

Legally Speaking

Attention healthcare practitioners: the National Practitioner Data Bank can ruin your career!

By Michael V. Favia, Esq.

Introduction

Although most healthcare practitioners are aware of the existence of the National Practitioner Data Bank (NPDB), many do not realize the negative impact that a report with the NPDB can have on their career. The report can make a health practitioner, in fact, almost unemployable.

The NPDB's mission, as stated in the Department's 2004 Annual Report, is to "protect the public by restricting the ability of unethical or incompetent practitioners to move from state to state without disclosure or discovery of previously damaging or incompetent performance." This lofty and worthy goal, however, can be misapplied or abused. The NPDB's reporting procedure has been used as a retaliatory mechanism against whistleblower physicians or those deemed to be disruptive.

Quick overview of the NPDB

The NPDB was created by the Health Care Quality Improvement Act of 1986. It receives reports regarding five different matters: 1) malpractice payments made for the benefit of physicians and other healthcare practitioners; 2) licensure actions taken by state medical boards against physicians; 3) professional review actions primarily taken against physicians by hospitals and other healthcare entities, including HMOs, group practices, and professional societies; 4) actions taken by the drug enforcement agencies (DEA); and 5) Medicare/Medicaid exclusions. The NPDB also collects reports against physician assistants, residents, nurses, dentists, and other licensed healthcare practitioners.

While, in theory, the NPDB information is not available to the public and is considered confidential, the fact is that some information is made available to a number of different entities. State licensing boards, hospitals, and HMOs, for instance, are considered authorized healthcare entities that can query the NPDB about reports on health practitioners who are wither applying for clinical privileges, being appointed to the medical staff, or who have just begun or have applied to begin employment with those entities. Even though generally the NPDB cannot disclose any information to a medical malpractice insurer or to a defense attorney, under certain circumstances in a malpractice action, a plaintiff, or an attorney for him or her, may receive information from the database.

Querying and reporting to the National Practitioner Data Bank

The Health Care Quality Improvement Act of 1986 divides both querying of the NPDB and reporting to it into wither mandatory or voluntary. State licensing boards, healthcare practitioners themselves and other authorized healthcare entities may query at any time. Hospitals, on the other hand, *must* query the NPDB in certain instances, or they will face sanctions.

Hospitals have a duty to query when, for instance, a physician or licensed healthcare practitioner applies for clinical privileges or to be on the medical staff of a hospital and every two years for physicians or practitioners on the medical staff or possessing clinical privileges at the hospital. Failing to query in those instances may result in the presumption of knowledge by the hospital of any reports against a practitioner contained in the NPDB's database. Such lack of a hospital query, and the resulting presumption of knowledge, may be used against the hospital in a medical malpractice action. For example, when a practitioner is involved as a plaintiff in medical malpractice action against a hospital, his attorney can obtain information from the NPDB if the hospital failed to submit the mandatory query regarding the practitioner.

Reporting to the NPDB is also divided into mandatory under some circumstances and voluntary in others. Entities making payments on behalf of individual physicians, which resulted as a consequence of a medical malpractice settlement or judgment, or payments under a policy of insurance or self-insurance *must* report that information to the NPDB. Such reporting to the NPDB must be done even if the case was settled, if there was a judgment, out-of-court settlement or arbitration. Non-compliance with the reporting requirement may cause the entity to be assessed a penalty of not more than \$10,000 for each non-reported

payment. However, if the payment is not made on behalf of an individual but rather it is made on behalf of an entity, then the payment does not have to be reported to the NPDB.

Hospitals, and other healthcare entities, *must* report in at least three instances: 1) when a physician's clinical privileges have been adversely affected by a professional review for more than 30 days; 2) when a physician has surrendered his or her clinical privileges while he or she was under investigation relating to incompetence or improper professional conduct or if such surrender was in exchange for the hospital not conducting such an investigation; and 3) when a professional society takes a professional review action adversely affecting the membership of that physician in the society. In addition to mandatory reporting, hospitals and other healthcare entities *may* choose to report some other actions taken against licensed healthcare practitioners, other than physicians and dentists.

When it comes to boards and medical examiners and/or medical disciplinary boards, every time the board revokes, suspends, or otherwise restricts a physician's license or "censures, reprimands, or places on probation a physician, for reasons relating to the physician's professional competence or professional conduct," or if a physician surrenders his or her license, the board must report that to the NPDB.

Following the filing of a report with the NPDB, a practitioner against whom the report was filed will receive a copy of the report. The practitioner may then add his or her own personal statements, which will be disclosed to querying entities along with the report. Moreover, although the practitioner can also dispute the report's accuracy by asking the Secretary of Health and Human Services to review the information, in most instances, the reports stay unchanged. Furthermore, the reviews conducted by the secretary do not decide whether the decision to take adverse action against a health practitioner was correct and necessary, but, rather, the review is concerned with the accurateness and appropriateness of the submitted report.

How the NPDB is misused

The NPDB in itself is not a bad mechanism. After all, why shouldn't the public be protected from unqualified or unethical physicians and other healthcare practitioners? Why should practitioners who have no complaints filed against them be treated in the same way as those who either disregard applicable rules and laws or are incompetent practitioners? When the NPDB reporting process works the way it is intended to, everyone wins. The hospitals and other healthcare entities are alerted to those practitioners who may be unqualified or unethical, the practitioners who abide by the rules are rewarded with more career opportunities, and the public, in the end, is better served with competent healthcare providers. A problem appears when the NPDB reporting process is misused to retaliate against whistleblowers or practitioners deemed disruptive due to their unpopular stands against the healthcare entity itself.

Instances of blatant disregard for the aim and purpose of the NPDB have grave consequences for healthcare practitioners wrongfully reported to the database. When the threat of a possible report is used to intimidate health practitioners, the entire medical profession, as well as the public, is injured. Unfortunately, wrongful, spiteful and retaliatory reporting does happen. What health practitioners need to understand is that once they are reported 1) that only the hospital can void the report; and 2) that their future reappointments, medical privileges and career choices can be severely limited.

Why hire an attorney when there is a possibility of a report with the NPDB?

An experienced and well-versed attorney in this area of practice may be crucial in navigating the process that many healthcare practitioners know so little about. During various disciplinary proceedings, many physicians agree to lesser disciplinary charges, thinking that since they were never prosecuted and found guilty of any charges, the small disciplinary action will not impact their career.

That is not true, especially if the disciplinary action is such that it may have to be reported to the NPDB. Since not every action taken against a physician needs to be reported to the NPDB, it is essential to know the differences between reportable and non-reportable actions.

Knowing that difference and having someone who knows whether the physician should really be reported or if he or she is being used as a scapegoat for an unpopular view or is being retaliated against for a complaint, is essential not only to the well-being of that particular individual, but also to maintain the credibility and usefulness of the reporting process for those instances for which it was created.

Knowing the difference between reportable and non-reportable actions is of special importance now that the number of adverse actions reports, such as state licensure actions or professional society membership actions, are on the increase with the NPDB/

Conclusion

The National Practitioners Data Bank is here to stay. Its popularity is growing and as of 2004, it contained over 364,000 reports and received over 35 million queries. The database, although a great system in theory, should be better understood by healthcare practitioners and also taken very seriously.

Keeping an honest and fair system of reporting is healthy for the public and for the profession. The public needs to be protected against unqualified and unethical professionals. But when the system is not used properly or fairly, it is the healthcare professional who needs to be protected. When in need, these practitioners should not hesitate to ask for legal counsel.

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