

Resolving Physician Disputes with Hospital Medical Staffs Through the Use of Confidential Settlement Agreements

*Alma L. Saravia
Steven S. Poulathas
Flaster/Greenberg PC
Cherry Hill, NJ*

Physicians and hospital medical staffs often have disputes over issues such as denials of applications for privileges or summary suspensions of a physician's medical staff privileges. A hospital's medical staff bylaws include standards for investigating issues related to a physician's behavior or competence as well as qualifications for medical staff privileges and membership. Denying or suspending a physician's privileges may result in the physician exercising procedural rights under the bylaws by notifying the Medical Executive Committee (MEC) that the physician wishes to proceed with a fair hearing.

This article discusses resolving this sort of dispute through a Settlement Agreement (Agreement) rather than a fair hearing, and reviews the benefits and pitfalls of this approach.

Options for Resolving Privileging Disputes

If an MEC summarily suspends a physician's medical staff privileges, the options for resolving the matter at that point are limited to requesting a fair hearing, challenging the suspension in court, or negotiating a settlement agreement. Commonly these disputes are resolved with fair hearings, which require adherence to the medical staff's bylaws.

Reasons to Consider Alternatives to Fair Hearings

MECs and physicians may each prefer to resolve disputes without utilizing the fair hearing process. Retaining knowledgeable counsel can be costly, largely due to the time involved in reviewing the documents related to the privileging issue, meeting with the clients, and evaluating the medical and other issues raised.

Counsel for physicians must advise their clients that fair hearings present a formidable set of challenges to prevail. Counsel for physicians face an uphill battle in arguing that the decision should be modified or rejected, particularly if the bylaws create a presumption of validity in favor of the MEC. In a fair hearing, the physician often has the burden of proving to the hearing officer or fair hearing panel that the MEC's reasons for its decision

were arbitrary or unreasonable and not based upon facts, but rather on some other motive.

As the process continues, each side may become more invested in its position, which results in an increasingly "adversarial" process. Therefore, resolving the suspension with an Agreement may be an increasingly reasonable option. Importantly, settlement discussions should commence before the MEC incurs the time and expense of appointing a fair hearing panel, preparing briefs and exhibits, and retaining experts.

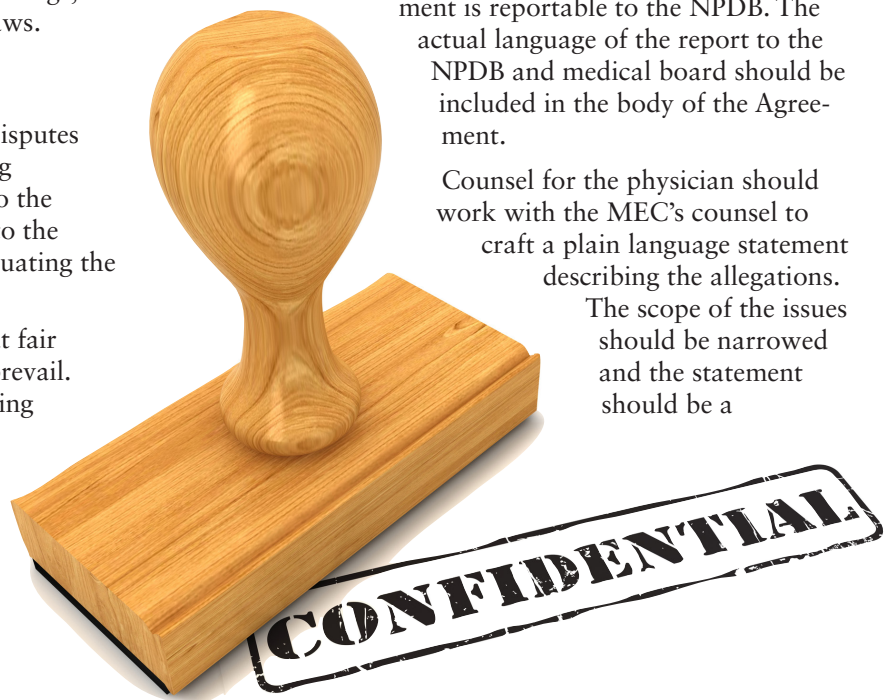
Key Provisions in the Agreement

Generally, the MEC and the physician mutually agree to settle, compromise, and resolve the disputes between them fully and finally, but without making any admissions or concessions concerning their respective factual or legal positions. The prefatory language of the Agreement should provide a succinct and balanced description of the facts leading to the MEC's suspension, as well as the physician's position on the issue. By the time the parties are willing to enter into an Agreement, there generally has been an exchange of documents and other information that provides the physician's counsel with an opportunity to determine the merits of the MEC's allegation. Thus, counsel should be on guard and avoid having anything in the prefatory language that is based on conjecture or speculation, or other unfounded statements.

