

# Resignation of Privileges Prior to Notice of a Formal Investigation: Beware of Falling into a Reporting Trap

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It is a common misconception that practitioners may resign clinical privileges in a health care entity or membership in a managed care program, medical society, or association at any time without repercussions prior to being provided notice of a formal investigation being initiated against that practitioner. However, such failure to receive notification is not necessarily sufficient to avoid a report to the National Practitioner Data Bank (NPDB). Importantly, it is irrelevant if the reason for the resignation is to avoid the investigation or any subsequent report being made to NPDB.

NPDB was established to serve as a national repository for information related to professional competency and conduct for certain health care professionals. This database assists in ensuring that the professional history of the practitioner is available in any geographic area by entities that are credentialing or otherwise ascertaining the practitioner's professional competence. However, with the publication of the new edition of the NPDB Guidebook<sup>1</sup> in April 2015 and the guidance contained therein, reporting requirements have been expanded and sections regarding notice of actions, the status of investigations, and the ability to resign privileges or memberships without adverse events occurring have been clarified. The practitioner and those advising him, and the entities conducting such investigations, should be cognizant that reporting requirements are more expansive than in the past, and the previous misconceptions now create additional reporting traps.

## National Practitioner Data Bank

The Health Care Quality Improvement Act of 1986 (HCQIA)<sup>2</sup> requires the reporting of medical malpractice payments and certain adverse actions levied against physicians as it relates to professional conduct or competency.<sup>3</sup> Prior to its passage, it was common for practitioners who had been subject to such adverse acts to relocate to other states. Accordingly, the entity investigating the practitioner would have to rely on what he disclosed in his application and supporting documentation tendered at the time the application was made. With a lack of a nationwide database, the entity would be hindered from otherwise being able to complete a full investigation of the practitioner. NPDB was developed to allow for such a database.

Before the recent update, the last version of the NPDB Guidebook was published in 2001.<sup>4</sup> The 2015 version expanded reporting requirements and provided additional guidance for mandatory reporting related to resignations under investigation, as well as non-renewal and expiration of privileges while under investigation. The 2015 version generated controversy due to the determination of the type of investigation that leads to a reportable event and specific clarification that a practitioner need not have knowledge of an ongoing investigation to be subject to NPDB reporting if he resigns his privileges or otherwise fails to renew them.<sup>5</sup> The revised NPDB Guidebook now provides that the term "investigation" is interpreted "expansively."<sup>6</sup> In determining what is meant by, and the time period of, an investigation, the NPDB may look at the health care entity's bylaws and other governance or operational documents to determine when an investigation has been initiated or is currently ongoing.<sup>7</sup> However, those resources, even if they define investigation, are not controlling. Ultimately, the NPDB has the sole authority to determine the existence and time period of an investigation.<sup>8</sup>

## HCQIA Reporting Requirements

The HCQIA establishes two instances when a hospital must file a report with the NPDB: (1) when it "takes a professional review action that adversely affects the clinical privileges of a physician for a period of longer than 30 days"<sup>9</sup>; and (2) when it "accepts the surrender of clinical privileges of a physician (i) while the physician *is under investigation by the entity* relating to possible incompetence or improper professional conduct, or (ii) in return for not conducting such an investigation or proceeding."<sup>10</sup> This article focuses on when a practitioner is "under investigation" and what constitutes a resignation that triggers NPDB reporting.

## What Type of "Investigation" Leads to a Reportable Event?

The issue of what constitutes an "investigation" that would lead to a reportable event is dependent on the determination of whether an investigation is ongoing, what party is conducting the investigation, and the investigation's purpose. As previously discussed, NPDB maintains broad discretion in determining what constitutes an investigation. It considers an investigation to encompass all of its aspects, from the beginning stages of the inquiry, such as fact gathering, until a final decision has been issued related to clinical privileges.<sup>11</sup> It does not take a formal inquiry to be considered an investigation.

