An Ounce of Prevention: Enhancing the Confidentiality of IPA Quality Improvement Records

By Kathleen Duffett, R.N., J.D.

The confidentiality of the minutes of hospital quality improvement committees pursuant to New York Education Law Section 6527(3)(e) and New York Public Health Law (PHL) Section 2805-m is an issue that has been raised before the courts many times.[1] As a general rule, the courts have consistently held that hospital quality improvement committee minutes or other hospital quality improvement records are considered confidential under these statutes and, as such, are protected from disclosure in subsequent civil litigation.

But hospitals are not the only health care entities conducting quality improvement activities. Health maintenance organizations (HMOs) and independent practice associations (IPAs) also evaluate quality of care issues. A question yet unanswered by the courts is whether the minutes of an IPA quality improvement committee are protected from disclosure in civil litigation under New York law. This article discusses the current state law and regulations that address IPA quality improvement committee activities and provides recommendations for how to strengthen an argument that the minutes or other records of such committees should be afforded protection from disclosure in civil litigation.

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The Relationship Between IPAs and HMOs

Very briefly, in New York State, an IPA is an organization that has a contract with one or more HMOs to deliver services to some or all of the HMO's members.[2] The IPA itself is typically paid on a capitation basis. The IPA then contracts with individual providers to provide the necessary services. How the IPA providers are paid is determined by the IPA itself and can take different forms (for example, capitation for primary care providers (PCPs) and discounted fee for service for specialists). Since the IPA must abide by all laws and regulations governing HMOs,[3] for all practical purposes, the IPA becomes the HMO. Consequently, the growing trend to name HMOs as defendants in malpractice actions has implications for any entity that provides or arranges for medical services to HMO members, such as an IPA. This is especially so when the IPA conducts its own quality improvement review of services rendered to the members of the HMOs with which the IPA is contracted.

New York Statutes and Regulations Addressing IPA QI Confidentiality

PHL Article 44 and Part 98.1 of the New York Compilation of Codes, Rules and Regulations are the statute and regulations, respectively, that govern HMOs. Neither Article 44 nor Part 98.1 expressly address the issue of the confidentiality of the minutes of IPA quality improvement committees, although 10 N.Y.C.R.R. 98.18 appears to contemplate that IPAs that contract with HMOs will conduct quality improvement activities on behalf of the IPA.[4] The New York State Department of Health (DOH) confirms this in Section E(I)(15) of its HMO & IPA Provider Contract Guidelines, which states, "[a]n IPA may perform QA activities on behalf of its contracted providers but not on behalf of an HMO. An IPA may share the results of its QA activities with an HMO."[5]

Application of New York Statutes and Regulations to IPA QI Records

PHL Section 2805-m, which is a frequently cited legend on the quality improvement committee minutes of many health care entities, applies exclusively to hospital committees and thus would not be applicable to the minutes of an IPA quality improvement committee.[6] However, New York Education Law Section 6527(3)(f) states in relevant part:

> No individual who serves as a member of . . . a committee established to administer a utilization review plan, **or** a committee having the responsibility of evaluation and improvement of the quality of care rendered, in a health maintenance organization organized under article forty-four of the public health law or article forty three of the insurance law, **including a committee of an individual practice association or medical group acting pursuant to a contract with such a health maintenance organization,** shall be liable in

damages to any person for any action taken or recommendations made, by him *[sic]* within the scope of his *[sic]* function in such capacity provided that (a) such individual has taken action or made recommendations within the scope of his function and without malice, and (b) in the reasonable belief after reasonable investigation that the act or recommendation was warranted, based upon the facts disclosed.

Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function . . . shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided or as provided by any other provision of law. No person in attendance at a meeting when a medical or a quality assurance review . . . was performed . . . shall be required to testify as to what transpired thereat. The prohibition relating to discovery of testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting.[7]

At present, there is no case law on the protections afforded to IPA quality improvement committee minutes under Section 6527(3)(f). However, the language of that section is substantially the same as that of PHL § 2805-m(2), which provides protection to the quality improvement minutes of hospital quality improvement committees. The case law construing the latter statute has consistently held that records relating to a "quality review function," such as quality improvement committee minutes, are confidential and therefore are protected from disclosure in any subsequent civil litigation.[8]

When Is a "Quality Review Function" Really a Quality Review Function?

As a practical matter, the case law governing PHL § 2805-m would very much inform the courts' construction of Education Law Section 6527(3)(f) based on the substantially similar goal and wording of the two statutes. As such, the issue becomes how to demonstrate that the IPA is in fact performing a quality review function such that the documentation relating to such function should be treated as privileged. Based on a review of the case law involving the confidentiality of hospital quality improvement records, it appears that the more formalized the quality improvement process and lines of reporting, the more likely it is that the courts will treat the resulting minutes or other records as confidential. It is the author's belief that the guidelines provided below would provide counsel with the ability (i.e., evidence) to support an assertion that an IPA's quality improvement committee minutes or other quality improvement records should be treated as privileged under Education Law Section 6527(3)(f).

