



This Week's Feature

The Future of Peer Review: Physician Candor vs. Patient Right

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A BRIEF HISTORY OF PEER REVIEW

Peer review for physicians was developed in the first half of the twentieth century, by the medical profession, as a way of reviewing the qualifications and practice patterns of physicians and surgeons on staff, as well as new applicants. Susan O. Scheutow, *State Medical Peer Review: High Costs But No Benefit – Is it Time for a Change?*, 25 AM. J.L. & MED.7, 12 (1999); Susan O. Scheutow & Sylvia Lynn Gillis, *Confidentiality and Privilege of Peer Review Information: More Imagined than Real*, 7 J.L. & HEALTH 169, 171 (1992-1993).

Historically, peer review assists in determining whether physicians are qualified to provide health care services in the medical facility, and if so, which procedures and treatments they are qualified to perform. See Scheutow, *infra* at 12; Jeanne Darricades, *Comment, Medical Peer Review: How is it Protected by the Health Care Quality Improvement Act of 1986?*, 18 J. CONTEMP. L. 263, 263 (1992). The intent behind the creation of peer review is to analyze critically the medical services rendered by physicians, and if deficiencies exist, either to prevent a physician who has quality problems from continuing to practice, or to force him or her to improve the quality of services rendered. *Id.*

Beginning in 1952, the Joint Commission on Accreditation of Hospitals (now known as the Joint Commission on Accreditation of Healthcare Organizations “JCAHO”) began requiring that hospitals perform peer review in order to qualify for accreditation. See also, B. Abbott Goldberg, *The Peer Review Privilege: A Law in Search of a Valid Policy*, 10 AM. J.L. & MED. 151, 151 (1984)(stating that one of JCAHO’s accreditation criteria is to require hospitals to organize peer review boards.) Peer review eventually developed into the primary method of evaluating the quality of physician services. See Scheutow *infra*; Richard L. Griffith & Jordan M. Parker, *With Malice Toward None: The Metamorphosis of Statutory and Common Law Protections for Physicians and Hospitals in Negligent Credentialing Litigation*, 22 TEX. TECH L. REV. 157, 158 (1991). Now, peer review is performed in a myriad of settings including not only hospitals, but medical societies, health care institutions, and third-party payers of health care expenses. See Scheutow *infra* OHIO REV. CODE ANN. § 2305.25(A) (West 1998).

The peer review process in hospitals for initial applicants involves members of the hospital’s medical staff reviewing the training and previous clinical experience of the applicant and then making a recommendation to the hospital board. See Scheutow *infra* at 14; See also Griffith & Jordan *infra*; Lowell C. Brown *et al.*, *Facing the Limits on Uses of Medical and Peer Review Information: Are High Technology and Confidentiality on a Collision Course?*, 19 WHITTIER L. REV. 97, 104-05 (1997). For physicians who already have staff privileges, the peer reviewers are also able to review quality assurance data, diagnostic and laboratory utilization reports, and other information regarding each staff member’s actual practice at the hospital. See Scheutow *infra*; See also Brown *et al. infra*.



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Generally, existing medical staff members are only required to submit to review every two years. Hospitals can review a physician's privileges whenever there is a reason to believe the need has arisen. See Scheutow *infra* at 14; Paul L. Scibetta, Note, *Restructuring Hospital-Physician Relations: Patient Care Quality Depends on the Health of Peer Review*, 51 U. PITT. L. REV. 1025, 1029 (1990) (Both JCAHO and the American Osteopathic Association require hospitals to reappoint physicians to the medical staff every two years and to review the physician's performance and credentials at such appointment.)

Historically, peer review has been one of the most widely accepted methods of aiding hospitals in purging low quality physicians while at the same time, enhancing the skill sets of the high quality ones. See Scheutow *infra* at 15; Christopher S. Morter, Note, *The Health Care Quality Improvement Act of 1986: Will Physicians Find Peer Review More Inviting?*, 74 VA. L. REV. 1115, 1118 (1988). Its history is mainly one of nondisclosure.

PATIENT'S RIGHTS TO PEER REVIEW INFORMATION

The crux of the judicial system in the United States is that the public "has a right to every man's evidence." Friend, Rangel, Finch & Storm, *The New Rules of Show and Tell: Identifying and Protecting the Peer Review and Medical Committee Privileges*, 49 BAYLOR L. REV. 607, 609 (1997). Providing complete protection for peer review proceedings, however, goes against this concept. The party bringing an action for medical negligence often feels that he should be granted complete access to all information concerning the problem, including documentation from peer review proceedings involving his case and typically all other cases. Matthew J. Cate, *Physician Peer Review*, 20 J. LEGAL MED. 479 (1999). Plaintiffs in civil suits often argue they are entitled to undertake discovery of *all relevant information*. This concept has recently been enacted in Florida through a voter referendum. Critics argue, however, that allowing complete access to this information will have an inevitable detrimental effect on the peer review system.

Historically, there have been two common levels of protection for peer review proceedings: immunity and privilege. Peer review committee members become *immune* from civil suits in states that provide the immunity type of protection. See Scheutow *infra* at 31. In states that provide *privileged* protection to peer review proceedings, communications and information submitted or created by the committee are generally not discoverable. State statutes govern exactly which information will be protected as a matter of privilege. *Id.* at 33. Most states offer some type of immunity; however the degree of immunity varies by state. Additionally, most states offer some type of privilege for peer review proceedings, but again the degree of this privilege varies greatly by state.

How much peer review protection for physicians is too much? Peer review statutes come in an array of forms. Certainly public policy concerns regarding quality assurance of health care providers necessitates effective peer review procedures. However, it can be argued that patients and future plaintiffs have a right to know and to be able to obtain and utilize evidence which directly supports their claim that a physician or hospital was negligent.

