In any action for injunction brought pursuant to this article, any finding of the public health council . . . shall be prima facie evidence of the fact or facts found therein.”
WHAT DOES LITIGATION CHALLENGING A DECISION RELATING TO PRIVILEGES UNDER PUBLIC HEALTH LAW SECTION 2801-C LOOK LIKE?

STANDARD FOR INJUNCTIVE RELIEF UNDER N.Y. PUBLIC HEALTH LAW SECTION 2801-C

“The court should have restricted itself to a determination whether the purported grounds were reasonably related to the institutional concerns set forth in the statute, whether they were based on the apparent facts as reasonably perceived by the administrators, and whether they were assigned in good faith.”


STANDARD FOR INJUNCTIVE RELIEF UNDER N.Y. PUBLIC HEALTH LAW SECTION 2801-C

“The issue here is not the ultimate truth of the charge of lack of competence. Rather, all that respondent [hospital] need show is that the board acted upon a reasonably objective basis in concluding that there had been violations of accepted standards in each case.”

In re Gerald Moss v. Albany Medical Center, 61 A.D.2d 545 (3rd Dep't 1978).
“Even though plaintiff . . . asserts a claim for breach of contract, the fact that he seeks injunctive relief to restore his staff privileges places him squarely within the intended scope of § 2801-b. Were plaintiff permitted to bypass threshold PHC review simply by asserting a breach of contract claim . . . section 2801-b . . . would be undermined. . . . The statutory requirement of threshold PHC review is too important to be circumvented by artful pleading.”

ARTICLE 78 PROCEEDINGS: PHYSICIANS’ FAVORITE “SHORTCUT” TO COURT

So, under Gelbard and Mason it was absolutely clear that before challenging a privileges decision as an improper practice under PHL 2801-b and seeking reinstatement or a restoration of privileges, an aggrieved physician must always first seek review of that decision by the Public Health Council before that physician can challenge that decision in court under PHL 2801-c, right?
Well . . . that’s the rule, except when it isn’t.

WHAT?
WHAT IS ARTICLE 78?

- It is a proceeding in which, amongst other things, a “petitioner” can seek review of the final determination of a body or officer.
- in privileges context, it is invoked to challenge the actions of a hearing panel, MEC, Medical Board, and/or governing body
- cheaper for the doctor
  - no discovery
  - court generally decides it on the papers (typically no hearing)
- courts often don’t know what to do with them

AN EXAMPLE OF ARTICLE 78 RUN AMOK!

- Physician summarily suspended
- Hospital appoints ad hoc committee to investigate (not contemplated by bylaws)
- Internal due process hearing under bylaws scheduled
- Ad hoc committee recommends that suspension be lifted and that the physician’s privileges be reinstated
- Before hearing starts, physician commences Article 78 proceeding to enforce ad hoc committee’s recommendation
- Hearing panel later upholds suspension and loss of privileges

THE MURPHY “EXCEPTION”

- Dr. Murphy had been summarily suspended for perceived mental impairment.
- A hearing was subsequently conducted before the medical board pursuant to the bylaws.
- It recommended that the suspension be nullified if a psychiatric evaluation showed no mental disability.
- Psychiatrist found no evidence of any psychiatric illness; nevertheless, the suspension was not revoked.
- Dr. Murphy brought an Article 78, alleging hospital violated bylaws by not giving written notice of the medical board’s determination
### WHAT ACTUALLY HAPPENED V. WHAT SHOULD HAVE HAPPENED

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<th>WHAT SHOULD’VE HAPPENED</th>
<th>WHAT DID HAPPEN</th>
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<td>The Article 78 should have been dismissed because the court lacked jurisdiction since there had been no prior PHC review; and The proceeding should have been dismissed (or converted) because it was not brought as a plenary action under Public Health Law 2801-c</td>
<td>The trial court vacated the suspension because the hospital failed to follow its bylaws The Second Department affirmed, finding that the physician was not required to obtain review by the PHC and that Article 78 was the appropriate vehicle to challenge the hospital’s action</td>
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### MURPHY’S MISGUIDED RATIONALE

- The court rejected the lack of jurisdiction argument—holding that because the reasons given by the hospital for the suspension were related to the “objectives of the institution,” it was not an “improper practice” under § 2801-b, and thus Dr. Murphy was not required to go to the PHC.
- This is totally at odds with Gelbard because:
  1. The experts on the PHC are the best arbiters in the first instance of whether an improper practice occurred; and
  2. Whether a physician must seek review by the PHC is determined primarily by relief sought (reinstatement), not by the characterization of the hospital’s reasons

