



RESOLUTION: 44(20)

SUBMITTED BY: Robert McNamara, MD
Thomas Scaletta, MD, FACEP

SUBJECT: Due Process in Emergency Medicine

PURPOSE: 1) adopt a policy prohibiting members from denying another emergency physician the right to due process regarding their medical staff privileges and prohibits members from holding management positions at entities that deny an emergency physician this right; 2) revise the policy statement “Emergency Physician Rights and Responsibilities;” 3) adopt a new policy requiring any entity that wants to advertise, exhibit, or provide other sponsorship of any ACEP activity to remove all restrictions on due process for emergency physicians.

FISCAL IMPACT: Budgeted committee and staff resources for policy development and advocacy efforts. Potentially significant reduction in outside funding support.

1 WHEREAS, It is common knowledge that, despite an ACEP policy in favor of due process, many ACEP
2 members are denied due process as it regards to their ability to see patients in the emergency department; and
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4 WHEREAS, This denial is often achieved by requiring a physician to automatically give up their rights to a
5 fair hearing outlined in the Medical Staff Bylaws when terminated by the entity holding the exclusive contract for
6 emergency services; and
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8 WHEREAS, Hospital administrators can request or pressure the entity holding the exclusive contract for
9 emergency services to terminate an emergency physician thus avoiding the existing Joint Commission prohibition on
10 such administrative interference with the Medical Staff Bylaws and responsibilities, and
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12 WHEREAS, Due process is considered a fundamental right that is essential to allow the physician to act in
13 the best interest of the patient; and
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15 WHEREAS, The literature and recent examples during the pandemic confirm that emergency physicians can
16 be terminated for speaking up regarding the quality of care and patient safety; and
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18 WHEREAS, The FTC in 2004 (8/30/04 letter of Jeffery W. Brennan to Alvin Dunn, Esq.) stated in response
19 to antitrust concerns raised by ACEP, that ACEP could respond to “behavior of market participants that it believes are
20 detrimental to its members or the public”; and
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22 WHEREAS, The denial of due process is detrimental to ACEP members and the public; therefore, be it
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24 RESOLVED, That ACEP adopt this policy; “No member of ACEP will, directly or indirectly, deny another
25 emergency physician the right to due process regarding their medical staff privileges and ability to see patients in an
26 emergency department. No member of ACEP will hold a management position with any entity that denies an
27 emergency physician of this right.”; and be it further
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29 RESOLVED, That ACEP modify the existing policy statement “Emergency Physician Rights and
30 Responsibilities” through deletion and substitution as follows: “6. Emergency physicians ~~should~~ **shall** be accorded
31 due process before any adverse final action with respect to employment or contract status, the effect of which would
32 be the loss or limitation of medical staff privileges. Emergency physicians' medical and/or clinical staff privileges
33 ~~should~~ **shall** not be reduced, terminated, or otherwise restricted except for grounds related to their competency, health
34 status, limits placed by professional practice boards or state law. 7. Emergency physicians who practice pursuant to an

35 exclusive contract arrangement ~~should~~ shall not be required to waive their individual medical staff due process rights
36 as a condition of practice opportunity or privileges.”; and be it further

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38 RESOLVED, That ACEP adopt this policy: “Any entity that wishes to advertise in ACEP vehicles, exhibit at
39 its meetings, provide sponsorship, other support or otherwise be associated with the ACEP will as of January 1, 2021
40 shall remove all restrictions on due process for emergency physicians. Physicians cannot be asked to waive this right
41 as it can be detrimental to the quality and safety of patient care. The entities affected include but is not limited to
42 physician groups, hospitals, and staffing companies.”

References:

Weiss LD. AAEM White Paper on Due Process Rights for Physicians. J Emerg Med 2007;33:439-40.