As part of this determination, the next issue to be addressed is who exactly is conducting the investigation? In *Simpkins v. Shalala*,<sup>12</sup> the U.S. District Court for the District of Columbia held that HCQIA's reporting requirements are not automatically triggered when an individual supervisor is investigating



the physician.<sup>13</sup> Rather, there must be a determination as to the capacity of authority held by the party conducting the investigation to determine whether it should be reported. In *Simpkins*, the court ruled that reporting is required when there is a “formal action by the hospital” because it is the “health care entity.”<sup>14</sup> In this scenario, a departmental review process (or a Focused Professional Practice Evaluation (FPPE) using The Joint Commission terminology) did not constitute an investigation by a health care entity for reporting purposes under NPDB, unless it can be demonstrated that the action of a supervisor constituted an action of the hospital.<sup>15</sup>

The Kentucky Court of Appeals in *Omar v. Jewish Hospital Healthcare Services*<sup>16</sup> noted that the HCQIA does not define the term investigation.<sup>17</sup> Rather, citing the 2001 version of the Guidebook, the court held that “factors indicative of an investigation include scrutiny carried out by the health-care entity as opposed to an individual on staff, scrutiny focused on the physician and concerned with his professional competence, and scrutiny that is a precursor to a professional review action.”<sup>18</sup> In *Omar*, the physician was the subject of a formal corrective action investigation initiated by the Medical Executive Committee pursuant to the Bylaws, which was clearly an action by an entity rather than the limited action at issue in *Simpkins*.

So how does a practitioner know whether resigning his privileges or membership during an investigation is a reportable event? The next step is determining whether the investigation pertains to “possible incompetency or improper professional conduct.”<sup>19</sup> If so, a resignation of privileges or membership during the investigation may be reportable depending on, as discussed above, who is conducting the investigation. If the investigation involves “individual action” by a person like a departmental supervisor as in *Simpkins*, then reporting is not triggered *unless* that person had the authority to represent the health care entity and issue a final determination. However, if the investigation is undertaken by the health care entity itself or a committee of the entity as in *Omar*, then reporting would be required.

## What Is Considered a Resignation Under Investigation?

The 2015 Guidebook expanded the reportability of a resignation during an investigation because it now has more authority to define what constitutes an investigation. In the 2015 Guidebook, NPDB provided significant guidance, including examples, as to when a resignation is reportable and why.<sup>20</sup> It should be noted that in some of the examples, the physician is not aware of the investigation. *Importantly, the 2015 Guidebook makes clear that notice of the investigation is immaterial.* The following are examples from the Guidebook of a resignation or surrender of privileges and the reasoning for whether it is reportable:

- A physician withdraws his reapplication for privileges or membership or allows for such to expire without any effort to reapply while unaware of an ongoing investigation due to quality complaints. The surrender is reportable. The organization must produce sufficient evidence that the investigation occurred prior to the surrender. The physician’s knowledge of the investigation is immaterial.<sup>21</sup>
- A hospital begins a review of issues related to professional competence just prior to the expiration of privileges and the physician fails to renew the clinical privileges. The surrender is reportable. Again, the physician’s knowledge of the investigation is not required for it to be reportable. The failure to renew the clinical privileges is the equivalent of a surrender.<sup>22</sup>
- A preferred provider organization is investigating a member physician as a result of quality of care complaints. The physician has not been provided notice of the investigation. While the investigation is ongoing, she resigns her plan membership. The resignation is reportable. Again, even in this scenario, the physician’s lack of knowledge is immaterial.<sup>23</sup>
- A physician is being investigated for professional competence but resigns his privileges because the physician plans to move to another state. The surrender is reportable. NPDB was created to ensure physicians with issues of professional competence are tracked when they move to other states.<sup>24</sup>
- A physician that is the subject of an investigation is offered the ability to stay at the hospital under some restrictions on her privileges. The physician refuses the agreement and resigns her privileges. The physician contended the investigation had concluded because of the offer and therefore the resignation of privileges was not reportable. In reality the health care entity’s decision-making authority must either formally close the investigation or move forward with a final action for the investigation to be concluded. Here, the physician was simply offered an agreed-upon resolution, which she refused. Because the offer was not a final disposition, the investigation was ongoing and the resignation was reportable.<sup>25</sup>
- A hospital initiates an investigation of a physician who is the subject of numerous quality-of-care complaints. The physician resigns his privileges but no professional review action was taken. The resignation is reportable because the investigation was triggered by professional competency complaints and was outside a routine review of the medical staff.<sup>26</sup>
- A physician resigns his privileges while a routine review is being conducted that applies to all practitioners holding clinical privileges. This resignation is not reportable because it is not directed at a specific physician.<sup>27</sup>



