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GRIEVANCES **Turn Lemons Into Lemonade** **and Reduce Legal Risk**

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GRIEVANCES

Turn Lemons Into Lemonade and Reduce Legal Risk

by Jana Brady, JD, Theresa Powell, JD, and Keith Hill, JD

The goal should be to not only address the issues raised in the grievance, but also improve the provision of medical services and communication

You provide quality care to a large, complicated and often thankless patient population. An inmate grievance is then lodged against you—the content of which may have no basis in fact or medicine. This is annoying. You feel confident that you provided all medically necessary care and your charting is accurate, so you brush off the grievance knowing it to be unfounded. This is where you go wrong. While responding to grievances is time consuming, if it's done properly, you might avoid a lawsuit or you can lay the foundation for getting the inevitable lawsuit dismissed early on.

This article discusses the Prison Litigation Reform Act grievance requirement and instances where poor response to grievances enabled inmates to overcome grievance challenges and proceed to full-blown litigation. The article will conclude with practice tips and recommendations.

An Inmate Must Comply With the Grievance Procedure Before Litigating a Claim

The PLRA provides that “[n]o action shall be brought with respect to prison conditions” under federal law by “a prisoner confined in any jail, prison, or other correctional facil-

ity until such administrative remedies as are available are exhausted.” The plain language of the PLRA contains only one exception: The grievance procedure must be “available.” This caveat has been interpreted to excuse compliance with the grievance procedure in instances such as the following three examples: a grievance was not responded to (or was insufficiently responded to) by prison officials, prison officials interfered with the prisoner’s attempt to submit a grievance and the inmate lacked the mental capacity to utilize the grievance procedure.

The grievance requirement gives inmates an incentive to make full use of the facility’s grievance process and provides the administration with an opportunity to correct any errors. It also reduces the number of inmate suits and improves the quality of suits that are filed because proper exhaustion is believed to result in the creation of an administrative record helpful to the court. The PLRA has been interpreted to require strict compliance with the facility’s grievance procedure—use of appeals, compliance with deadlines, submitting grievances to the appropriate person and so forth.

If an inmate files a Section 1983 claim against you, one of the first issues your defense attorney will address is whether the inmate exhausted the facility’s grievance procedure

before filing suit. If not, your attorney will file a motion with the court asking the judge to dismiss the case on that basis. Discovery on the merits of the claims asserted against you will be stayed pending the court's ruling on this threshold issue.

If there is an issue of fact as to whether the inmate exhausted the grievance procedure, the judge may hold an evidentiary hearing where testimony and evidence will be elicited and submitted on the grievance issue. If there are no issues of fact, the case may be dismissed based on written submissions filed by the parties.

If the judge concludes that the inmate exhausted the grievance procedure or that the grievance procedure was not available to the inmate—i.e., because the inmate did not receive a sufficient response to the grievance—the parties will proceed to full-blown litigation that addresses the merits of the claims asserted against you. More often than not, litigation will go on for years and will require you to assist in responding to written discovery, execute an affidavit, sit for a deposition and/or testify at trial. Time spent properly responding to a grievance is well worth your time when viewed in this light.

The Courts Often Find That Exhaustion Is Unnecessary Under Certain Circumstances

The Seventh, Third and Eighth Circuits have held that administrative remedies are not available, and therefore exhaustion is not required, where prison officials refuse to give a prisoner the forms necessary to file an administrative grievance. Similarly, the Seventh Circuit has held that where prison officials invite noncompliance with a procedure, the prisoner is not required to follow it. In one case, prison officials told the inmate not to file a grievance because the problem would be resolved without the need for the formal grievance procedure.

The Seventh Circuit has also held that prison officials' failure to respond to a properly filed grievance makes remedies unavailable and therefore excuses a failure to exhaust. The Third Circuit has held that exhaustion was excused where guards erroneously informed an inmate that he had to wait until an investigation was complete before filing a grievance. The Ninth Circuit has excused exhaustion where the prisoner was prevented from doing so by a prison official's mistake. And several circuits have held that prison officials' threats of retaliation can render administrative remedies effectively unavailable such that a prisoner need not exhaust them.

Finally, courts have found a prison grievance process to be unavailable because of an inmate's physical infirmity. In one of these cases, the prisoner had a stroke leaving him totally incapacitated; in another, the prisoner had advanced multiple sclerosis and moved in and out of lucidity. Even a broken hand sufficed in yet another case.

