

HOSPITAL PEER REVIEW GUIDE: AVOIDING MONEY DAMAGES

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1. INTRODUCTION

The Healthcare Quality Improvement Act of 1986 (“HCQIA”) provides protection against money damages for physicians and other health care professionals and for hospitals and other health care entities that engage in professional peer review. Underlying the passage of HCQIA are these determinations by the United States Congress:

THE THREAT OF PRIVATE MONEY DAMAGE LIABILITY . . . UNREASONABLY DISCOURAGES PHYSICIANS FROM PARTICIPATING IN EFFECTIVE PROFESSIONAL PEER REVIEW.

AND

THERE IS AN OVERRIDING NEED TO PROVIDE INCENTIVE AND PROTECTION FOR PHYSICIANS ENGAGING IN EFFECTIVE PROFESSIONAL PEER REVIEW.

However, the statute conditions this protection against money damages upon meeting certain standards. Failure to meet these standards means that the protection can be lost. This guide addresses how to avoid or remedy peer review mistakes and maintain the protection provided by HCQIA.

2. MOST COMMON COSTLY MISTAKES IN PEER REVIEW.

The following are the most common mistakes by hospitals and medical staffs when preparing for and conducting professional review actions. Note, however, that, in most cases these mistakes can be remedied to re-establish the protection of HCQIA from money damages.

2.1 FAILURE TO RECOGNIZE THE COMMENCEMENT OF A “PROFESSIONAL REVIEW ACTION” UNDER HCQIA.

HCQIA defines a professional review action as an “action or recommendation . . . in the conduct of a professional review activity which is based on the competence or professional conduct of an individual physician . . . which affects (or may affect) adversely clinical privileges, or membership in a professional society, of the physician.”

Hospitals and medical staffs routinely conduct “professional review activities” (e.g. quality assurance). Sometimes, these professional review activities result in an adverse “action or

recommendation based on the competence or professional conduct of the individual physician.” This adverse action or recommendation is a “professional review action” under HCQIA and must satisfy the standards of HCQIA to provide the hospital and medical staff with immunity from money damages.

At some point, the professional review *activity* becomes a professional review *action* subject to the due process protections afforded to the physician by the medical staff bylaws. In many instances, the participants unintentionally fail to recognize the action or recommendation which creates the professional review action. As a result, the hospital and the medical staff may fail to provide the due process protections of HCQIA or follow the medical staff bylaws.

The consequences of failing to recognize the commencement of a professional review action are serious. Legally, the hospital and the medical staff may lose the HCQIA protection against money damages. In addition, the hospital and the medical staff officers may lose credibility and the respect of the medical staff. At this juncture, it may be proper to recommence the process to remedy the process to remedy the defects.

2.2 FAILURE TO FOLLOW THE DUE PROCESS PROVISIONS OF HCQIA, THE MEDICAL STAFF BYLAWS AND THE HOSPITAL BYLAWS.

Whether due to the failure to recognize the commencement of a professional review action, negligence or ignorance, the most common mistake in professional review activities is the failure by the hospital and the medical staff to comply with the due process provisions of HCQIA, the medical staff bylaws and the hospital bylaws.

In many cases bylaw protections are skipped, notices are not timely, reasons for actions are not given, witnesses are not identified, medical staff bylaws conflict with HCQIA, hearing panel members are competitors, practitioners are denied attorneys, hearings are conducted improperly, reports to the NPDB are defective and other similar occurrences which result in defective due process.

Although immediate and precise compliance with the due process provisions of HCQIA and the bylaws are preferable, defective due process actions may be remedied sufficiently to take advantage of the immunity provisions of HCQIA.

2.3 FAILURE TO RECOGNIZE THAT THE HOSPITAL CANNOT “PLEA BARGAIN” CLINICAL PRIVILEGES.

The Rules and Regulations under HCQIA require a hospital to report to the National Practitioner Data Bank (“NPDB”) the “[a]cceptance of the surrender of clinical privileges or any restriction of such privileges . . . [w]hile . . . under investigation [for] incompetence or improper conduct; or . . . in return for not conducting such an investigation or proceeding.”

Therefore, once a complaint is lodged, an investigation starts, committee review is commenced or suspension is considered, the physician cannot resign, accept probation or take similar action to prevent an adverse report to the NPDB.

