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Nebraska Peer Review Privilege: Protecting the Hospital's Most Secret of Secrets

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Peer Review Privilege: The Most Secret of Secrets

- Which committees and activities enjoy peer review protection; have you missed any?
- Policies and Forms that should be in place
- Handling of Incident Reports to ensure their protection by privilege
- Application of the Nebraska Health Care Quality Improvement Act to requests for information from NDHHS
- Medical Staff Bylaw and Policy provisions necessary to gain physician support and protection of privileged information

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Nebraska Health Care Quality Improvement Act - Background

- Approved by Governor Heinemann 4/26/11
- New Immunity
  - A health care provider or an individual
    - Serving as a member or employee of a peer review committee, working on behalf of a peer review committee, or participating in a peer review activity as an officer, director, employee or member of the governing board of a facility which is a health care provider and
    - Acting without malice

    Shall not be held liable in damages to any person for any acts, omissions, decisions, or other conduct within the scope of the functions of the peer review committee
  - A person who makes a report or provides information to a peer review committee shall not be subject to suit as a result of providing such information if such person acts without malice.

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Nebraska Health Care Quality Improvement Act

- The Act solved many problems under the old Nebraska peer review statute:
  - No limit to 2 hospital committees (medical staff and utilization review)
  - **Hospital policies and Bylaws need updating if they still refer to the 2 committees**
  - Paper trail is less critical to show delegation by 1 of 2 committees
  - Protects required activities by the governing boards of hospitals and other health care entities
  - Provides immunity for peer review activities that were not present in the past
  - Federal Act provided immunity from federal civil suits; new Nebraska Act provides immunity from state civil suits
  - Expanded protections to facilities other than hospitals, associations and health clinics

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Nebraska Health Care Quality Improvement Act

- Peer Review Privilege
  - The proceedings, records, minutes, and reports of a peer review committee shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action.
  - No person who attends a meeting of a peer review committee, who works for or on behalf of a peer review committee, provides information to a peer review committee or participates in a peer review activity as an officer, director employee or member of the governing board of a facility which is a health care provider shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings or activities of the peer review committee or as to any findings, recommendations, evaluations, opinions, or other actions of the peer review committee or any members thereof.

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Nebraska Health Care Quality Improvement Act

- Peer Review Privilege
  - This privilege does not prevent discovery or use in any civil action of medical records, documents, or information otherwise available from original sources and kept with respect to any patient in the ordinary course of business, but the records, documents, or information shall be available only from the original source and cannot be obtained from the peer review committee's proceedings or records.

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Privileges are Fragile Things!

- Privileged information must be maintained confidentially in order to preserve the privilege.
- A disclosure to an individual or an entity that is not entitled to peer review info can waive the privilege as to all other individuals and entities seeking access to the peer review info.
- It's important to set up systems designed to preserve the privilege:
  - Policies and Procedures
  - Training for peer review staff and committee members

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What is "Peer Review"?

According to the Nebraska Health Care Quality Improvement Act:

- The procedure by which health care providers evaluate the quality and efficiency of services ordered or performed by other health care providers, including practice analysis, inpatient hospital and extended care facility utilization review, medical audit, ambulatory care review, root cause analysis, claims review, underwriting assistance and <u>the compliance of a hospital, nursing home, or other health care facility operated by a health care provider with the standards set by an association of health care providers and with applicable laws, rules and regulations</u>.

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What is "Peer Review"?

- Doesn't have to be in a hospital or other licensed facility
- Doesn't have to be physician peer review; other professions allowed
- Doesn't have to be within a particular organizational structure
- Includes utilization review
- Includes compliance with laws
- Includes peer review by associations of health care providers
- Can include external reviewers engaged by a peer review committee

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Which Committees and Activities enjoy Peer Review Protection?

- What is a "peer review committee"?
- The Act defines them as including:
  - Utilization review committee
  - Quality assurance committee
  - Performance Improvement committee
  - Tissue committee
  - Credentialing committee
  - Or other committee established by the governing board of a facility which is a health care provider that does either of the following:
    - Conducts professional credentialing or quality review activities involving the competence of, professional conduct of, or quality of care provided by a health care provider, including both an individual who provides health care and an entity that provides health care; or
    - Conducts any other attendant hearing process initiated as a result of a peer review committee's recommendations or actions.