The Grievance Process Should Be Used as a Way to Improve Health Care and Communication

Correctional facilities may or may not have formal grievance procedures. To the extent they exist, there should be a written grievance procedure advising the incarcerated person of

the exact steps that must be followed in order to complete the grievance process. The responsibility for answering a grievance may vary by institution. Jails may not have a designated person who answers all grievances. Larger institutions may give this task to designated persons regardless of the issues. It is likely in your best interest to be aware of that procedure when approached to assist with responding to any grievance or contributing to any step in the grievance process.

When faced with participating in the grievance process at your facility, consider the following.

Is this grievance actually related to the provision of medical services?

Inmate grievances may contain any number of issues. Typically, a facility will have a person designated to respond to grievances. In such cases, the official grievance examiner will conduct some fact investigation that may require information from medical staff in order to properly respond. If the issue is not medically related, there is likely no need to become involved. Your response or input may be limited to stating that the matter is not medical but relates to a security issue, for example.

What should or can be my role in answering grievances?

If you are asked to give medical information to the grievance examiner, ask to review the grievance personally. The examiner may simply ask you, "How is Mr. Jones doing?" You might read an assessment from the physician that states the patient is stable and respond with "stable." However, if you knew that the grievance was actually related to an issue concerning medication, or an issue relating to whether or not the patient should be weight bearing, you would tailor your response to address the issue raised in the grievance. You don't want to inadvertently provide information that may make the matter worse—for example, a vague response may be incorrectly interpreted by the person who actually writes the response. If you are not sure how your comments or input are being conveyed to the grievant, keep a personal record or, better yet, document in the patient's chart what was asked and your response.

Consider contacting a supervisor if you are asked to prepare a written report of a patient's care and treatment if it is to be sent for reasons not related to treating a patient. Statements regarding medical treatment for a patient may or may not be shared with others under the law (HIPAA). If information is needed to answer a grievance, you will want to know the nature of the complaint so it can be addressed specifically.

Are you the person being complained about in the grievance? This is important because if you are named as a party in a case, any written or oral statements by you could be used against you as evidence.

Also, the manner in which your response is documented may be very important later. Sometimes the grievance staff may be asking for your input when you are already represented by counsel in a pending matter. In such cases, you

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should relay that communication to your attorney before answering.

In smaller facilities, medical staff may be asked to directly respond to a grievance in writing. Again, you want to address the specific issue referenced and to do so within the guidelines of the policies at your facility. Be familiar with the terms of those policies. If the policy requires a response from you in 30 days, there may be no time for delay.

If the grievance suggests that a person did not receive a certain medication, be sure to address the issue raised after confirming the facts.

1. Was there an order for that medication in the chart?
2. Does the patient's chart reflect whether the medication was given?
3. Does the chart reflect that the medication was refused?
4. What are the circumstances in which medical staff will write "refused"?
5. Find out what the circumstances were in this instance.
6. Respond accordingly.

What else can or should I do about the complaints made in grievances regarding medical care and treatment?

If the grievance makes reference to an ongoing issue, be sure to take steps to document the complaint and address the issue in the patient's medical records if necessary. If you determine that a medication error did occur and would

continue to occur without a corrected order, note that you are now aware of the issue and that you have taken steps to address it. It is not enough to just respond to the grievance. You need to follow through to correct any issue that is discovered through the grievance process.

However, if you determine that the patient's complaint is not founded, you will want to document that, as well, to show that you have reviewed the record, discussed the issue with the physician and resolved the issue using your best professional judgment. For example, if a patient believed that he was not getting his medication and the medication administration record also showed that the medicine was not being given, you would document the reason for withholding the medication. Maybe the patient was on a hunger strike at the time and the medication is one that must be taken with food or on a full stomach, maybe the patient refused the medication (list the witnesses and/or circumstances for the refusal) or maybe the patient is scheduled for an upcoming procedure and the medication needed to be discontinued for a short time.

It is helpful to document such information to remind yourself about the circumstances of any modification in a patient's care and treatment. Correctional health care poses many challenges for the practitioner. Inmates are often transferred from one facility to another without any notice to the medical staff at either facility. Documentation of complaints in the patient's medical records may prove vital to addressing pressing concerns and changes in a patient's care.

Work Together to Address the Issues

Addressing medical grievances is a process that requires coordination between medical and correctional staff in most instances. Work together to address the issues raised in a way that provides appropriate resolution for the patient, and document your efforts and level of involvement in addressing the situation. The goal should be to not only address the issues raised in the grievance for the inmate, but also improve the provision of medical services and communication to avoid such grievances and complaints in the future.

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