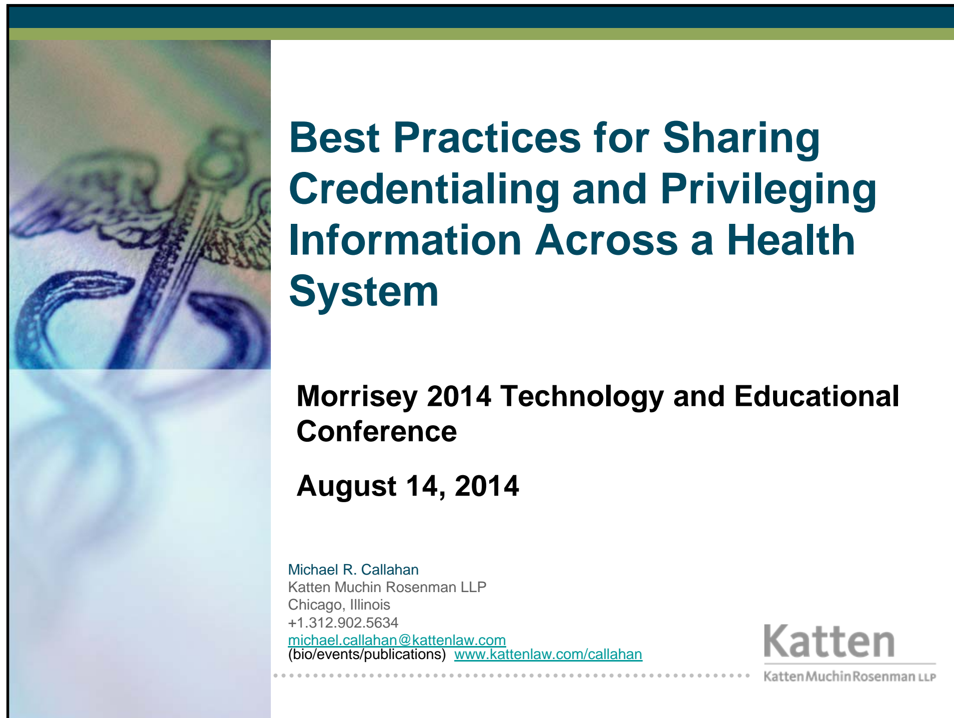
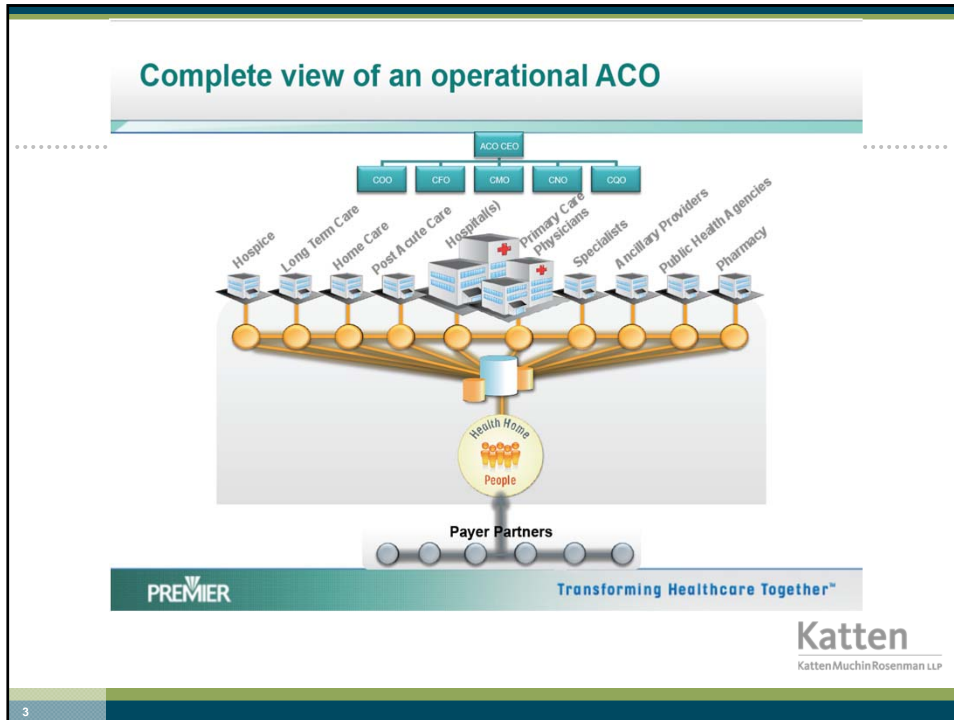