CONFIDENTIALITY (OR A LACK THEREOF) AND THE PRIVILEGES BEHIND PEER REVIEW RECORDS

Regardless of the many positive effects of peer review, physicians are often hesitant to participate in the process based on a reluctance to criticize their peers and the looming fear of lawsuits by the physicians they review. See Scheutow *infra* at 16; See also Morter *supra*, at 1119-20. As case law has proven, these fears are often substantiated when the reviewing physicians are sued by fellow physicians for slander, defamation, or tortious interference with business relations. See *Memorial Hospital v. Shadur*, 664 F. 2d 1058, 1062 (7th Cir. 1981); See also, *Virmani v. Novant Health Incorporated*, 259 F. 3d 284 (4th Cir. 2001). In an attempt to ease these fears and encourage effective peer review, most states have passed some form of peer review protection statutes. See *infra* GA. CODE ANN. and TENN. CODE ANN.; See also, MO. REV. STAT. § 537.035(2) and IND. CODE ANN. §34-4-12.6-1(c)(2). However, in recent years other states, such as Florida, have passed laws that are in favor of a



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patients' right to know. (On November 2, 2004, voters in Florida approved Amendment 7, known as the "Patients' Right-to-Know About Adverse Medical Incidents." This amendment was later codified as article X, section 25, of the Florida Constitution.) Florida's Amendment 7 has essentially removed any privilege associated with the peer review process, thus increasing the likelihood of additional medical malpractice lawsuits in the state while decreasing the participation in the peer review process.

Prior to the approval of Amendment 7 in Florida, physician's peer review records were immune from the discovery process. However, following Amendment 7, patients have a right to access "any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." ART. X, SEC. 5, FLA. CONST.

One purpose of Amendment 7 is to assist potential patients in making informed decisions concerning their future health care. J.B. Harris, *Riding the Red Rocket: Amendment 7 and the End to Discovery Immunity of Adverse Medical Incidents in the State of Florida*, 83 FLA. BAR J., 20, March 2009, No. 3. Another purpose is to allow patients who are or claim to be injured by a physician, to discover information relating to adverse medical incidents involving that physician, during litigation. *Id.* Obviously, the purposes behind Florida's Amendment 7 as evidenced make Florida one of the most, if not *the most* broad state when it comes to peer review privileges. This is wholly in contrast with other states, such as Georgia (GA. CODE ANN. §31-7-15) and Tennessee (TENN. CODE ANN. § 63-6-219 ("Tennessee Peer Review Law of 1967.)) The peer review statutes in these states are aimed toward physician privilege and less toward a patient's right to know.

Statutes in Georgia and Tennessee protect peer review proceedings to ensure complete candor in discussions of quality care issues, and to ultimately protect patients from what may be a lesser quality physician. In fact, the Tennessee Peer Review Law of 1967 specifically states that its purpose is to "encourage committees made up of Tennessee's licensed physicians to *candidly, conscientiously, and objectively* evaluate and review their peers' professional conduct, competence, and ability to practice medicine. Tennessee further recognizes that confidentiality is essential both to effective functioning of these peer review committees and to continued improvement in the care and treatment of patients." TENN. CODE ANN. § 63-6-219(b)(1). Tennessee courts for example, have held that any disclosure by Medicare Peer Review Organization of detailed information relating to its investigation of health care rendered to a patient would violate Tennessee's Peer Review Law. *General Care Corp. v. Mid-South Foundation for Medical Care, Inc.* 1991, 778 F. Supp. 405. Rulings such as these seem to essentially prevent patients in malpractice lawsuits from accessing information about the physicians they are suing.

While arguably broad laws such as Florida's may on their face seem patient-centered, in reality they could ultimately be the most harmful to the patient because the result will likely be *less* candor by the physicians and *less* participation in peer review proceedings entirely.

This result poses various problems for hospitals because they are required by the Joint Commission to hold peer review proceedings. See Scheutow, *infra*. See also, Goldberg *infra*. Consequently, many hospitals have begun to limit their peer review proceedings to mainly discussion, rather than reducing comments to writing. Others are limiting the types of incidents that must be revealed to the peer review committee. Regardless of the position that hospitals take, the only benefit to patients appears to still be their ability to obtain the records. In light of these changes, the quality assurance techniques for on-staff physicians do not show any signs of improving.

HOW DO WE BALANCE?

Arguably, most peer review documents that are produced through discovery will never be seen by a jury. Some might argue that, because they are likely inadmissible based upon various evidentiary preclusions, they should never be produced in the first place. However, these documents, if discovered, could lead the plaintiff to what could be admissible evidence; therefore preventing discovery of this information entirely does not seem feasible. However, there are steps that could be taken that can satisfy the rights of all parties involved. For example, in states such as Florida, one can allow limited access by plaintiffs to documents related to the incident involving their claim and not to any and all claims involving the physician. This satisfies the patient's right to know while encouraging physician candor in review.



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So where are we headed? If peer review privileges continue to be abolished by states, the candor and self-policing of the medical practice is likely to be a thing of the past. Therefore, will less qualified physicians continue to practice, are compromises a possibility? Perhaps the two concerns could coexist if physician proceedings were privileged unless there were a certain number of adverse events. Another possible remedy is to allow full disclosure but to make any information discovered from such disclosure inadmissible in a civil trial. If the true issue is patient education before choosing a physician, then only allow requests which are related to a pending procedure. Another alternative is an in-camera review of peer reviewed proceedings by the judge, where only incidents with marked similarity are disclosed. This more closely parallels evidentiary admissibility rules.

The interesting questions will be answered five years from now. How has peer review changed? What percent of patients requesting these documents are researching doctors versus are represented by lawyers for suits? If we find the majority is lawsuit related, is that really what the Florida voters wanted?

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