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Which Committees and Activities enjoy Peer Review Protection?

- Other Committees established by the board:
  - "Conducts professional credentialing or quality review activities involving the competence of, professional conduct of, or quality of care provided by a health care provider, including both an individual who provides health care and an entity that provides health care"
    - This sounds like Medical Staff and other professional credentialing and ongoing and focused review activities
    - Also applicable to nonphysicians and employees within the HR system
  - "Conducts any other attendant hearing process initiated as a result of a peer review committee's recommendations or actions"
    - This reference to hearing processes is very limiting, and would probably apply strictly to medical staff and AHP hearing processes

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Which Committees and Activities enjoy Peer Review Protection?

- Is the Compliance Committee a "Peer Review Committee"?
- "Peer review" definition includes review for compliance with laws.
- Not listed among the identified committees; but established by the governing board for peer review activities . . .
- But not clear that it is a committee that does either of the following:
  - Conducts professional credentialing or quality review activities involving the competence of, professional conduct of, or quality of care provided by a health care provider, including both an individual who provides health care and an entity that provides health care; or
  - Conducts any other attendant hearing process initiated as a result of a peer review committee's recommendations or actions.

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Ensuring Peer Review Committees are Properly Identified as Such

- Review hospital committees in which "peer review" is conducted.
  - If there is an affiliated nursing facility or other institutional provider requiring peer review, consider that structure as well
- Think broadly with reference to the definition of "peer review".
- If all such committees are specifically listed by statutory description in the definition of peer review committee, no need to take further action.
  - However, if a statutorily identified peer review committee goes by another name, it should be officially identified as a peer review committee

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Ensuring Peer Review Committees are Properly Identified as Such

- If there are additional peer review committees, the governing board should adopt a resolution identifying them as committees falling within the catch-all of "other committees established by the governing board of a facility"
- Consider whether there are ad hoc committees that need to be identified as such, even though they are not standing committees. E.g., medical staff investigating committees.
- Are there HR grievance committees reviewing nonphysician employees in a peer review context?

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Policies and Forms

- Adopt a policy limiting access to peer review info within the hospital
  - Only individuals with direct authority and accountability for attending or supporting Peer Review Committees should have access to the materials
    - Peer Review Committee members, Governing Board members, Hospital CEO, Director of Health Information Management Services, Director of Quality Assurance/PI, and support/clerical personnel.
  - Peer Review Information should be accessed internally only for peer review activities.
  - Access for medical or academic research should not occur without consulting legal counsel concerning its effect on the privilege.

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Training on Peer Review Confidentiality

- Train all peer review committee chairs, members and staff to maintain confidentiality of peer review records
- Refresh training annually, or whenever new individual members are added to the committee
- This training should include governing board members with regard to their role in peer review
  - Medical Staff credentialing
  - Appeals from due process hearings

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Peer Review Procedures

- Peer review materials generally should be distributed at the peer review committee meetings, collected after the meeting and not be taken away by members or left in the room at the end of the meeting.
- A staff member with accountability for attending the meetings should be responsible for collecting peer review materials at the close of the meeting and destroying duplicate copies, retaining one official file copy.

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Peer Review Procedures

- Peer review materials may be distributed in folders, kept closed to shield materials prior to meetings and when individuals are in attendance who do not have authority to access the materials.
- Any dictation tapes, notes, or other primary sources used in preparing the materials or to record the meetings, should be stored in a locked file/area with access limited to the persons designated in the policy.

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Peer Review Procedures

- Peer review materials should be stamped or bear a legend as such.
- Peer review materials received by mail, email, or facsimile should be immediately stamped and kept confidential.
- Peer review materials should not be left unattended.
- When not in immediate use, such materials should be stored in a locked area with access limited to the designated person(s).

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Peer Review Procedures

- All requests for access to or copies of peer review records and information (physician requests, patient requests, attorney requests, subpoenas or court orders) should be referred to the designated peer review coordinator.
- The peer review coordinator should be notified of any subpoena or order for disclosure of peer review records or information.

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Peer Review Procedures

- Non-Members at Peer Review Committee Meetings
  - At times, non-members of a Peer Review Committee will attend a meeting to provide information.
  - Non-members should not see, hear, or otherwise become aware of Peer Review records or information except as necessary to their participation in the meeting.
  - No committee discussion should be conducted while non-members are present; questions of the non-member should be allowed.
  - Non-members should be instructed that the entire proceeding and information discussed or revealed at the meeting is strictly confidential.