McNamara RM, Beier K, Blumstein H, Weiss LD, Wood J. A survey of emergency physicians regarding due process, financial pressures and the ability to advocate for patients. J Emerg Med 2013; 45: 111-116

Seattle Times article on Dr. Ming Lin <https://www.seattletimes.com/seattle-news/health/er-doctor-who-criticized-bellingham-hospitals-coronavirus-protections-has-been-fired/>

Background

This resolution directs the College to adopt a policy prohibiting members from denying another emergency physician the right to due process regarding their medical staff privileges and prohibits members from holding management positions at entities that deny an emergency physician this right. The resolution further calls for wording changes in the policy statement “Emergency Physician Rights and Responsibilities” and the adoption of a new policy requiring any entity that wants to advertise, exhibit, or provide other sponsorship of any ACEP activity to remove all restrictions on due process for emergency physicians.

ACEP’s policy statement “[Emergency Physician Contractual Relationships](#)” includes the following provisions:

- ACEP supports the emergency physician receiving early notice of a problem with his or her performance and an opportunity to correct any perceived deficiency before disciplinary action or termination is contemplated.
- All entities contracting with or employing emergency physicians to provide clinical services, either indirectly or directly, should ensure an adequate and fair discovery process prior to deciding whether or not to terminate or restrict an emergency physician’s contract or employment to provide clinical services.
- Emergency physicians employed or contracted should be informed of any provisions in the employment contract or the contracting vendor’s contract with the hospital concerning termination of a physician’s ability to practice at that site. This includes any knowledge by the contracting vendor of substantial risk of hospital contract instability.
- Emergency physician contracts should explicitly state the conditions and terms under which the physician’s contract can be reassigned to another contracting vendor or hospital with the express consent of the individual contracting physician.
- The emergency physician should have the right to review the parts of the contracting entities’ contract with the hospital that deal with the term and termination of the emergency physician contract.

The policy statement has an accompanying [Policy Resource and Education Paper \(PREP\)](#), which states in part: “The core issue behind language in emergency medicine contracts having to do with termination of the physician’s ability to practice is that of due process. Due process refers to the right to have a fair hearing, including input from the affected physician, prior to any decision being made about termination of the ability to practice (specifically the loss of hospital medical staff privileges). The concept of due process is felt to support the independence of a physician in advocating for patients without undue influence from extrinsic forces and preserves the sanctity of the physician-patient relationship. These forces may include non-medical concerns, such as financial, marketing, or political interests.”

The Joint Commission requires hospital medical staffs to provide due process for physicians. Section 10.01.01 of its Medical Staff Standards dictates that “There are mechanisms, including a fair hearing and appeal process, for addressing adverse decisions regarding reappointment, denial, reduction, suspension or revocation of privileges that may relate to quality of care, treatment, and services issues.” Additionally, the Health Care Quality Improvement Act of 1986 includes a provision that members of a professional review body are not shielded from liability for their professional review actions if they do not ensure due process for the physician facing that action.

Despite these efforts to ensure physicians are accorded due process related to actions that may negatively impact their medical staff privileges, physicians aren’t always assured due process in actual practice. The aforementioned PREP notes that “frequently emergency physicians have been forced to waive due process rights.” Hospitals may ask physicians to waive their due process rights as part of the employment agreement or award staffing contracts only to groups that require their physicians to waive their rights to due process.

ACEP’s policy statement “[Emergency Physician Rights and Responsibilities](#)” addresses the due process issue, stating in part:

“7. Emergency physicians should be accorded due process before any adverse final action with respect to employment or contract status, the effect of which would be the loss or limitation of medical staff privileges. Emergency physicians’ medical and/or clinical staff privileges should not be reduced, terminated, or otherwise restricted except for grounds related to their competency, health status, limits placed by professional practice boards or state law.

8. Emergency physicians who practice pursuant to an exclusive contract arrangement should not be required to waive their individual medical staff due process rights as a condition of practice opportunity or privileges.”

In 2018, ACEP and seven other emergency medicine organizations signed a letter to CMS Administrator Seema Verma. The letter noted that “Whether employed by hospitals or contracted groups, emergency physicians are often deprived of their due process rights via inclusion of a ‘waiver of due process rights’ clause in employment contracts. The letter requested CMS to guarantee physician due process rights by making them unwaivable and irrevocable. Also in 2018, ACEP and the other emergency medicine organizations supported the introduction of legislation that would prohibit the mandatory waiver of due process rights which many emergency physicians are forced to comply with as a condition of employment. An ACEP [press release](#) issued after introduction of the legislation quoted then president Dr. Paul Kivela who stated “This is an important safeguard that will ensure all emergency physicians have access to a fair due process procedure.”