One of the most important provisions of an Agreement should be the agreed-upon language that will be submitted to the National Practitioner Data Bank (NPDB) and the state medical board, if such a report is mandatory. If there has been a summary suspension related to quality of care issues, then a voluntary Agreement is reportable to the NPDB. The actual language of the report to the NPDB and medical board should be included in the body of the Agreement.

Counsel for the physician should work with the MEC's counsel to craft a plain language statement describing the allegations.

The scope of the issues should be narrowed and the statement should be a



reasonable and balanced explanation about why the adverse action occurred. If a report has already been filed with the state's medical board, the parties should agree that the MEC will file an amended report with the medical board notifying them that it has reconsidered its summary suspension for the reasons agreed upon.

In addition, the Agreement should include a provision stating that there are no admissions of liability by the parties. This provision is crucial as there are circumstances when a physician may still be called before the state medical board, and he will need to explain that the MEC agrees there were no admissions of liability by the physician.

The Agreement also should include language that any and all future reference requests or inquiries concerning the physician should be directed to the MEC or to a designated physician functioning in an official capacity. That official will respond with a letter, which has been agreed upon by the parties, that is appended to the Agreement. The Agreement should state that no further information, oral or written, should be provided in response to any inquiries without the physician's express written approval in advance of such a release.

The parties should acknowledge that the Agreement and all actions taken by the hospital and its MEC in connection with the matter are confidential and privileged. Specifically, the parties should agree that the physician (or anyone acting on behalf of the physician), the hospital, and the medical staff should not disclose to any third party the terms of the Agreement. The only exceptions for disclosing the Agreement's contents are: (1) as expressly permitted by the Agreement; or (2) if required to do so, pursuant to an order of a government agency or court. Notice should be provided in advance to the physician that there has been a request or motion to disclose the terms of the Agreement prior to any actual disclosure. Only the physician may waive the confidentiality provision in writing.

Moreover, in certain circumstances the Agreement may include a provision specifying that the physician voluntarily agrees to resign from the medical staff, or if she has been denied privileges, that the physician agrees not to re-apply for a reasonable number of years. In the alternative, a physician may agree to permit his medical staff privileges to remain inactive until the date that it expires.

Additionally, the Agreement should provide for the MEC and the physician to extinguish all rights and claims that each may have against the other and each party and to hold each other harmless.

Finally, as with any binding agreement, the parties should represent that they understand and voluntarily accept the

Agreement and all its terms, with the full knowledge of the significance of the Agreement and its terms.

Benefits of a Settlement Agreement

The Agreement is a compromise and often presents itself as the best opportunity for the physician and the MEC to resolve the dispute with terms acceptable to each party. It may also serve to prevent an action by a state medical board against a physician that might have occurred absent such an Agreement. Another benefit to the MEC is that its members are physicians with active practices who may not have the time to consult with counsel about the nuances of the dispute. As with any compromise, the results may not meet all of the parties' needs; however, the Agreement offers a definitive result as opposed to the uncertain outcome of the fair hearing or court proceeding.

Another benefit to entering into an Agreement is that the adverse action report filed with the NPDB may include more favorable language than if the physician goes through a fair hearing and appeal process, with a final, adverse decision by the Board.

Pitfalls of a Settlement Agreement

Since a settlement is a compromise, a physician who has substantial credible evidence in his favor may obtain a more satisfactory outcome at a fair hearing. By settling the matter, the physician denies himself the opportunity to attempt full vindication through the hearing and appeal process. However, the cost of obtaining such a victory could be significant for both the MEC and the physician.

Further, despite an attorney's best efforts to maintain the confidentiality of the Agreement, a state medical board may still investigate the matter and obtain the underlying documents that allegedly led to the suspension. Although the matter was settled with an Agreement, the medical board may determine that it has the jurisdiction to find that the physician violated a standard of practice and impose disciplinary action.

Conclusion

An Agreement can be a valuable means of resolving a physician's dispute over an adverse recommendation by the MEC. If the Agreement contains the types of provisions outlined in this article, the physician and the MEC may both be satisfied with this resolution of a privileging matter or an application dispute. Fair hearings are costly and time-consuming affairs. It is appropriate to use new and practical methods for resolving these types of disputes and a confidential Agreement is a viable option for MECs and physicians to consider.