The practical result of enactment of this provision of HCQIA is that the physician is forced to proceed with all of the due process requirements of HCQIA and the medical staff bylaws rather than quit, even in the face of overwhelming odds. HCQIA, by preventing this type of “plea bargaining,” has substantially increased the costs of peer review cases.

There are settlement options, however, which may mitigate the costs to both sides while still complying with HCQIA.

2.4 FAILURE TO PROVIDE A HEARING REQUIRED BY THE MEDICAL STAFF BYLAWS.

HCQIA provides that “[I]f a professional review action ... meets all of the standards ...” the participants in the professional review action “shall not be liable in damages ...” One standard of HCQIA is the “adequate notice and hearing requirement.” Notice of a proposed action (except suspension) is required and the hearing date should be set “not less than 30 days after the date of the notice.” Meeting the notice and hearing standards of HCQIA is essential to preserving immunity from damages.

In several recent cases of note, hospitals have not provided a hearing date or a hearing after the “proposed” action has been taken. This failure to promptly provide a hearing establishes a basis for the physician and the physician’s attorney to claim that the HCQIA immunity does not apply to the hospital and its medical staff.

2.5 FAILURE TO PROVIDE A HEARING NOT REQUIRED BY THE MEDICAL STAFF BYLAWS.

Even if there is a legal basis for a hospital’s position that the right to a hearing has been waived by the physician (e.g., the physician did not respond to a notice in the prescribed period) or that the physician does not have a right to a hearing (e.g., excluded under the bylaws), a hearing should be considered by the hospital and the medical staff.

Avoiding a hearing due to a “technicality” creates the impression that the hospital and the medical staff have something to hide. As a result, a court may be motivated to attribute suspect motives to the hospital’s denial of a hearing.

Rather than engage in a long, expensive court battle to determine if a hearing is necessary, it may be wise to exercise good faith by waiving the technicality and provide the physician with a hearing. The benefits of conducting a hearing may outweigh the expense and risks of resisting a hearing. These benefits include allowing the hospital and the medical staff to:

- a. avoid the expensive court battle over the right to a hearing;
- b. claim the immunity of HCQIA in court;
- c. make the appropriate record;
- d. rectify errors without damages, if HCQIA is satisfied; and
- e. avoid redirecting the issue from the competence or disruption of the physician to the credibility of the hospital.

2.6 FAILURE TO PROCEED AS IF A HEARING WAS INEVITABLE.

Many professional review actions are routine and handled without reaching the hearing or appellate review stage. Therefore, as QA Committee activity proceeds, due diligence becomes lax, paper trails are brief or non-existent and evidence, sufficient for a hearing or appellate review by the board, is not collected.

For example, a QA committee may retain an outside peer review organization to provide a report regarding several questionable cases. The outside peer review organization provides a review of the cases, but not a comprehensive review of the practice patterns of the physician. While a case review may be adequate in certain cases, an analysis of a few questionable cases may not sustain the burden of proof in a hearing or an appellate review of the board.

This approach provides even a poor quality physician with natural defenses. The physician and the physician's attorney will argue that: (i) physicians cannot be judged by a few poor quality cases; (ii) all physicians have a few poor quality cases; or (iii) the professional review activity is a conspiracy to use a few bad cases to justify termination. If the physician obtains a qualified peer review organization to review a more appropriate sample of cases, the physician's attorney will argue that the broader review more accurately reflects the practice patterns of the reviewed physician and, therefore, should supersede the review obtained by the hospital and the medical staff.

Confronted with this position at the time of a hearing, the hospital and the officers of the medical staff are forced to proceed with a weak case, to concede or to obtain additional outside review with an adequate sample of cases. A second review performed after the suspension or termination of a physician will leave the hospital and the medical staff open to the charge that the suspension or termination was arbitrary, because obtaining a second review is an admission that the first review (i.e., the basis for the action) was inadequate.

The potential cost in time, money and potential liability for inadequate preparation is substantial. Therefore, considering a hearing inevitable and preparing appropriately is the most prudent course of action.

2.7 FAILURE TO PROCEED AS IF PEER REVIEW RECORDS ARE DISCOVERABLE BY THE PHYSICIAN UNDER INVESTIGATION

As discussed in Section 2.6, many professional review actions are routine and usually handled without reaching the hearing or appellate review stage. Due to the routine nature of these activities, as QA Committee activity proceeds, the paper trail becomes a careless collection of ill-conceived documentation.

