Peer Review Reporting Obligations – CA Medical Staff Reporting Update

Enhancements to Peer Review Reporting Obligations

Since becoming effective in 2011, California Business and Professions Code Section 805.01 ("Section 805.01") has required peer review body, after its formal investigation, to report final decisions or recommendations for disciplinary action against certain licensed medical professionals. This particular code section only deals with four categories of allegations. Beginning January 1, 2018, the California legislature and Governor Jerry Brown gave Section 805.01 more teeth by creating steep penalties for non-compliance. The Medical Board of California (the "Medical Board") believes that establishing fines and other disciplinary consequences against the peer review administrators and other mandated reporters will lead to increased compliance. Peer review bodies are taking note, and some may be concerned about the implications of increased scrutiny of Section 805.01 reporting

Background on Section 805.01

Peer review bodies consist of medical or professional staff of licensed health care facilities or professions that review the basi qualifications, staff privileges, employment, medical outcomes, or professional conduct of "licentiates," which consist of licensed medical workers, like physicians, surgeons, psychologists, clinical social workers, dentists, and physician assistants, among other healthcare workers.[1] Peer review bodies are commonplace at hospitals, and may also exist where there are provider committees in professional groups or in certain health plans and insurers. Peer review bodies make recommendation for quality improvement and education, and are often tasked with: (1) determining whether a licentiate may practice or continu to practice in a health care facility, clinic, or other setting providing medical services and, if so, to determine the parameters of that practice; and (2) assessing and improving the quality of care rendered in a health care facility, clinic, or other setting providing medical services.[2] Under California law, peer review bodies have legal obligations to file required reports when the make certain findings or take certain actions.

Pursuant to Section 805.01, when a peer review body makes a final decision following a formal investigation of one of the categories of misconduct identified below, it must file a report with the Medical Board of California (an "805.01 Report") within 15 days of its final decision. The investigation findings trigger reporting obligations when the following "may" have occurred:

1. Incompetence, or gross or repeated deviation from the standard of care involving death or serious bodily injury to one o more patients, to the extent or in such a manner as to be dangerous or injurious to any person or to the public;
2. The use, prescribing, or administration to himself or herself of any controlled substance, or the use of any dangerous dr or of alcoholic beverages, to the extent or in such a manner as to be dangerous or injurious to the licentiate, any other person, or the public, or to the extent that such use impairs the ability of the licentiate to practice safely;
3. Repeated acts of clearly excessive prescribing, furnishing, or administering of controlled substances or repeated acts of prescribing, dispensing, or furnishing of controlled substances without a good faith effort prior examination of the patient and medical reason therefor; or
4. Sexual misconduct with one or more patients during a course of treatment or an examination.[3]

The timing of these reports is key. When a peer review body makes a final decision or recommendation regarding disciplinary action, it has 15 days from the date it makes its decision to file its report – as compared with reporting obligations under other Business and Professions Code sections that are tolled from the date of the actual suspension or other action taken against the licentiate. Thus, 805.01 Reports are considered "prospective" in that they must be filed before the disciplinary action takes place.

Section 805.01 was designed to promptly inform the Medical Board of an individual that could be a danger to the public. The early reporting means that the Medical Board has the ability to begin its investigation and potentially discipline or remove such an individual from practice, rather than waiting until a peer review hearing is completed (as is the case in a report generated under California Business and Professions Code Section 805, which is described in further detail below). Accordingly, Kimber Kirchmeyer, Executive Director of the Medical Board, has said that 805.01 reporting is in keeping with the Medical Board's "mission of consumer protection because the earlier that we know about a doctor that may be a danger to the public, the

earlier we can actually get that investigation going and take appropriate action."[4]

Differences Between Peer Review Reporting Obligations

In contrast to 805.01 Reports, reports under California Business and Professions Code Section 805 ("805 Reports"), which ar required when the peer review body denies, terminates, or restricts staff privileges or terminates or restricts membership or employment of a licentiate, are due 15 days after the termination, restriction, or other action takes place, as opposed to 15 days from the date the decision is made.[5] In this way, 805 Reports are considered "retrospective."