The bill was introduced again with the new Congress in 2020 as [H.R. 6910](#), the “ER Hero and Patient Safety Act.” In April, a [letter](#) from ACEP President Dr. William Jaquis was sent to the bi-partisan cosponsors of the new bill, Congressmen Raul Ruiz and Roger Marshall, reaffirming ACEP’s support for legislation to ensure every emergency physician has due process rights. The letter notes, “The threat of termination or the actual termination of physicians without the right of a fair hearing prevents emergency physicians from fully advocating for their patients for fear of retribution. For these reasons, ACEP believes that all emergency physician contracts should include a due process clause regardless of whether those physicians are directly employed by a hospital or they provide emergency medical services at a hospital through a group or individual contract.” ACEP continues to encourage members to ask their representatives to cosponsor the bill through a [call to action](#), which has resulted in more than 1,000 contacts with members of Congress in support of the bill.

During the pandemic, emergency physicians have faced new threats to their employment. A Washington State emergency physician sued his hospital and group employer after losing his position at the hospital following his social media postings that claimed insufficient hospital efforts to protect staff from contracting the virus. There were also numerous reports of emergency physicians being threatened with termination for bringing their own PPE to work to better protect themselves. In a [statement](#) issued by ACEP, Dr. Jaquis stated, “Emergency physicians are prepared to handle virtually anything thrown at us as we seek to treat and heal our patients, however, we should not be forced to put our own lives at risk and have our jobs threatened simply for wearing our own supplied protective equipment.”

There is not one universally accepted standard for what constitutes due process. If the resolution is adopted, a detailed definition will need to be developed and advertised to fully inform the membership and stakeholder organizations about the new obligations, and ultimately to determine compliance.

Adoption of a policy that prohibits members from denying other emergency physicians the right to due process regarding their medical staff privileges and prohibit members from holding management positions at entities that deny emergency physicians this right would presumably entail sanctions, including possible expulsion from membership, for members failing to abide by the policy. ACEP would be required to report any suspension or expulsion to the National Practitioners Data Bank. Enforcement of self-regulation codes, even if the enforcement is not anti-competitive, must be carried out in a manner that affords the alleged offender due process, which includes proper notice and a fair hearing. The ACEP Bylaws state that “Members of the College may be subject to disciplinary action or their membership may be suspended or terminated by the Board of Directors for good cause. Procedures for such disciplinary action shall be stated in the College Manual.” The College Manual currently describes one process for addressing all disciplinary actions; the process currently used to adjudicate ethics charges.

Should the resolution be adopted, the College would be required to create and implement a means of investigating alleged offenses, responding to complaints of noncompliance, gathering evidence, and conducting fair and impartial hearings in order to provide adequate due process to the accused member. The College would also be required to impose a similar process to determine whether it should refuse or accept advertising, sponsorship, or offer to exhibit from an individual or group. It is possible that the filing of charges and the conduct of this process could be used as a tool by competitors to discredit or limit the effectiveness of their competition.

Taking enforcement action to revoke a member’s membership or deny an entity’s ability to exhibit, sponsor or advertise with ACEP may create additional potential liability risk for ACEP. Affected members could bring legal action against the College with claims of defamation, limiting professional opportunities, or denial of due process on the part of ACEP. Excluding an entity from being able to sponsor any ACEP activity could subject the College to a claim of restraint of trade. Such challenges can be mitigated by developing and adhering to strict processes.