This documentation may be based upon "a reasonable effort to obtain the facts of the matter" as required under HCQIA and the preliminary conclusions regarding the clinical competence or professional conduct of the physician may have been made in good faith. However, without careful preparation, the written records may be interpreted to the disadvantage of the hospital and the medical staff.

In most states it would appear that collecting extraneous documentation would not present a problem due to the legal privilege granted to the peer review process. However, the hospital and medical staff should consider the possibility that the record of the peer review process may be discoverable by the physician under investigation or that the hospital and the medical staff may wish to provide these materials to the physician.

First, why would the hospital and the medical staff *want* to provide this information to the physician? The answer is credibility. In a hearing or subsequent litigation the attorney for the physician may request the physician's files and the failure to provide them, even if within the rights of the hospital, may give the impression to a hearing panel or a court that the hospital and the medical staff are hiding something. Constant references to "secret files" could provide an otherwise clinically incompetent or disruptive physician with sympathy or a legal argument in an appellate review or in litigation.

Second, the physician under investigation may be legally entitled to obtain these records. If the peer review privilege is weak or if the attorney for the physician provides a court with a sound legal argument, the records may be obtained by court order.

There are two recent examples of courts ordering that peer review records be provided to the physician. In *Virmani v. Novaint Health Inc.*, 259 F3d, 293 (4th Cir. 2001) the peer review privilege did not prohibit the discovery of records in a federal discrimination case. In *Mattice v. Memorial Hospital of South Bend*, N.D. Ind., No. 3:98-CV-303 RM 10/15/01, the need to obtain evidence in litigation regarding an Americans With Disabilities Act claim outweighed the peer review privilege.

Therefore, to avoid the loss of credibility in a hearing or in subsequent litigation and to avoid the expense of litigation, the hospital and medical staff should conduct peer review activities as if the entire record of the peer review process will be disclosed to the physician. With this understood from the beginning, the process should be conducted in an appropriate professional manner and the documentation should reflect this conduct.

2.8 FAILURE TO SUSPEND A PHYSICIAN.

In many instances, acts by a physician are clearly indicative of impairment, incompetence or disruptive behavior which immediately affects the safety of patients and the hospital staff. Physicians exhibiting behavior which poses a threat to the safety of patients and staff should be suspended. Failure to suspend such a physician exposes the hospital to significant liability.

However, hospital administrators and medical staff officers with the power to suspend a physician often do not exercise the power. The usual reasons are fear of litigation by the physician, fear of ruining the career of the physician, fear of retaliation or because the physician is a significant referral source.

Most medical staff bylaws have a provision for suspension and quick action to determine if the suspension is justified. If the suspension lasts less than 30 days the hospital is not obligated to report the physician to the NPDB unless other actions are taken which require reporting.

2.9 FEAR OF LITIGATION BY THE PHYSICIAN.

In many instances, peer review is paralyzed due to fear of litigation or by actual litigation by the physician.

However, if the hospital has substantial evidence that a physician is incompetent or disruptive and creates a risk to the safety of patients, the failure to act creates a greater risk of litigation by a patient.

Balancing the risk of litigation by a physician versus litigation by a patient would appear to be a “no win” situation. However, if the professional review action against the physician is conducted appropriately, the hospital has immunity from money damages from the physician. A patient successfully suing a hospital for failing to act against the physician will recover actual money damages.

2.10 FAILURE TO USE OUTSIDE PEER REVIEW OR A PEER REVIEW IN THE SAME SPECIALTY.

In many hospital systems with large medical staffs there is an adequate supply of non-competitive physician expertise to properly investigate and review the competence and behavior of a physician.

However, in other hospitals it is difficult to find a non-competitive physician in the same specialty or with the expertise to judge a colleague.

Professional review actions require an appropriate analysis of the professional competence and conduct of a physician. Failure to provide the appropriate analysis may lead a hearing panel, an appellate panel of the board, the board or a court to reject the suspension, reduction of privileges or termination of a physician, even if there has been compliance with the due process procedures of HCQIA and the medical staff bylaws.

The result may be that, due to an inappropriate peer review, an incompetent or disruptive physician continues to practice at the hospital and create liability for the hospital.