Risk Management Guidelines for Enhancing Confidentiality of IPA Quality Improvement Committee Minutes and Other Records

1. The IPA's quality improvement committee should be a formal committee of the IPA's board of directors. Ideally, a written document, such as a program description, should be created to explain the committee's relationship to the IPA board. The program description should also state the membership of the committee (typically by titles), purposes of the committee, meeting schedule, quorum requirements, reporting structure and frequency, etc. Although IPA board minutes should be used to reflect the committee's creation by the board, a program description would likely provide more useful evidence to support an assertion of the confidentiality of any IPA quality improvement committee minutes or other records in the event such a challenge was made.

   For any IPA that utilizes a management services organization (MSO) for its day-to-day administration, the program description or other document should specifically reference the titles of any MSO staff that act as staff to the committee. Such staff may include the MSO medical director and/or the director of utilization review. This is recommended because in the event the MSO staff are called upon to investigate a quality-of-care concern involving an HMO member treated by the IPA, there will be no question that such staff are acting on behalf of the IPA quality improvement committee.

2. The IPA quality improvement committee should have a defined purpose (for example, to review quality-of-care issues involving patients of the HMOs with which the IPA is contracted).

3. The IPA quality improvement committee should have regularly scheduled meetings.

4. Written quality improvement committee minutes should consistently contain the legend, "The IPA Board considers this document privileged under Section 6527 of the New York State Education Law and any other applicable law."

5. Quality improvement committee minutes should routinely reflect that the IPA quality improvement committee reviewed and approved the minutes of any prior quality improvement meetings.

6. Dissemination of the minutes should be limited to the IPA quality improvement committee members and its staff, and, if indicated, the IPA board.

7. An official copy of the minutes should be maintained by a designated individual of the committee (e.g., the committee secretary). Ideally, all other copies, such as those handed out for review at any given meeting, should be collected and destroyed. If legal advice is necessary, the minutes should be shared with counsel under attorney-client privilege. If an HMO requests the minutes as part of an audit, it would be preferable to have the auditor review the originals under supervision rather than to provide the HMO with copies.

8. Last but not least, minutes should be written in an objective and fair manner, keeping in mind that a court may order their disclosure in a subsequent civil action.

Conclusion

The confidentiality (or lack thereof) of quality improvement committee minutes is a common issue raised by plaintiffs' attorneys in medical malpractice actions against hospitals. There is a growing trend to name HMOs as defendants in malpractice actions. HMOs often have contracts with IPAs, which themselves may conduct quality improvement activities related to the care provided to HMO members. In the event an HMO member who was treated by an IPA provider was injured due to alleged malpractice, the plaintiff's attorney would likely attempt to access any and all of the quality improvement records relating to that member, including any IPA quality improvement records. This situation, combined with the weakening of the ERISA preemption defense (which historically has provided protection for HMOs when a malpractice cause of action has been asserted), make it essential for IPAs to take an "ounce of prevention" approach. Structuring an IPA quality improvement program based on the above guidelines would provide counsel with a persuasive argument that the documentation of the IPA's quality improvement activities is entitled to protection under Education Law Section 6527(3)(f).

Endnotes

1. *See, e.g.*, Notes of Decisions following N.Y. Education Law § 6527 (McKinney's 2001) (Supp. 2004) and N.Y. Public Health Law § 2805-m (McKinney's 2001) (Supp. 2003).
2. N.Y. Comp. Codes R. & Regs. tit. 10, § 98.18 (hereinafter "N.Y.C.R.R.")
3. 10 N.Y.C.R.R § 98.18(b).
4. *See* 10 N.Y.C.R.R. § 98.18(c).
5. N.Y.S. Department of Health HMO and IPA Provider Contract Guidelines (Oct. 1, 2002), *available at* http://www.health.state.ny.us/nysdoh/mancare/hmoipa/guidelines.htm.
6. *See* PHL § 2805-m (1) and (2).
7. N.Y. Education Law § 6527(3)(f).
8. *See, e.g.*, *Megrelishvili v. Our Lady of Mercy Medical Center,* 291 A.D.2d 18, 739 N.Y.S.2d 2, (1st Dep't 2002), *leave to appeal dismissed by* 99 N.Y.2d 532, 752 N.Y.S.2d 591 (2002); *Zion v. New York Hospital,* 183 A.D.2d 386, 590 N.Y.S.2d 188 (1st Dep't 1992).

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