As referenced in the Whereas statement, in 2004, ACEP sought and received an Advisory Opinion from the Federal Trade Commission (FTC) regarding issues raised in two Council resolutions referred to the Board in 2003. The resolutions were 17(03) Certificate of Compliance and 18(03) Intention to Bid for a Group Contract. Resolution 17(03) desired to require emergency medicine staffing groups to sign a certificate and comply with its terms as a prerequisite for their participation as an exhibitor or sponsor of any College activity. One of the terms included was that groups must confirm that “with the provision period not to exceed one year, our physician group provides our emergency physicians access to predefined due process.” Other provisions of the certificate included certification that groups provide their physicians a predefined and reasonable pathway to full partnership, that they do not impose post-contractual restrictive covenants, and that the group is wholly owned by practicing physicians. While the FTC Advisory Opinion noted that ACEP could respond to “behavior of market participants that it believes are detrimental to its members or the public,” it raised a number of potential antitrust concerns about actions contemplated by both resolutions. Regarding Resolution 17(03), the Advisory Opinion stated that “an agreement among ACEP members to affiliate only with entities that adopted all of the business practices listed in the proposed Resolution would be highly suspect.” It also stated that “agreements among ACEP members not to do business except on the terms contained in the Resolution, or a direct ACEP prohibition of its members’ accepting employment on non-conforming terms, would raise serious antitrust concerns.” The Advisory Opinion also stated that “ACEP may not unreasonably restrict competition among its members in order to force all contractual relationships between emergency physicians and holders of contracts to provide emergency services to hospitals into its preferred model.”

ACEP Strategic Plan Reference

Goal 2 – Enhance Membership Value and Member Engagement

Objective H – Strengthen job security and opportunity for individual members at all stages of their careers.

Fiscal Impact

Budgeted committee and staff resources for policy development. Potentially significant reduction in outside funding support. The financial impact would depend on how many employing entities would stop sponsoring ACEP activities because of the requirement to remove all restrictions on due process for emergency physicians and how many entities and individual members would be accused of violating the policy and be subject to an ACEP investigation. Physician groups, staffing companies, and hospitals/clinics contributed \$1,055,000 in advertising, exhibits, and all other sponsorship of ACEP programs and activities in 2019-20, representing about 24% of all corporate financial support for these activities. Additionally, ACEP's prescribed procedures for adjudicating accusations of member misconduct is time intensive for the Ethics Committee, Board of Directors, and staff involved in investigation and rendering decisions on ethics complaints.

Prior Council Action

Resolution 45(13) Revision of "AMA Principles for Physician Employment" referred to the Board of Directors. The resolution called for ACEP to work to amend the AMA Principles for Physician Employment to state that no physician employment agreement should limit a physician's right to due process as a member of the medical staff if terminated. The AMA Section Council on Emergency Medicine recommended that the AMA Organized Medical Staff Section (OMSS) review the information and potentially submit a resolution to the AMA Interim Meeting in November 2014. However, AMA staff reported that the AMA amended the Principles for Physician Employment in June 2014 to address the issue of automatic termination of staff privileges following termination of an employment agreement (sections 3e and 5f) based on a report from the OMSS Governing Council that outlined the rationale for the amended language.

Amended Resolution 30(11) Emergency Physician Contracts and Medical Staff Activities/Membership adopted. Directed ACEP to develop model language for emergency physician employment contracts addressing termination for any emergency physician subjected to adverse action related to involvement in quality/performance improvement, patient safety, or other medical staff activities, and specifying due process for physicians subjected to such adverse action.

Resolution 29(11) Due Process for Emergency Physicians adopted. Directed ACEP to review and update the policy statement "Emergency Physician Contractual Relationships" regarding due process and distribute the updated policy to the American Hospital Association, the American College of Health Care Executives and other entities.

Resolution 18(03) Intention to Bid for Group Contracts referred to the Board of Directors. The resolution called for ACEP to require member to abide by a policy regarding "Duty to Inform Other ACEP Members of Intention to Bid for Their ED Group Contract."

Resolution 17(03) Certificate of Compliance referred to the Board of Directors. The resolution called for ACEP to require emergency physician staffing groups to comply with terms of a certificate as a prerequisite for being an exhibitor or sponsor for any ACEP activity. The certificate included multiple provisions that groups must attest to including "With the provisional period not to exceed one year, our physician group provides our emergency physicians access to predefined due process."