2.11 USE OF NON-BYLAW INFORMAL REMEDIES.

In many instances, information about an incompetent or disruptive physician is formally or informally provided to the QA Committee, Credentials Committee, Risk Management Committee, the officers of the medical staff or to the hospital administration. Rather than commence the formal procedures required by the medical staff bylaws, a committee member, an officer of the medical staff or a member of the hospital administration “informally talks to” the physician under investigation. The practitioner may even be put on “informal probation” which remains undocumented.

If the informal probation is based upon issues of competence, the hospital and possibly the other participants may be exposed to liability. In addition, in a serious case, the participants may be disciplined for violating the medical staff bylaws or hospital bylaws.

If the informal probation is based upon disruptive behavior, the participants and the hospital may be exposed to liability for failure to take the appropriate action based upon complaints of employees. For example, repeated charges of sexual harassment handled in this informal manner could result in employee litigation.

In addition, in the case where informal probation is the response for nurses' complaints, this semi-action appears to be non-action to the nurses. Later, when the physician is disciplined and a hearing is conducted there is usually a gap (sometimes years) between nurses' complaints. The disruptive physician argues that this gap exists because his behavior was exemplary during this period, when in fact, the nurses stopped filing complaints due to the non-action of the hospital and fear of retaliation.

2.12 FAILURE TO INVOLVE LEGAL COUNSEL, EXPERIENCED IN MEDICAL STAFF MATTERS, IN THE EARLY STAGES OF A PROFESSIONAL REVIEW ACTION.

HCQIA provides that “[i]f a professional review action ... meets all of the standards ...” the participants in the professional review action “shall not be liable in damages ...” Meeting the standards of HCQIA, compliance with the medical staff bylaws and hospital bylaws and reconciling any differences between HCQIA and these bylaws is essential to avoid damages.

Many of these matters appear routine. Therefore, QA Committees, Credentialing Committees, medical staff officers and hospital administrators, do not involve legal counsel in the early stages of a professional review *activity* which is likely to become a professional review *action*.

Counsel usually does not become involved because the activity is not recognized as a likely to become a professional review action (see Section 2.1) or because the participants are not aware that the physician has due process rights at an early stage of a professional review activity (see Section 2.2). In addition, decision-makers are hesitant to involve counsel due to the fear of exacerbating the situation. These decision-makers prefer to attempt resolution without putting the matter into the hands of attorneys. As a result, the process may have moved too far or too fast before legal counsel is consulted requiring remedial steps to correct prior errors.

However, a professional review action, managed appropriately by experienced counsel in the early stages, will protect the hospital and the medical staff by preserving the HCQIA immunity from damages. In addition counsel's knowledge of settlement options may facilitate an early, and therefore less costly, settlement. Counsel need not be overtly involved initially, but may guide the process in the background.

Legal counsel should be experienced in handling medical staff matters and professional review actions. Without this expertise, legal counsel can exacerbate many of the problems outlined in this Guide, including exposing the participants to liability, delaying the process and increasing the costs to the hospital.

In addition to legal counsel with expertise in medical staff matters, other specialty counsel should be consulted when the need arises. For example, if a physician is reported for sexual harassment or other employment issues, consultation with a labor attorney is necessary. Once

the advice of a specialty attorney has been obtained, the medical staff attorney may guide the case appropriately through the due process requirements of HCQIA and the medical staff bylaws.

2.13 POLITICAL USE OF HOSPITAL ADMINISTRATION AND MEDICAL STAFF BYLAWS AND PROCEDURES.

In many cases, politically powerful physicians and physician groups seek to use their leverage to eliminate competitors, political enemies or other unfriendly medical staff members.

However, politically motivated professional review actions may result in the loss of HCQIA immunity as not “taken in the reasonable belief that the action was in the furtherance of quality health care.” In addition, the participants may be exposed to liability for defamation and anti-trust violations, as well as other potential causes of action.

Due to this significant exposure to liability, if political motives are suspected, the hospital administration and/or the non-participant medical staff officers should avoid complicity by conducting a thorough professional review action in accordance with HCQIA and the medical staff bylaws, coordinated by legal counsel using independent outside peer review.

