Proposed rule changes for the National Practitioner Data Bank

SUSAN O MARTIN, RN, JD

From Burford & Ryburn, L.L.P., Dallas, Texas.

Corresponding author: Susan O. Martin, RN, JD, Burford & Ryburn, L.L.P., 3100 Lincoln Plaza, 500 N. Akard, Dallas, Texas 75201-6697 (e-mail: smartin@brlaw.com).

The Department of Health and Human Services recently published proposed new regulations to the National Practitioner Data Bank (NPDB) that will dramatically change hospitals' and health care organizations' requirements for reporting medical malpractice payments. The purpose of the proposed regulations is to close the loophole regarding entities, including hospitals and professional associations, that settle cases or claims on behalf of the entity and not a particular health care practitioner (1).

The NPDB acts primarily as a flagging system. Its principal purpose is to facilitate a comprehensive review of professional credentials, including information on medical malpractice payments and adverse licensure or privilege actions. Another objective of the NPDB is to restrict the ability of physicians with incompetent performance and state medical board restrictions to move to another state to practice medicine (1). Hospitals, health care entities, and malpractice carriers are required to report any payment made on behalf of a health care practitioner.

CURRENT REPORTING REQUIREMENTS

Entities required to report

Four entities are required to report to the NPDB.

1. Medical malpractice payers, including self-insured hospitals, must report payments within 30 days of making the payments.
2. Hospitals and other health care entities must report professional review actions affecting privileges for longer than 30 days or voluntary surrender or restriction of clinical privileges to avoid investigation within 15 days of the adverse action.
3. State licensing boards must report disciplinary action against a health care professional within 30 days of taking the action.
4. Professional societies must submit professional review action reports against a health care professional within 15 days of the adverse action.
Reporting medical malpractice payments

Each entity that makes a payment for the benefit of a physician, dentist, or other health care practitioner in settlement of or in satisfaction in whole or in part of a claim or a judgment against the practitioner must report the payment information to the NPDB. Under the current rules, a payment made on behalf of an entity (hospital, clinic, or group practice) is not reportable. The payments are limited to exchanges of money and must be the result of a written demand for money or damages based on the practitioner's provision of or failure to provide health care services. Any payment must be reported within 30 days from the date the payment is made. If a practitioner or other person makes a medical malpractice payment out of his or her personal funds, the payment is not reportable (1).

Also under the current rules, the health care practitioner must be named in both the written complaint and the settlement release or final adjudication to be reported to the NPDB. If the practitioner is named in the claim letter but not in the final release or is dismissed from the lawsuit, no report is required. However, the NPDB makes it clear that if the dismissal from the lawsuit is a condition of settlement, reporting is required on behalf of that individual practitioner. Many hospitals and health care practitioners are not listed specifically as a settling defendant in order to avoid NPDB reporting. This commonly occurs with residents and housestaff in large teaching organizations where it may be difficult to determine on whose behalf a payment is made. Hospitals have frequently settled lawsuits to include in the release “all residents, interns, housestaff, teaching staff, fellows, etc. . . .” to avoid the reporting requirements. In many circumstances, plaintiff attorneys have agreed to nonsuit the health care practitioner in order to settle with the hospital or corporate entity.

Reporting adverse actions

The NPDB requires the reporting of adverse actions against physicians by hospitals, state medical boards, licensing agencies, and professional societies. This requirement includes those physicians who voluntarily relinquish their privileges to avoid data bank reporting.

A lawsuit filed in federal court caught the attention of many physicians across the country. A physician's privileges were terminated by a government facility without an appropriate due process hearing in 1992. The hospital reported the physician to the NPDB for termination of privileges due to substandard care. The physician appealed this decision, and the hospital reinstated her privileges with conditions. However, the physician had difficulty getting medical staff privileges in other hospitals. She was also denied licensure in many states because of the NPDB report. Unfortunately, the hospital had neither retracted the report nor sent an amended report to the NPDB. The physician sued, and the court agreed with the physician, stating that the hospital had the power to void the original action in light of the fact that the original mark against the physician was unwarranted (2). The ongoing litigation floundered in the courts for many years. The physician's federal court case was finally decided in May 1997.
PROPOSED RULES

Under the proposed rules, reports on payments made by those practitioners who provided the care will be reported whether or not they were named as defendants to the claim or action. These changes are designed to prevent the evasion of the NPDB medical malpractice reporting requirements. The Notice of Proposed Rulemaking published in the Federal Register in December 1998 would amend the existing reporting requirements. The Department of Health and Human Services admits that there are legitimate situations where it may be impossible to identify those multiple practitioners on whose behalf a payment is made. However, the department makes it very clear that these situations will be limited, and it will monitor those facilities and health care entities that continually do not report practitioners. A hospital, health care facility, or other entity that fails to report to the NPDB can be fined $10,000 for each payment that should have been reported (1).

The NPDB acknowledges that practitioners can submit their own explanation as to the settlement and rebut the report. Alternatively, health care practitioners can request that the reporting entity change the report if it is incorrect. However, if the reporter refuses to change the report, the physician may request that the secretary of the Department of Health and Human Services review the matter. This review goes to the Division of Quality Assurance, which will consider the physician's and the reporter's information. This division can order the report to be voided or changed (3).

CONCLUSION

These new reporting requirements could create a new area of litigation between health care facilities and physicians. If a self-insured hospital settles a lawsuit where nurses, residents, and teaching staff were all involved in a patient's care and perhaps contributed to the patient's damages, then are all of the practitioners reported? How does a malpractice carrier or health care entity decide who is more culpable? The proposed language of the NPDB seems to indicate that all practitioners who participated in the care of a patient are reported for the total amount of the settlement; however, the report would indicate that multiple practitioners were involved and participated in the settlement or payment. If a resident or intern is not as culpable as a nurse or other physician involved in the care of a patient and yet is reported to the NPDB for the entire settlement, what remedies does that resident or intern have? Attorneys representing multiple health care defendants are likely to find themselves with conflicts of interest regarding these issues.

Plaintiff and defense attorneys have responded with their comments to the proposed rules. Interestingly, this is one subject that even adversarial attorneys have in common. If the proposed rules are passed, this will surely stalemate settlements and cause increased friction between settling defendants and reporting agencies.
References