Industry Developments

- Health care providers are consolidating at all levels
  - Hospitals/medical staffs
  - Physician groups and practices
  - Patient centered medical homes
  - Surgicenters
  - Nursing homes/assisted living centers
  - Clinics
  - ACOs
  - Clinically integrated networks

Katten
Katten Muchin Rosenman LLP

2



Industry Developments (cont'd)

- Government and private payors are reimbursing providers based on value and quality outcomes and not volume
  - ACO and Value Based Purchasing quality metrics
  - Pay for performance standards
  - Denied payments for never events (i.e., wrong site surgery), hospital acquired conditions (i.e., MRSA) and over-utilization of services
  - Managed Medicare and Medicaid patients based, in part, on meeting performance standards

Katten
KattenMuchinRosenman LLP

4

Industry Developments (cont'd)

- The failure to meet these metrics therefore has a direct impact not only on a provider's liability exposure and continued licensure and accreditation, but on its bottom financial line
  - Will not be included in an ACO, CIN, managed care organization or a hospital medical staff
  - Payments will be denied or reduced
  - Provider will be financially penalized
  - Provider will not be able to receive shared savings

Katten
KattenMuchinRosenman LLP

5

Hospital/Health System/MCO/ACO Duties

- Consistent with state, federal and accreditation standards, all providers must demonstrate current competencies to exercise all of the clinical privileges granted to them.
- Performance against standards must be continuously monitored and compliance enforced.
- If the entity knew or should have known that a provider was not qualified or competent to exercise a particular privilege(s) and a patient suffers harm or injury, the entity will be legally responsible and liable for any compensatory damages.
- THEREFORE, the need and ability to share information across the continuum of provider facilities, medical staffs and responsible parties relevant to a physician's, APNs, etc., credentials and privileges becomes more critical than ever.

Katten
KattenMuchinRosenman LLP

6

Categories of Credentialing and Privileging Information

- CVO/Primary Source Information (see attachment)
  - License
  - DEA registration
  - Medical school, residency, fellowship training
  - Board certification
  - Insurance
  - Affiliations
  - Liability claims history
  - Medicare/Medicaid sanctions

Katten
Katten Muchin Rosenman LLP

7

Categories of Credentialing and Privileging Information (cont'd)

- Peer Review/Quality
  - Peer/professional references
  - Health status including history of physical/psychological impairment
  - Peer review actions, i.e., termination, suspension, and underlying minutes, records, reports, etc.
  - Patient/employee complaints
  - Quality scorecard using established quality metrics

Katten
Katten Muchin Rosenman LLP

8

Categories of Credentialing and Privileging Information (cont'd)

- Performance improvement studies/results
- OPPE/FPPE reports
- RCA reports
- Number of never events and HACs
- Data Bank and state disciplinary reports

Katten
KattenMuchinRosenman LLP

9

Categories of Credentialing and Privileging Information (cont'd)

- Utilization Management
  - Average length of stay
  - Cost per patient visit
  - Number of medications ordered, name brand and generics
  - Number of consultants used
  - Number of tests ordered/procedures performed
  - Readmission rate
  - Efficient use of outpatient and ancillary services
  - Effective care transitions

Katten
KattenMuchinRosenman LLP

10

What are the Legal Issues Related to Sharing?

- Is the information publically available?
- If not, is it privileged and confidential under state and/or federal law?
  - State peer review confidentiality statutes
  - Information that is patient safety work product under the Patient Safety and Quality Improvement Act of 2005
  - Information protected under HIPAA, state/federal mental health, drug and disability laws
  - Physician/patient protections

Katten
KattenMuchinRosenman LLP

11

What are the Legal Issues Related to Sharing? (cont'd)

- If information is disclosed improperly are the protections waived?
- Do the state law protections apply in federal proceedings?
- Is the proposed sharing of information by and between controlled or affiliated organizations?
- Have the providers authorized the release of information as a condition of employment and/or medical staff, ACO, MCO membership?

Katten
KattenMuchinRosenman LLP

12

Hypothetical

- Dr. Callahan is an orthopedic surgeon who is on the medical staff of two hospitals in a five hospital System. Each has its own medical staff.
- He also has surgical privileges at two System surgicenters.
- Callahan is not employed and is a partner in a 10 physician surgical group.
- He recently was reappointed at one of the System hospitals and is now applying for membership and clinical privileges at a third System hospital.

Katten
KattenMuchinRosenman LLP

13

Hypothetical (cont'd)

- Over the course of the past 10 years the following events have occurred and actions have been taken at the two System hospitals and two surgicenters.
  - Placed on medical records suspension several times
  - Placed on an FPPE plan twice because of adverse patient outcomes including wrong site surgery
  - Suffered a minor stroke that has made it difficult to stand during any lengthy surgical procedure
  - Was summarily suspended for over 30 days and reported to the Data Bank based on repeated disruptive behavior but was later reinstated
  - Periodic utilization reports reflect that Callahan's average length of stay and use of narcotics is in the 90th percentile.

