

DISMISSAL OF APPEAL CHALLENGING COURT-MANDATED NPDB VOID REPORT—WHAT TO DO NOW

In February of 2017, the U.S. District Court for the Eastern District of Texas ordered a Texas hospital (the "Hospital") "to immediately submit to the National Practitioners Data Bank a Void Report" regarding a physician whose clinical privileges were restricted by the Hospital's medical executive committee, resulting in a report to the National Practitioner Data Bank ("NPDB").^[1] The court held that the Hospital improperly reported to the NPDB because the terms of the proctoring requirement required proctoring for Dr. Walker's next five bowel cases but was silent as to the duration of the proctoring; therefore, the proctoring would not necessarily require it to last "for a period longer than 30 days."^[2] The Hospital appealed to the Fifth Circuit.

While on appeal, the U.S. Department of Justice, on behalf of the NPDB, filed an amicus curiae brief stating their position that the plain language of the NPDB reporting requirement is focused on the real-world consequences of the peer review action and disregards a reporting entity's expectations as to how long a professional review action is planned to last. Accordingly, the Department of Justice argued that it is how long the limitation of privileges actually lasts, not what is expected when the limitation is initially imposed, that governs whether an action is reportable. In addition, the NPDB published additional guidance on September 12, 2017 setting forth its position that a restriction of privileges "is reportable to the NPDB once that restriction has been in place for 31 days."^[3] However, before the Circuit Court could decide the issue, Dr. Walker voluntarily dismissed his underlying tort claim filed in District Court, thereby resulting in the United States Court of Appeals for the Fifth Circuit dismissing the appeal on February 8, 2018.

This voluntary dismissal of the appeal technically leaves in place the District Court order that was criticized by both the U.S. Department of Justice and the NPDB. Because the underlying District Court *Walker* opinion was not overturned, it is possible that physicians whose privileges are restricted by a professional review action without a specific duration will cite to *Walker* in support of a request that a NPDB report not be filed. However, it is likely that any court judging the validity of this argument will be unconvinced, largely because of the subsequent U.S. Department of Justice amicus curiae brief and the NPBD guidance rejecting the *Walker* holding.

This leaves hospitals in the position of deciding what to do regarding the conflict between the *Walker* trial court decision and the new NPDB Guidance. This is a challenge for hospitals, especially considering their new NPDB attestation requirement. Specifically, the new attestation requirement requires a hospital to attest every two years that they have reported all required NPDB reports to the NPDB.^[4] Although hospitals should consult their legal counsel regarding the reporting requirements for any specific case, the existence of the DOJ position and NPDB guidance published after the *Walker* decision, along with the dismissal of the *Walker* appeal, could provide a basis to follow the NPDB guidance rather than the dictates of the *Walker* opinion.

If you have any questions or if you would like additional information on this topic, please contact:

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^[1] *Walker v. Mem'l Health Sys. of E. Texas et al.*, 231 F.Supp. 3d 210, 217 (E.D. Tex 2017).

^[2] For more information, see our previous analysis of the court's opinion [here](#).

^[3] National Practitioner Data Bank Policy Corner, available at: <https://www.npdb.hrsa.gov/qa/policy8.jsp> (last visited February 20, 2018).

^[4] National Practitioner Data Bank Attestation 101, available at: <https://www.npdb.hrsa.gov/hcorg/attestationGuide.jsp> (last visited February 20, 2018).