

## PROCTORSHIPS AND THE 30 DAY REPORTING REQUIREMENT

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Recently, the United States District Court for the Eastern District of Texas issued a decision regarding a hospital's obligation to report a restriction of a physician's privileges to the National Practitioner Data Bank ("NPDB"). Health care entities are required to report "a professional review action that adversely affects the clinical privileges of a physician for a period of longer than 30 days" to the NPDB.<sup>1</sup> A report to the NPDB can have a chilling effect on a physician's practice, as insurance carriers, hospitals, state licensing boards, and other entities review reports to the NPDB. The NPDB Guidebook states that "[i]f, for a period lasting more than 30 days, the physician . . . cannot perform certain procedures without proctor approval or without the proctor being present and watching the physician . . . , the action constitutes a restriction of clinical privileges and must be reported to the NPDB."<sup>2</sup> Typically, a

health care entity that has imposed a proctorship restriction on a physician's privileges for an indeterminate period will wait for thirty days to elapse and, if the requirements of the proctorship have not been fulfilled, will report the restriction to the NPDB. In *Walker v. Memorial Health System of East Texas*, the court ruled that the defendant hospital should not have reported a proctoring restriction that did not contain a temporal limit (i.e. 60 days) to the NPDB simply because the restriction had been in place for longer than thirty days.<sup>3</sup>

The facts of the *Walker* case are not uncommon. Dr. Walker is a physician who had clinical privileges at the defendant Hospital. His privileges permitted him to perform surgery, including major abdominal surgery. When questions arose about Dr. Walker's surgical skill, the Hospital's Medical Executive Committee conducted a peer review. Upon completion of the peer review, the Hospital imposed a proctorship that required that Dr. Walker have a surgical proctor for five bowel surgery cases. The restriction did not specify a timetable for the completion of the proctored cases, and Dr. Walker did not complete the five proctored bowel surgery cases within thirty days. After thirty days elapsed, the hospital filed an adverse report to the NPDB that disclosed the proctoring requirement, and indicated that the basis for the action was the doctor's substandard or inadequate skill level.

Dr. Walker filed suit and moved for, among other relief, a preliminary injunction that would require the Hospital to submit a Void Report to the NPDB. The Hospital claimed that "the Court lack[ed] authority to issue a preliminary injunction because the Health Care Quality Improvement Act ("HCQIA") does not provide a private right of action."<sup>4</sup> The court disagreed with the Hospital's position and found that the court had the authority to issue a preliminary injunction, notwithstanding the HCQIA because the matter before the court concerned injunctive relief.

The Court conducted an expedited evidentiary hearing on the motion for a preliminary injunction. After the hearing, the Court granted the injunction, noting that the HCQIA sets a bright-line temporal threshold of thirty days for reportable proctoring sanctions, the purpose of which is to provide certainty for all concerned. The court ordered the Hospital to submit a Void Report to the NPDB and to refrain from filing any other statements or reports with the NPDB related to Dr. Walker during the pendency of the suit.

The court reasoned that due to the aforementioned temporal limit, a restriction should not be reportable to the NPDB based on how long it takes a physician to satisfy the requirement. “Whether a proctoring sanction is reportable should be established by the terms of the sanction at the time it is delivered, not by whether, in fact, it takes more than thirty days to satisfy the requirement.”<sup>5</sup> The court gave the following example: a surgeon in a busy hospital might be able to quickly find a proctor and complete the required cases within thirty days, but a surgeon in a rural hospital might not be able to secure a proctor or complete the required cases within thirty days. In that scenario, the exact same proctorship restriction would be reportable for the surgeon in the rural hospital, but not reportable for the surgeon in the busy hospital.

While the Walker decision is not controlling authority in New York, physicians faced with a proctoring restriction should be mindful of its holding. The holding could provide a good faith basis for a hospital not to submit a report to the NPDB or, if a report has already been submitted, to submit a Void Report.

1. 42 U.S.C. § 11133(a)(1)(A).
2. National Practitioner Data Bank Guidebook, E-37.
3. Walker v. Memorial Health System of East Texas, 231 F.Supp. 3d. 210 (E.D.TX. 2017).
4. *Id.* at 214.
5. *Id.* at 215.

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