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Cumulative Data

- Consider whether to treat cumulative and/or trending data on quality assurance and performance improvement as peer review information.
- If the hospital intends to share such information with associations, Joint Commission, NDHHS, it might be best to exclude this data from the definition of peer review in the hospital's peer review policy.
- To do otherwise could raise questions of waiver of the privilege

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Incident Reports under the Act

- Nebraska Health Care Quality Improvement Act:
  - Incident reports and risk management reports and the contents of such reports are not subject to discovery in, and are not admissible in evidence in the trial of, a civil action for damages for injury, death, or loss to a patient of a health care provider.
  - A person who prepares or has knowledge of the contents of an incident report or risk management report shall not testify and shall not be required to testify in any civil action as to the contents of the report.

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Handling of Incident Reports

- Incident reports will be privileged if prepared for and "in the hands of" a peer review committee.
- Therefore, incident reports containing clinical quality information must be directed to a peer review committee.
- Consider using an Incident Report form that identifies the peer review committee(s) to which it should be directed.
- Be careful not to adopt a form just because it is recommended by the hospital's liability insurer.

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Handling of Incident Reports

- The form could have initial check boxes identifying the type of incident and the committee to which the incident report is referred.
- Identify incident reports that do not contain clinical information so as to logically require peer review.
- They go to a non peer review committee.
- E.g., for "slips and falls" unrelated to clinical care, peer review might be unnecessary. Those can be directed to a committee without clinical personnel.

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Handling of Incident Reports

- For clinically-related incident reports, identify a staff member such as the Quality Assurance Director to receive incident reports on behalf of the designated peer review committees.
- The staff member will provide incident reports to the appropriate peer review committees, as identified to the incident's subject matter.
- Review destruction policy for incident reports
  - No longer a need to have an aggressive destruction schedule

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Requests for Information from NDHHS

- Prior to the enactment of the NHCQIA, there was a blanket privilege for peer review activities, information and documents.
- Historically, in order to avoid waiver of the privilege, it was necessary to maintain confidentiality of peer review info, including with regard to NDHHS.
- Under the Act, the privilege is from discovery in a civil lawsuit.
- This makes it harder to refuse to respond to NDHHS requests for incident reports.

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Requests for Information from NDHHS

- There is still some concern that disclosure to NDHHS will result in waiver of the privilege for peer review info.
- However, there are many incidents when it would be advantageous to disclose the incident reports to NDHHS.
- Safest approach may be to request a subpoena for peer review information.
- In that case, the disclosure is by compulsion of law, not a voluntary disclosure that would more likely be construed as a waiver.

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Medical Staff Bylaw and Policy provisions

- Medical staff quality of care issues are identified in any of a number of ways:
  - Patient complaint
  - Staff concern; incident report
  - Peer concern
  - Bad outcome
  - Random selection
- Level of review may depend on circumstances
  - Internal for random reviews
  - External – for CAHs, the Network Hospital
  - Contracted external peer review for politically sensitive cases

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Medical Staff Bylaw and Policy provisions

- Establish a paper trail for external reviewers to report to peer review committees.
  - Their reports will not be privileged unless addressed to a peer review committee
- Examine relationships with network hospitals, external peer review experts, SERPA, etc.
- The paper trail should be traced through:
  - Policy; e.g., regularized network hospital chart review
  - Minutes of meetings when external review is determined necessary
  - Agreements with the external reviewers

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Medical Staff Bylaw and Policy provisions

- Medical Staff Bylaws should identify peer review privilege
  - Define it consistent with statute
  - Cite it by statute
  - Describe it with reference to policy
- Include immunity language and release in MS application process and forms
  - Include continuing authority to request peer review references during 2-year appointment, not just with regard to pending application

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Medical Staff Bylaw and Policy provisions

- Require through Bylaws that medical staff members maintain confidentiality as to all peer review information
  - Peer review info gleaned from their participation as committee members
  - Also, peer review information about themselves
    - Hearing decisions
    - External review opinions
  - This is in the best interests of the medical staff member, to avoid use of the peer review info against him/her in a civil lawsuit

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