The National Practitioner Data Bank: Six Need-to-Knows

3 Nov 2017

The National Practitioner Data Bank (NPDB) was established through Title IV of Public Law 99-660, the Health Care Quality Improvement Act of 1986. Codified at 45 CFR Part 60, the NPDB is an online repository for reports on negative events involving physicians, dentists, and other licensed health care professionals. The statute requires certain health care entities to report the following information about practitioners:

- Medical malpractice payments made on a practitioner's behalf (including out-of-court settlement payments);
- Any adverse licensure actions or loss of license;
- Any negative action or finding by a State licensing or certification authority;
- Adverse clinical privileging actions or adverse professional society membership actions;
- Private accreditation organization negative actions or findings against a health care practitioner or entity;
- Any negative action or finding by a federal or state licensing and certification agency that is publicly available information;
- Civil judgments or criminal convictions that are health care-related;
- Exclusion from federal or state health care programs; and
- Other adjudicated actions or decisions.

NPDB reports can have a very serious impact on a practitioner's career. The reports are available to state licensing boards, hospitals, health plans, and other health care entities looking to enter into employment or affiliation relationships with a practitioner. Not only are the reports available to these organizations, but also in some instances entities are required to query this information before hiring and/or engaging a practitioner. Once a report is entered into the database it stays forever. A negative report can lead to a credentialing denial, loss or limitation of licensure or privileges, increases in insurance premiums, and exclusion from health plans. This is often the final piece of a nightmare scenario for any physician facing a medical malpractice claim and/or adverse action licensure or privileges. Despite this reality, many physicians are unaware of several key facets of the statute that could help them avoid the reporting altogether, or at the very least, lessen the damage caused by a report. Below are six key things that every physician should know about all stages of the NPDB reporting process.

The 30-Day Rule

As evidenced by the extensive list above, there is little maneuverability in what must be reported to the NPDB. When that reporting must occur, however, is a different story. For practitioners facing possible action against their licenses or privileges, the first thing to be aware of is that an adverse action only becomes reportable once it has been in effect for more than 30 days. At that point it becomes reportable regardless of the outcome of any investigation or adjudicative process. While a physician's natural instinct may be to seek a thorough (slow)
investigation of allegations of misconduct, in light of this provision a practitioner may be best served by seeking an expedited investigation and adjudication. If the issue is resolved in less than 30 days, it will not have to be reported.

### Early Resolution

In situations that involve a malpractice suit in addition to/instead of potential adverse action, the 30-day rule does not provide an opportunity to avoid reporting. However, practitioners facing such a situation may still be able to avoid being reported with strategic early action. A medical malpractice payment must be reported to the NPDB only if it is the result of a written complaint or claim demanding monetary payment for damages. In many states, the written complaint clause of this provision has been construed liberally to include even a Notice of Intent To Sue. The rule as currently constructed, however, does not require the reporting of a payment made in the absence of a written claim or demand. This leaves room for a particularly proactive practitioner and/or hospital, in the face of a certain malpractice claim, to avoid reporting by initiating contact with an aggrieved patient and facilitating a payment before pen meets paper in the form of a claim or demand. It should also be noted that early contact with a patient after a bad outcome, particularly by hospital administration instead of attorneys, could engender positive feelings and eliminate the involvement of plaintiff attorneys, thus making a cost-effective resolution more easily achievable.

### The Corporate Shield Loophole

As currently constructed, the medical malpractice reporting statute only requires reporting to the NPDB if a provider is a defendant to the action at the time of the payment. This allows medical providers originally named in a lawsuit to avoid the reporting of a malpractice settlement to the NPDB if he or she is dismissed without promise of payment before settlement is finalized. Traditionally this occurs when a practitioner is named alongside his or her hospital or medical group, with whom some type of malpractice coverage is shared. The individual practitioner defendant will obtain dismissal from the case prior to settlement, leaving only a hospital or group medical practice in the case to settle the plaintiff’s claims. This has become known as the corporate shield loophole. Practitioners named as defendants in a lawsuit alongside their hospital or another corporate entity should work with the other parties involved in the suit to negotiate a dismissal before payment as any part of settlement. And the resulting settlement agreement should make no mention of the individual practitioner or that any money is being paid on his or her behalf, thus not creating any reporting obligations.