There are a few other notable differences between the reports required under Section 805.01 and 805 Reports. 805.01 Reports are only required for the four types of violations identified above, whereas 805 Reports are required for any medical disciplinary cause or action. Peer review bodies must still file an 805 Report when the disciplinary action takes place, even if a report under Section 805.01 has already been filed.

According to statistics released by the California Medical Board from before the enhanced penalties took force, another substantial distinction between the reports filed under these related code sections are the number of reports submitted for each. For example, in fiscal year 2015-2016, the California Medical Board received 127 submissions of 805 Reports against physicians and surgeons, but only 5 reports under Section 805.01 against the same population.[6] Prior years show similar disparities. Since becoming effective in 2011, there have been an average of 7.2 reports under Section 805.01 annually, compared with 108.4 annual 805 Reports on average.

Some of this disparity is explained by the fact that 805 Reports cover a wider range of potential misconduct; however, the numbers may also suggest that some of the incidents leading to 805 Reports, which could qualify as reportable events under Section 805.01, are only being reported when the underlying disciplinary actions are instituted, rather than when they are beir decided as is required under Section 805.01. Officials at the Medical Board have indicated that they are hopeful that the increased penalties will incentivize more 805.01 Reports and close the gap.[7]

New Penalties for Non-Compliance

Recent legislation effective January 1, 2018, created a penalty scheme for failure to make required reports under Section 805.01. Now, the failure to file required reports can be subject to fines up to $100,000 for willful violations. Fines for non-willfu violations can be up to $50,000 per violation. In either event, the fines can be imposed in civil or administrative proceedings brought by an agency having regulatory jurisdiction over the person required to file the report. In addition, if the person designated to file the report is a licensed physician or surgeon, a violation of the reporting requirements may constitute unprofessional conduct and subject the licensee to proceedings by the Medical Board.

According to its "Current Sunset Review Issues for the Medical Board of California – 2017," the Medical Board indicated that i "believes that enhanced penalties for not providing 805.01 reports to [the Medical Board] may yield additional compliance."[8] Executive Director Kirchmeyer has also echoed that the increased fines are meant to incentivize these early reports and allow the Medical Board the opportunity to investigate alleged misconduct earlier.[9] The new law will create the same penalties as had been in place for failure to file 805 Reports and, therefore, may lead to the same level of compliance. Thus, the Medical Board was in favor of the legislative change.

According to statement by Executive Director Kirchmeyer, the Medical Board most often learns of reporting failures when conducting its own investigations of professionals following patient complaints and other issues. When interviewing the doctor or other professional, the Medical Board asks about the existence of any prior disciplinary actions, and then will learn about reportable issues that were subject to 805 Reports and/or 805.01 Reports but that were not properly filed.[10] Another way th Medical Board learns about reportable events is through the media.

The Medical Board has been working with the California Attorney General's Office to investigate and prosecute cases where reports were not timely filed, and there was a Notice of Violation and Imposition of Penalty for 805 Reports. In January 2018, Christina Delf, Chief Enforcement Officer at the Medical Board, indicated that the "whole collaboration with the Attorney General's Office has been a great improvement to the enforcement process."[11]

The effects of Section 805.01 being subject to increased civil and administrative penalties, and the potential involvement of th Attorney General's office in enforcement of that provision are expected.

Potential Concerns from Peer Review Committees

With their own reputations and licenses on the line, the members of peer review committees have increased skin in the game when reviewing potential disciplinary actions and making required reports to the Medical Board. While the Medical Board hopes and believes that the increased penalties under Section 805.01 will lead to more reporting and, thus, earlier identification of potential problems, institutional challenges and other considerations may still lead to underreporting.