Resolution 14(02) Emergency Physician Rights and Self-Disclosure not adopted. The resolution would have required any exhibitor, advertiser, grant provider, and sponsor who employs emergency physicians as medical care providers to disclose their level of compliance with College policies on compensation and contractual relationships.

Amended Resolution 14(01) Fair and Equitable EM Practice Environments adopted. Directed ACEP to continue to study the issue of contract management groups and determine what steps should be taken by ACEP to more strongly encourage a fair and equitable practice environment and to continue to promote the adoption of the principles outlined in the "Emergency Physician Rights and Responsibilities" policy statement by the various emergency medicine contract management groups, the American Hospital Association and other pertinent organizations.

Substitute Resolution 10(01) Commercial Sponsorships adopted. Directed the Board to continue initiatives to develop and implement policies on self-disclosure of compliance by sponsors, grant providers, advertisers, and exhibitors at ACEP meetings with ACEP physicians' rights policies, including: "Emergency Physicians Rights and Responsibilities," "Emergency Physician Contractual Relationships," "Agreements Restricting the Practice of Emergency Medicine," and "Compensation Arrangements for Emergency Physicians"

Amended Resolution 20(00) Due Process in Contracts Between Physicians and Hospitals, Health Systems, and Contract Groups adopted. Directed ACEP to endorse the right to have due process provisions in contracts between physicians and hospitals, health systems, health plans, and contract groups.

Resolution 59(95) Due Process for Emergency Physicians referred to the Board of Directors. The resolution called for the College to support, and incorporate into educational and advocacy efforts, promotion of the concepts of due process in all employment arrangements for emergency physicians, that any emergency physician being terminated has the right to receive the reasons for such termination and to formally respond to those reasons prior to the effective date of the termination.

Amended Resolution 54(94) Due Process adopted in lieu of resolutions 52(94) Due Process Exclusion Clause and 54(94) Due Process. The amended resolution directed the College to study the issue of peer review and due process exclusion clauses in emergency physician contracts.

Resolution 38(90) Due Process Rights of Hospital Based Physicians not adopted. The resolution called for ACEP to work with The Joint Commission on the Accreditation of Hospital Organizations (now The Joint Commission) to develop standards to protect due process rights of hospital-based physicians.

Prior Board Action

July 2019, reviewed the updated information paper "Fairness Issues and Due Process Considerations in Various Emergency Physician Relationships;" revised June 1997, originally reviewed July 1996.

September 2018, approved the policy statement "[Due Process for Physician Medical Directors of Emergency Medical Services.](#)"

June 2018, approved the revised policy statement "[Emergency Physician Contractual Relationships;](#)" revised and approved October 4 2012, January 2006, March 1999, and August 1993 with the current title. Originally approved October 1984 titled "Contractual Relationships between Emergency Physicians and Hospitals."

July 2018, reviewed the PREP "[Emergency Physician Contractual Relationships](#)" as an adjunct to the policy statement "Emergency Physician Contractual Relationships."

October 2015, approved the revised policy statement "[Emergency Physician Rights and Responsibilities;](#)" revised and approved April 2008 and July 2001; originally approved September 2000

Resolution 29(11) Due Process for Emergency Physicians adopted.

Amended Resolution 30(11) Emergency Physician Contracts and Medical Staff Activities/Membership adopted.

September 2004, approved a report to the Council with a letter from the Federal Trade Commission regarding issues raised in Resolution 17(03) Certificate of Compliance and Resolution 18(03) Intention to Bid for Group Contract and agreed to take no further action on the resolutions.

September 2003, approved the submission of the request for an FTC Advisory Opinion

Amended Resolution 14(01) Fair and Equitable EM Practice Environments adopted.

Substitute Resolution 10(01) Commercial Sponsorships adopted.

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Amended Resolution 20(00) Due Process in Contracts Between Physicians and Hospitals, Health Systems, and Contract Groups adopted.

Amended Resolution 54(94) Due Process adopted.

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