### Using Personal Funds

In instances where a physician is named individually in a lawsuit and the relationship between the defendants prevents the use of the corporate shield loophole, using personal funds is another option to avoid reporting. As noted above payment, on behalf of a physician by another party is a reportable action. Payment made by an individual physician on his or her own behalf, however, is not reportable. Practitioners should consider settling claims, particularly low dollar amount claims, with their own money to avoid reporting. In some instances, taking out a personal loan and using the money to settle a claim may be a better alternative than having one’s name reported to the data bank where it will reside forever, potentially effecting future employment, compensation, and/or insurance premiums.
The Dispute Process

Even after being reported to the NPDB, a practitioner’s efforts should not stop there. Once a report is filed to the NPDB, a copy is sent to the practitioner. The practitioner may notify the NPDB that he or she wishes to place the report into dispute status under the belief that the action was reported incorrectly or not reportable at all. The practitioner must contact the reporting entity and notify it of the dispute. The practitioner and the reporting entity have 60 days to resolve the dispute. If an agreement is reached, the reporting entity can submit a corrected report. If there is no agreement, the practitioner can elevate the issue to the NPDB’s Dispute Resolution team. A Dispute Resolution Manager will review the case and make a determination as to whether the event was reported correctly. The Dispute Resolution Manager will make a final determination as to the contents of the report and issue a decision to allow the report to remain as submitted, require a correction, or even void the report completely from the NPDB. The NPDB reports a shockingly low number of reports submitted each year are challenged. This suggests that many practitioners are unaware of their right to challenge these reports. Any practitioner who is the subject of a report to the NPDB can benefit from placing it into dispute status. At the very least, initiating a dispute will create an opportunity to negotiate the wording of the report with the reporting entity and possibly shape the way that the event is reported.

It is also important to appreciate that while the dispute process is available, it is very difficult to have a report altered or retracted. When faced with a situation in which reporting is required, practitioners are best served by working with the reporting entity from the outset to make sure it is aware of all aspects of the incident and any mitigating circumstances. Furthermore, a practitioner should also look to negotiate the wording of the report prior to its submission. Front end cooperation with a reporting entity is a very effective way to mitigate the damage that a NPDB report could have. Given the importance of this type of pre-report negotiation, a practitioner should consider engaging legal counsel to assist in the discussion with the reporting entity and in the wording of the subsequent report.

Subject Statements

If the dispute process is unsuccessful and the report submitted is maintained as originally submitted by the reporting entity, there is yet another way that a practitioner can effect what is reported to future recipients of the report. The NPDB allows any practitioner who is the subject of a report in its repository to submit a 4,000-word or less written statement that will be added to the report as a supplement. The supplemental statement will accompany the report any time it is distributed and will be retroactively sent to any entity that received the report in the preceding three years. This provides a practitioner a chance to explain the circumstances of the event, his or her involvement in the event, and the reason for the outcome. This is particularly useful in instances where a practitioner is named in a lawsuit simply because of involvement on a health care team, but was not intimately involved in the alleged malpractice. A supplemental statement allows that practitioner to all but explain away the report that is attached to his or her name. Subject statements are also a woefully underutilized aspect of the reporting system of which many physicians are not aware. Any practitioner who is reported to the NPDB has no reason to forego this step in the process. It is a good idea to consult with counsel with legal counsel in this stage of the process as well about the content of his/her statement before it is submitted to explore all corollary legal issues relating to the statement. If there is ongoing litigation and/or any other investigation, the importance of consulting counsel pre-submission is even greater.

TAGGED: National Practitioner Data Bank, NPDB, Health Care Quality Improvement Act of 1986