2.14 BOARD ACTION FOLLOWING REVIEW BY THE HEARING PANEL OR APPELLATE PANEL.

The hearing panel or appellate panel may recommend the reversal of an action or recommended action of the Medical Executive Committee of the Medical Staff (“MEC”) or the Board to terminate or suspend a disruptive or incompetent physician. The basis for the Panel’s recommendation may be rational, irrational, clear or vague. In any event, the Board must act with extreme caution in making a final determination to avoid liability.

Request for Clarification

If the Panel recommendation is unclear, the Board should request and receive clarification of the reasons for the panel’s recommendation of the reversal of the action.

Board Conforms with an Unsubstantiated Panel Recommendation

If, upon review, the Board follows the panel recommendation despite clear evidence of the incompetence or disruptive behavior of the physician, the hospital may be held liable for any subsequent action or claim by a patient. Following the recommendation of the panel does not immunize the hospital from liability for reinstating an incompetent or disruptive physician. The Board is the final authority and must determine the action which is in the best interests of the patients and the hospital regardless of the panel’s recommendation.

Board Does Not Conform with a Substantiated Panel Recommendation

The due process requirements of HCQIA and the medical staff bylaws ensure that the physician is afforded due process protections and that a record is made of the process. This record may be used as evidence in a later court proceeding.

HCQIA requires action to be taken “in the reasonable belief that the action was in the furtherance of quality health care.” If the hearing panel absolves a physician and provides sufficient documentation to justify this determination, the hospital must take appropriate action. Failure to take such action could result in the loss of HCQIA protection against money damages.

3. MOST COMMON DEFENSIVE TACTICS BY PHYSICIANS FACED WITH A PROFESSIONAL REVIEW ACTION.

3.1 PROMISE OF REFORM IN EXCHANGE FOR INACTION

Tactic:

In many cases the physician will promise to reform clinical techniques or behavior in exchange for inaction (which means no documentation) by the medical staff or hospital administration.

Hospital and Medical Staff Response:

If the inaction is in exchange for the termination or reduction of clinical privileges, this is an illegal action in violation of HCQIA (see Section 1.2).

If the matter is serious, and does not constitute a violation of HCQIA, formal action within the structure of the medical staff bylaws, even a written warning, is still necessary. Formal action (unless it is obviously too lenient) reduces exposure to litigation by patients and hospital employees and builds a case if the inappropriate behavior continues. Without a paper trail of prior formal action, later action by the hospital and the medical staff may appear arbitrary.

3.2 THREAT OF LITIGATION

Tactic:

The physician threatens litigation if the medical staff and the hospital proceed with the professional review action.

Hospital and Medical Staff Response:

The threat of litigation should not deter the hospital and the medical staff from proceeding in accordance with the medical staff bylaws.

If the hospital and the medical staff proceed against the physician in the reasonable belief that the action was in the furtherance of quality health care in accordance with HCQIA and the medical staff bylaws, they are immune from damages. There is no such immunity from patient litigation.

3.3 AN INJUNCTION

Tactic:

Physician engages counsel and seeks an injunction from a court.

Hospital and Medical Staff Response:

The hospital and medical staff should resist an attempt for an injunction. Courts are reluctant to intercede in professional review actions. The courts usually avoid determining the competency of physicians and defer such decisions to the hospital and the medical staff.

In most cases the court will require the physician to exhaust remedies under the medical staff bylaws and hospital bylaws. After these remedies are exhausted the physician may initiate litigation based upon HCQIA and other causes of action.

However, once in court, compliance with the due process procedures of HCQIA and the medical staff bylaws puts the hospital and the medical staff in a position to successfully move to dismiss the case based upon HCQIA.

3.4 ALLEGATIONS OF CONSPIRACY

Tactic:

The physician alleges that the professional review action is the result of a conspiracy among competitors or other members of the medical staff or the nursing staff to remove the physician from the medical staff.

Hospital and Medical Staff Response:

Legitimate professional review actions may result from a union of other physicians on the medical staff or nurses to remove an incompetent or disruptive physician. Competitors may be energized to instigate a professional review action because they best recognize the basis for the physician's incompetence. If the movement of physicians is generated by a dislike of the physician, such dislike is often generated because the disruptive behavior of the physician compromises patient safety.

In the case of nurses, they tend to notice incompetence or be the subject of abusive behavior. Therefore, nurses will often unite to protect patients or themselves from a physician.

