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A New Take on the Risks Associated with Negligent Credentialing: Breach of Duty to Enforce Code of Conduct

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For decades, hospitals have been mindful of the risk that negligent credentialing or peer review could result in liability to an injured patient. Similarly, it has long been established that hospitals could be held accountable to a nurse or other staff member who is the victim of sexual harassment by a medical staff member, if the hospital knew or should have known about the unlawful conduct but failed to take effective remedial action. Now, in *Samuel v. Providence Healthcare Systems-Southern California* (B242208, Second District, Division Five, 12/17/13), the same principles have been invoked to support a claim for damages suffered by two physicians who were purportedly “forced to resign” from the medical staff because the hospital failed to take action against a colleague who had made their working conditions “intolerable.”

The plaintiffs are two trauma surgeons claiming to have been tormented by a third trauma surgeon, who allegedly engaged in a pattern of insulting and inappropriate language, disparaging comments to patients, interference in patient care, inappropriate access to medical records, contradiction of instructions to nurses, false and exaggerated statements to peer review committees, spiteful refusal to care for patients who had been treated by the plaintiffs, and other misconduct in order to gain a competitive advantage over the plaintiffs.

The plaintiffs alleged that complaints were made and corrective action was requested pursuant to the hospital’s code of conduct and the medical staff bylaws, resulting in some efforts to investigate the facts and remedy the situation (e.g., by holding a meeting to discuss conduct standards and handing out a book about improving the hospital culture), but the offensive conduct continued. Ultimately, the plaintiffs resigned from the medical staff, citing the hospital’s allegedly negligent failure to enforce its adopted standards of professionalism.

It is important to note that the hospital denied these allegations, and the *Samuel* decision does not reflect a determination of liability. It occurred in the context of the hospital’s motion for dismissal based on the hospital’s argument that the litigation was covered by the anti-SLAPP statute. This statute is designed to protect against litigation, such as a suit for defamation, that is calculated to stifle “protected speech,” including medical staff peer review activities. The court denied the hospital’s motion to dismiss. Therefore, this particular suit will now proceed to trial or settlement, and it remains to be

seen whether the plaintiffs will ultimately prevail on the merits. It is possible that the public will never know the outcome. However, it is still instructive, both factually and legally.

A motion to dismiss based on the anti-SLAPP suit statute may be defeated, even where the defendant's conduct is of a type that the law is intended to protect, if the plaintiff is able to show a "probability of prevailing" on the merits of the claim. That is what happened here: the trial court found that the statute applied to the peer review activities at issue, but the plaintiffs had demonstrated that their claims against the hospital for negligent failure to enforce its behavioral standards were likely to succeed if the case were to go to trial.

The appellate court upheld the denial, but for different reasons: it determined that the anti-SLAPP suit statute did not apply at all, regardless of whether the plaintiffs had shown a probability of prevailing on the merits, because the hospital's alleged failure to take action was not in the nature of "protected speech"; rather, it was in the nature of "non-communicative conduct," which the anti-SLAPP suit statute is not intended to address.

Legal technicalities aside, the *Samuel* case is easy to understand as an example of exposure to litigation, and potential liability, if a hospital and its medical staff fail to enforce applicable bylaws and policies. This is seen in the following excerpt from the court's description of the plaintiffs' complaint:

The Hospital expressly acknowledged that the physicians' ability to deliver quality care depends on communication, collaboration, and teamwork. The Hospital undertook to adopt, implement, and enforce standards of conduct to manage disruptive and inappropriate behavior by individual physician members of the medical staff and to assure a workplace free from intimidation, disruption and violence. The Doctors relied on the Hospital's representations that they would enforce these standards, which were contained, in part, in the medical staff bylaws. The Hospital had a duty to use reasonable care to enforce these standards. . . As a consequence of the Hospital's breach, the Doctors were forced to either resign or endure intolerable working conditions that jeopardized their ability to deliver quality patient care. . . As a proximate cause, the Doctors have suffered damages, including loss of income, and suffered emotional distress.

Hospitals and medical staffs have long sought to maintain appropriate standards of professionalism. Many cases could be cited in which medical staff membership has been denied or terminated based on deviations from such standards. However, the advent of broadly-framed and ambitious standards of the type referenced in *Samuel* is a relatively recent development, driven by evolving expectations and practical necessity. Indeed, establishing and enforcing a "code of conduct that defines acceptable behavior and behaviors that undermine a culture of safety" is now an accreditation requirement under The Joint Commission Standards (LD.03.01.01, EPs 4 and 5). Similarly, the Standards list "Interpersonal and Communication Skills" and "Professionalism" among

the “competencies” that must be demonstrated in the medical staff credentialing process for appointment and reappointment (MS.06.01.03 and MS.07.01.03).

Another noteworthy element of the appellate court’s decision is its express recognition of the principle that, where a medical staff fails to investigate or take disciplinary action contrary to the weight of the evidence, the hospital’s governing board has the authority and responsibility to take action on its own initiative.

The appellate court’s decision in *Samuel* has not been certified for publication, so it cannot be cited as precedent in other litigation. It also turns on legal technicalities that some might find confusing. Nonetheless, it has set the stage for trial or settlement in this particular suit, which is based on allegations of fact that will seem all-too-familiar to many readers. As such, it provides a good opportunity to reflect on these important points:

1. Comprehensive codes of conduct are pervasive, as a matter of both hospital and medical staff policy. Typically, they are well-intended, and thoughtfully structured to give practitioners fair notice of the standards of professionalism to which they will be held. Commonly, they include specific descriptions of the types of conduct to be avoided. Many of them also prescribe specific procedures to be followed and progressive disciplinary actions to be taken in the event of repeated misconduct. They can be very helpful to the hospital and its medical staff in the enforcement of appropriate professional standards. The *Samuel* case illustrates, however, that such instruments can be a double-edged sword. They should not be so intricate or prescriptive that they cannot be followed as a practical matter, nor should they serve as mere window dressing. Implementation is critical, as is maintaining a good record demonstrating the exercise of due care in taking, or deciding *not* to take, adverse action in a given situation.
2. The anti-SLAPP suit statute has been highly effective in protecting hospitals and medical staffs against litigation that is calculated to derail or disrupt effective peer review. However, it will not shield a hospital and medical staff from claims that they have *failed or declined* to invoke the peer review process prudently.

Hooper, Lundy and Bookman serves hospitals and medical staffs regarding all aspects of medical staff affairs and hospital operations. For more information, please contact: In San Francisco, Harry Shulman, Steve Lipton, or Clark Stanton at 415.875.8500; in Los Angeles, Larry Getzoff at 310.551.8111; and in San Diego, Jennifer Hansen at 619.744.7300.