### WASSERMAN V. MAIMONIDES MED. CTR.

In 2000, four years after Gelbard, the Second Department cited Murphy in support of the proposition that “since the plaintiff was advised of the reasons for the suspension and the reduction in privileges, and because the reasons were related to “standards of patient care, patient welfare, the objectives of the institution [and the plaintiff’s] competency” there was no basis to turn to the Public Health Council for relief.”
- Perpetuates the “Murphy mistake”; PHC review should not be avoided simply because a hospital has identified one of the lawful reasons specified in Section 2801-b for an adverse privileges decision.
MEYER V. FOREST HILLS HOSPITAL (MARCH 2011)

- Psychiatrist denied medical staff privileges on initial application
- Exhausted internal hospital hearing process and hearing committee upheld denial of privileges
- Dr. Meyer commenced an Article 78 seeking judicial review of that denial, a judgment vacating it and ordering the hospital to grant her privileges and seeking damages for economic loss resulting from the denial.
  - Article 78 has provision (CPLR 7806) that allows for a judgment that includes damages so long as it is "incidental" to the relief sought and could be recovered against the same entity in a separate court action on the same facts.

MEYER V. FOREST HILLS HOSPITAL

- A little different from Murphy and Wasserman—denial of initial application for privileges, not loss or suspension of privileges (distinction without a difference?)
- Filed Article 78 petition; did not seek review at PHC
- Second Department affirmed trial court's dismissal on rationale that "[a] physician who, like the petitioner, seeks to challenge the denial of clinical privileges must first file a complaint with the Public Health Council."
- Thus, dismissal was predicated on failure to exhaust administrative remedies—the result we thought we should have had in Murphy and Wasserman.

BUT . . . The court left the door slightly open . . .

- The Second Dep't in Meyer noted "[c]ontrary to the petitioner's contention, no exceptions apply that would allow her to avoid this procedural step [of PHC review]."
- Interestingly, in reaching its decision, the Second Dep't cited Gelbard favorably but did not cite either Wasserman or Murphy and certainly did not purport to overrule those cases explicitly.
- So . . . Meyer undermines Wasserman and Murphy, but one could argue that they remain viable give this "exception" language.
MEYER—THE TRIAL COURT DECISION (QUEENS COUNTY SUPREME)

The trial court’s decision elucidates what the Second Department meant, by identifying two purported “exceptions” to the primary jurisdiction of the PHC:

1. where the physician’s privileges have been terminated for reasons that do not pertain to medical care, and therefore do not invoke the particular expertise of the PHC (e.g., discrimination or retaliation); or

2. the plaintiff seeks damages, but not reinstatement, and the presence or absence of a proper medical reason for terminating the plaintiff’s privileges is not dispositive of the plaintiff’s claims (e.g., violation of bylaws or breach of contract).

THE SECOND “EXCEPTION”

The Meyers trial court cited Wasserman and Murphy, as well as the court of appeals’ decision in Mason, in support of that second exception.

The second exception “is applied narrowly . . . and a physician who seeks to obtain, or to restore his or her privileges cannot bypass the threshold of PHC simply by resorting to artful pleading.”

“This exception to PHC review is particularly applicable in actions wherein the gravamen of the physician’s complaint is not that the privileges were revoked for an improper reason, but rather that the defendant hospital breached a contract with the physician by failing to follow its relevant bylaws.”

MEYER (CONT.)

“Where, as here, a cause of action is based upon an allegedly wrongful denial of hospital privileges, the aggrieved physician is limited to injunctive relief under Public Health Law § 2801-c and is barred by § 2801-b from maintaining an action for damages.”

“Petitioner’s claim that she was improperly denied clinical privileges, and the hospital’s assertion that she was denied privileges based upon information pertaining to her character and competency, falls squarely within the purview of Public Health Law § 2801-b. The PHC, thus, has primary jurisdiction of this matter.”

So, as held by the trial court and affirmed by the Second Dep’t, the failure to go to PHC was fatal—no jurisdiction.
RECONCILING THE ARTICLE 78 CONUNDRUM

- Meyer seems to erode the ability of physicians to use Article 78 to avoid PHC review and avoid commencing a plenary action under PHL 2801-c (exceptions are narrow).
- It does not adopt and repeat the illogical Murphy and Wasserman rationale—that PHL 2801-b and –c are not triggered so long as the hospital states its reasons for its actions and those reasons are those that are set forth in 2801-b (e.g., character, competency, objectives of hospital).
- It also arguably refines Wasserman—the second exception to PHC review is not triggered simply because damages are sought—the presence or absence of a proper medical reason for terminating the plaintiff’s privileges must also not be dispositive of the plaintiff’s claims for it to apply.

THE FUTURE OF ARTICLE 78 IN MEDICAL STAFF MATTERS?

- They’ll still use it—the avenue exists under the cases, albeit narrowly, and the chance that a judge who does not understand this area of the law and might be inclined to grant relief to a physician is always there.
- Hospitals can still get these proceedings dismissed most of the time—the law is on their side for the most part.
- I think courts will narrow the supposed exceptions recognized by the trial court in Meyer and, eventually, the court of appeals will decide it conclusively.
- And when that happens, hopefully I can explain it for all of you!