Katten
KattenMuchinRosenman LLP

14

Hypothetical (cont'd)

- The third hospital has reached out to the two other hospitals, the surgicenters and Callahan's surgical group requesting that they share all CVO/Primary Source information, peer review/quality information and utilization management information in order to consider whether to appoint Callahan to the medical staff and to determine what privileges to give to him.
- The System also wants access to this information to determine whether Callahan should be included in an ACO which it has decided to form.

Katten
Katten Muchin Rosenman LLP

15

Analysis

- CVO/Primary Source
  - Information in this category is generally public, easily accessible and is not confidential.
  - If the System has a CVO and Callahan recently was reappointed, the primary source information is probably current and can be shared with the third hospital as part of its appointment process
  - Depending on the length of time between his reappointment and application submission, it would probably be prudent to request any updates on new lawsuits, disciplinary actions, insurance coverages, sanctions, etc.

Katten
Katten Muchin Rosenman LLP

16

Analysis (cont'd)

- Bylaws should contain a provision which states that physician has the burden of producing accurate, complete and current information. The failure to do so at any point in the process will result in the application being withdrawn from consideration or denied if information is incomplete, false or misleading.

Katten
KattenMuchinRosenman LLP

17

Analysis (cont'd)

- Peer Review/Quality
  - Unlike CVO/Primary Source Information, most of the documentation in the Peer Review/Quality category is privileged and confidential. Consequently, there may be statutory and other limitations on how this information can be shared within a System and by and between facilities.
  - Questions which need to be asked include:
    - What information is privileged and confidential and under which statutes?
    - Will release of this information from one facility to a related facility trigger a waiver or result in civil fines or other penalties? Need to look to relevant statute and case law.

Katten
KattenMuchinRosenman LLP

18

Analysis (cont'd)

- Does the corporate parent or provider facility own, control or manage the related facilities? If so, the sharing of information can be more easily accomplished.
- Does applicable state and/or federal law require that the physician agree or authorize the release of this information, before it can be shared?
- Is the purpose for which the information is being used restricted? In other words, is it being used for health care operations (permitted by HIPAA), reducing morbidity or mortality or improving patient care (state confidentiality laws) or patient safety activities within the System's patient safety evaluation System and reported to a patient safety organization? (Patient Safety Act)

Katten
Katten Muchin Rosenman LLP

19

Analysis (cont'd)

  - For Data Bank reports, Callahan's report cannot be shared under the current Guidebook because the medical staffs are separate and distinct. Each hospital has to make its own query.
- In order to maximize ability to share the rest of Callahan's Peer Review/Quality Information, the System should take the following steps:
  - Include definitions in bylaws or rules and regulations which define peer review and quality information as privileged and confidential consistent with state and/or federal law because it is necessary in order to carry out protected activities.

Katten
Katten Muchin Rosenman LLP

20

Analysis (cont'd)

- Evaluate the corporate structure of System to determine whether provider facilities, i.e., hospital, surgi-center, nursing home, are legally affiliated or controlled, owed or managed by a corporate parent. A joint venture relationship or independent contract probably would not qualify.
- The bylaws, appointment and reappointment applications should include language which conditions employment and membership on any staff or work in any provider facility on the provider's agreement that peer review/quality information can be shared at all times throughout the System in order to carry out protected activities.

Katten
KattenMuchinRosenman LLP

21

Analysis (cont'd)

- Avoid using this information for activities not protected under state and/or federal law.
- Avoid improper disclosures.
- Limit access to individuals responsible for carrying out protected activities.
- Consider preparing policies to reaffirm protections and use of information consistent with the law.
- Policies should impose penalties for improper disclosures.

Katten
KattenMuchinRosenman LLP

22

Analysis (cont'd)

- Utilization Management
  - Most of the information in this category is data and factual and therefore is probably not protected.
  - BUT, under the Patient Safety Act data and reports which are designed to improve patient safety or reduce risk can be protected if collected in the PSES for reporting to a PSO and if it does not have to be reported to a state or federal agency.
  - If information is not protected, it can and should be freely shared when appropriate when needed to monitor a provider's utilization patterns and compliance with standards.

Katten
KattenMuchinRosenman LLP

23

Analysis (cont'd)

- Utilization information should be captured throughout the System so that a complete picture is obtained.
- Utilization reports which compare the practitioner to his or her peers should be shared periodically with the practitioner and used to educate and to assist in modifying behavior when necessary.

Katten
KattenMuchinRosenman LLP

24