

Fair Process in Physician Rating

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Physician Rating

- Many names: tiering, ranking, grading, performance measurement
- Lengthy history in many settings:
 - Hospital staff
 - Managed care network membership
- May be tied to
 - Membership
 - Payment
 - Public reporting

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Trends

- More information, more public reporting and rating,
 - Health care as consumer good
 - Patient safety and quality reports
- Federal government: 2008 legislation requiring public reporting of Medicare provider performance
- State governments: Medicaid
- Private sector:
 - Health plans
 - Angie's List

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Where Does the Law Come In?

- Types of claims that may arise
 - Fair process
 - Private sector
 - Due process
 - Government action, Constitutional basis
 - Breach of privacy
 - Economic damage
 - Tortious interference with business
 - Defamation

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How Has Law Dealt with This Issue Before?

- Peer review for admitting privileges
 - Health Care Quality Improvement Act
 - Limited appeals rights, limited external review of peer review decisions
 - Public disclosure to the Practitioner Data Bank
 - All hospitals expected to examine physician credentials through the Data Bank

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How is the Law Dealing with Fair Process Today?

- Examples
 - Voluntarily negotiated arrangements
 - Patient Charter for Physician Performance Measurement, Reporting and Tiering Programs
 - Voluntary agreement on procedures
 - Administratively imposed models
 - New York Doctor Ranking Model Code
 - Agreements developed following intervention by the State Attorney General

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CO's Physician Designation Disclosure Act (S.B. 08-138)

- Far-reaching law enacted Sept. 2008.
- Applies only to ratings that are:
 - For public reporting
 - By health plans
- Requires:
 - Notice to physicians of:
 - Methodology and data used
 - Rating decision 45 days prior to publication
 - Opportunity to appeal
 - Opportunity to submit corrected data, which are presumed valid and accurate. Burden is on plan to disprove physician's data.
- Enforcement:
 - Private enforcement by physician, including damages
 - Cannot be limited by contract
 - Penalties by state insurance commissioner

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Discussion

- Trend toward information transparency
- The law has a history of favoring public sanctions (exclusions, reporting) when the review is peer-based
 - Process heavily protected by the courts
 - Public reporting (Practitioner Data Bank)
 - Physicians have few legal rights
- The law may be less protective of payer-controlled review procedures that result in public information as opposed to network exclusion
 - Shift in burden of proof
 - Permit physician suit
- Government insistence on public information, along with outline of procedures, may shift balance once again

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