## Conclusion

As the above examples demonstrate, a physician should be proactive in determining whether he is under any type of investigation relating to professional competence or quality-of-care concerns before resigning or deciding not to renew his privileges or memberships. A health care entity in that instance has an affirmative obligation to report a resignation or failure to reapply if it occurs during such an ongoing investigation. Notably, reporting is mandatory whether or not it is a formal investigation, and regardless of whether the physician has been notified of such investigation.

A surrender of privileges during a routine investigation of a departmental or medical staff should not be problematic. However, if a targeted investigation of a specific physician's clinical competency results in the process of the routine review, the physician must recognize that any failure to maintain privileges and follow through with the investigation until a formal resolution has occurred is reportable to NPDB.

- 1 Available at [www.npdb.hrsa.gov/resources/aboutGuidebooks.jsp](http://www.npdb.hrsa.gov/resources/aboutGuidebooks.jsp).
- 2 42 U.S.C. § 11101 *et seq.*
- 3 42 U.S.C. §§ 11131-11133.
- 4 Available at [www.ire.org/media/uploads/files/datalibrary/npdb/guidebook.pdf](http://www.ire.org/media/uploads/files/datalibrary/npdb/guidebook.pdf).
- 5 See Markos, J., *Getting to Know the NPDB*, CHICAGO MED., 118(6), 12-13 (2015), available at, [www.cmsdocs.org/news-publications/chicago](http://www.cmsdocs.org/news-publications/chicago)

[www.acms.org/bulletin/2015/15jul.pdf](http://www.acms.org/bulletin/2015/15jul.pdf); Maruca, W., *NPDB Guidebook revision would clarify investigation reporting issues*, ALLEGHENY COUNTY MED. SOC'Y BULLETIN, 105(7), 524-526 (2015), available at [www.acms.org/bulletin/2015/15jul.pdf](http://www.acms.org/bulletin/2015/15jul.pdf); Cassidy, M., *NPDB Guidebook revision would clarify investigation reporting issues*, ALLEGHENY COUNTY MED. SOC'Y BULLETIN, 103(12), 524-526, 528 (2013), available at [www.acms.org/bulletin/2013/13dec.pdf](http://www.acms.org/bulletin/2013/13dec.pdf).

- 6 NPDB Guidebook; Chapter E: Reports, pp. E-34.
- 7 *Id.*
- 8 *Id.*
- 9 42 U.S.C. § 11133(a)(1)(A).
- 10 42 U.S.C. § 11133(a)(1)(B) (*emphasis added*).
- 11 NPDB Guidebook; Chapter E: Reports, pp. E-34.
- 12 999 F. Supp. 106 (D.D.C. 1998).
- 13 *Id.* at 114.
- 14 *Id.*
- 15 *Id.*
- 16 153 S.W.3d 845 (Ky. Ct. App. 2004).
- 17 *Id.* at 848.
- 18 *Id.*
- 19 42 U.S.C. § 42 U.S.C. 11133(a)(1)(B).
- 20 NPDB Guidebook, pp. E-29-E57.
- 21 NPDB Guidebook; Chapter E: Reports, pp. E-33-E-34.
- 22 NPDB Guidebook, Q&A: Reporting Clinical Privileges, Number 18, available at [www.npdb.hrsa.gov/resources/aboutGuidebooks.jsp?page=EclinicalPrivilegesQA.jsp](http://www.npdb.hrsa.gov/resources/aboutGuidebooks.jsp?page=EclinicalPrivilegesQA.jsp).
- 23 *Id.* at Number 11.
- 24 *Id.* at Number 20.
- 25 *Id.* at Number 23.
- 26 *Id.* at Number 24.
- 27 *Id.* at, Number 25.

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