Despite these legitimate concerns and actions, an incompetent or disruptive physician will perceive these unions of colleagues or nurses as a conspiracy.

The allegations of conspiracy should not deter the hospital and medical staff from dealing with the alleged incompetence or the disruptive behavior. The best response is to inform the accused physician that the defense of conspiracy may be asserted during the impartial due process procedures provided by the medical staff bylaws.

The hospital and the medical staff should be careful to obtain outside peer review in these cases.

3.5 ALLEGATIONS OF BEING SINGLED OUT FOR DISCIPLINE

Tactic:

The physician alleges that other physicians have the same practice patterns which are the subject of the review or that other physicians are just as disruptive. The physician claims to be singled out for punishment.

Hospital and Medical Staff Response:

The hospital and the medical staff should inform the physician that the professional review action regards only the physician. If, after due process, the physician is found to have aberrant practice patterns or be a disruptive physician, appropriate action will be taken. It is not a defense that others are guilty of the same conduct.

However, the physician should be requested to provide written formal complaints and evidence regarding the other physicians on the staff. Then, the hospital and the medical staff may, if necessary, conduct professional review activities regarding these allegations.

3.6 DISRUPTIVE BEHAVIOR IS ACTUALLY PATIENT PROTECTION

Tactic:

The physician being accused of disruptive behavior, such as verbal abuse to other physicians and nurses, claims that this behavior is for the protection of the patients. The disruptive physician claims to be protecting the patients from the incompetence of the other physicians or nurses (particularly those physicians and nurses filing complaints with the hospital.)

Hospital and Medical Staff Response:

The disruptive physician should be requested to provide formal written complaints regarding the allegations against the other physicians and nurses. If merited, the hospital and medical staff should commence the procedures required by the medical staff bylaws and the rules and regulations of the hospital to investigate the allegations.

However, the professional review activities regarding the physician should continue. Even if the disruptive physician's accusations are accurate, inappropriate behavior threatening the safety of patients can result in liability for the hospital and its medical staff.

3.7 THE PHYSICIAN'S PATIENTS ARE SICKER

Tactic:

Physician with poor statistics (e.g., mortality rate) will argue that their patients are sicker than the patients of other physicians. Therefore, their statistics cannot be compared with other physicians.

Hospital and Medical Staff Response:

Although it is necessary during the professional review action to investigate and respond to this defense, the hospital and medical staff should be careful not to allow the focus to shift from the physician's practice patterns or behavior to a discussion of statistics.

3.8 POLITICAL ACTIVITY

Tactic:

Asserting that "if they can do this to me they can do this to you," the physician attempts to unite the other physicians against the medical staff officers and committees and the hospital.

Hospital and Medical Staff Response:

Using the mechanisms provided in the medical staff bylaws, particularly the MEC, the medical staff officers and hospital administration should build a consensus among the members of the MEC and appropriate committee chairs regarding pursuing a professional review action against the physician.

Upon obtaining a consensus of the physicians on the MEC and the committee chairs, outside peer review should be obtained to provide the basis for any professional review action. Once properly in motion, the professional review action will be difficult to thwart by political moves.

4. MISTAKES PROVIDE BASIS FOR DIVERSIONARY TACTICS.

Physicians' attorneys often seize on the mistakes and improper responses of the hospital and medical staff to raise diversionary issues and redirect the focus away from the actual issue, the physician's incompetence or disruptive behavior. These diversionary issues may include:

- 1. An inadequate sampling of cases which were reviewed;**
- 2. Failure to provide timely notices;**
- 3. Failure to provide appropriate detail regarding the charges against the physician;**
- 4. Failure to provide a timely hearing;**
- 5. Failure to obtain appropriate patient and other releases;**
- 6. Disclosure of confidential information;**

- 7. Politically motivated Professional Review Actions, conspiracies and personal animosity toward the physician;**
- 8. Reports by competitors rather than outside peer review experts;**
- 9. Incompetence of other physicians and nurses;**
- 10. The basis for health care statistics used by the hospital;**
- 11. Potential loss of position or income by the physician.**

These issues, which may be avoided by proper peer review management, can appear to be glaring errors and indicative of a “conspiracy” against the physician. As a result the new issue becomes the credibility of the hospital and the medical staff officers rather than the fact of incompetence or disruptive behavior of the physician.