As an initial matter, doctors and other medical professionals may be hesitant to report instances of suspected misconduct. Even if they see or hear about questionable practices by their colleagues, they may not want to raise the issues in the first place. Doctors may not want to get colleagues in trouble in ways that threaten their staff privileges, employment, and livelihood. This may be a reflection of certain norms within the profession, arise from a sense of loyalty to a fellow practitioner or member of the profession, or be due to other sociological or institutional factors ingrained in medicine. Even though the proceedings and records of a peer review body are confidential and not subject to discovery in judicial proceedings,[12] there are cases which challenge the long-held confidentiality of peer review documents.[13]

Even when faced with the internal reports that are raised, peer review bodies have reason to be cautious when making their findings and required reports. Under California law, there are certain legal protections for members of peer review committees, including immunity from monetary liability and causes of action for damages for actions based on the reasonable belief that the action is warranted by the facts known or for communications intended to aid in the evaluation of healthcare professionals.[14] Federal law also protects hospitals and peer reviewers from liability for actions against a physician's hospital privileges, as long as the actions are reasonable and fair.[15] Nonetheless, an aggrieved physician or other professional subject to medical staff peer review reporting can make allegations that the peer review was conducted in bad faith.

There have been recent cases, including one before the Supreme Court of California, where a physician claimed that the peer review process was illegal retaliation for protected whistleblower activity reporting substandard practices at the hospital. In *Fahlen v. Sutter Central Valley Hospitals*, 58 Cal. 4th 655 (2014), the Supreme Court of California held that a physician may circumvent certain mandamus procedures to set aside the hospital's decision to terminate his or her staff privileges where the physician alleges that the hospital's decision was a means of retaliating against the physician for whistleblowing. In *Fahlen*, the Court observed that "both the California Legislature and the United States Congress have recognized that legitimate, properly conducted hospital peer review proceedings are themselves a crucially important means of protecting patients against unsafe hospital medical care … [and that] state and federal statutes seek to encourage participation in medical peer review activities by providing qualified tort immunity for those involved in reasonably founded medical peer review decisions."[16] However, the Court found that allegations of illegal retaliation that suggest the peer review process was done in bad faith are a basis to allow a suit to proceed in court without first making the physician challenge the peer review decision in special proceedings.

Conclusion

Due to institutional challenges and litigation concerns, revisions to the peer review reporting laws alone may not guarantee that all potential issues are promptly reported to the Medical Board. However, the new penalties associated with Section 805.01 will serve as a powerful incentive to make timely reports as required under the statute when certain disciplinary decisions are made.

Section 805.01 Reports only cover a subset of professional misconduct, and it is imperative that peer review bodies understand what disciplinary decisions must be reported and when the report must be made. Peer review bodies should review their policies and procedures and tracking systems to ensure that they timely and appropriately fulfil their mandatory reporting requirements.

For more information, please contact Sara Hersh. Ms. Hersh is a partner at Nelson Hardiman LLP, an industry leading healthcare law firm in Los Angeles, California. Ms. Hersh provides independent counsel for medical staffs and is an authority on medical staff credentialing, disciplinary and non-disciplinary peer review processes, medical staff bylaws, and mandatory reporting requirements. She is available to discuss changes in relevant laws and needed revisions to policies and bylaws, procedural steps in disciplinary actions, professional liability and risk management issues, and general compliance with state and regulatory requirements.

[1] CA Bus. and Prof. Code § 805(a)(1-2).

[2] CA Bus. and Prof. Code § 805(a)(1)(i).

[3] CA Bus. and Prof. Code § 805.01(b).

[4] Source: Webinar from the California Hospital Association, "New Law and Updates for Physician Reporting," Feb. 13, 2018 ("CHA Webinar").

[5] CA Bus. and Prof. Code § 805(b-c).

[6] Source: http://www.mbc.ca.gov/About_Us/Statistics/statistics_legally-mandated-reports.pdf

[7] Source: CHA Webinar.

[8] Source: https://www.mbc.ca.gov/Publications/Sunset_Report/sunset_report_responses_2017.pdf.

[9] Source: CHA Webinar

[10] Source: CHA Webinar.

[11] Source: Comments at January 18, 2018 Medical Board Enforcement Committee Meeting.

[12] CA Evid. Code § 1157(a).

[13] *See, e.g., Arnett v. Dal Cielo*, 14 Cal. 4th 4 (1996) (holding that hospital peer review committee records are not immune from an administrative investigative subpoena).

[14] CA Civ. Code §§ 43.7(b), 43.8(a).

[15] 42 U.S.C. §11112.

[16] *Fahlen*, 58 Cal. 4th at 662.