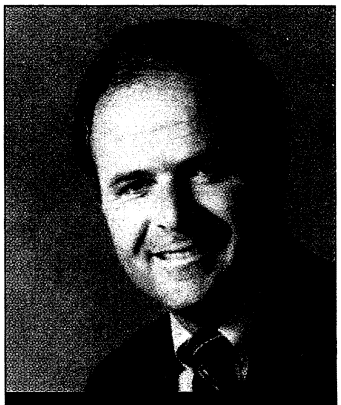
# Hospital peer review is a kangaroo court

*The law that provides immunity for doctors who participate in peer review should be declared unconstitutional, says this attorney.*



By David W. Townend, JD

Today's hospital peer review system is inherently unfair to physicians whose privileges are challenged. After representing dozens of physicians in these hearings, I know for certain that doctors are up against a stacked deck—despite the overblown promises of due process and fairness—unless they have powerful allies in the medical community.

Often, the loss of a doctor's privileges has little to do with the quality of care he renders. Here are just a few examples of cases I've seen where physicians faced a loss of privileges with scant justification:

▶A Vietnamese-born, but American-trained, cardiologist encountered racial hostility regarding the admission of Asian patients who could not speak English. Staff nurses complained about their inability to communicate with the patients, but the hospital provided few translation services. The doctor was targeted for removal from the medical staff.

▶A solo FP felt that a diabetic patient had adequate blood flow to his leg and didn't need the amputation recommended by a vascular surgeon. The hospital viewed this as a turf battle and argued that the FP was practicing outside his area of expertise. He was kicked off the staff for not referring the patient back to the surgeon.

▶Hospital administrators recruited a young oncologist they felt could bring in new revenue. After a few months, when their expectations weren't being realized, they tried to force the doctor off the staff. He'd been behind on some dictation, at least partly because the hospital didn't provide him with necessary staff and dictation equipment. Hospitals often overlook dictation delays if the physician is well-established within the facility. In this case, however, they used this minor problem as an excuse to get out of a bad business deal.

▶An ob/gyn performed a vaginal birth after cesarean. The patient's uterus ruptured, and she lost her baby. The patient sued the physician and the hospital. Although the doctor won his hearing before the credentials committee, the hospital's board of trustees removed him from the staff anyway because they felt that would shift liability away from the hospital in the malpractice suit.

There's no question that some physicians should have their hospital privileges revoked or curtailed, and I'm not suggesting that the whole peer review process be scrapped. But right now, there's an environment where questionable cases are brought against doctors who don't receive a fair hearing, and whose careers are devastated by unsubstantiated allegations. If your enemies look at enough charts, they can always find *something* to use against you.

A federal law that was touted as a measure to guarantee doctors due process has unfairly tilted the playing field in favor of hospital administrators. The Health Care Quality Improvement Act of 1986 was adopted by Congress in response to pressure from hospi-

The author, an attorney in Garland, TX, often represents physicians in peer review disputes with hospitals.

Photo courtesy of David W. Townend, JD

tals and peer review participants seeking legal immunity from lawsuits by physicians who'd lost privilege battles. The same law created the National Practitioner Data Bank.

Peer review had become a high profile issue in 1984, when a general surgeon in Oregon won a $2 million antitrust suit against his former partners. Timothy A. Patrick claimed that they had used hospital peer review to drive him out of business for purely economic reasons. His award was upheld by the US Supreme Court.

HCQIA provides immunity for physicians who serve on peer review committees as long as they act in good faith and the hospital gives due process to the physician being reviewed. In my view, it's unconstitutional, and as the attorney for the Vietnamese doctor mentioned earlier, I've asked a federal district court to overturn it.

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The law deprives physicians of a due process right of access to the courts. Also, HCQIA denies doctors equal protection under the laws. By granting immunity to hospital peer reviewers, the law singles out physicians for removal of common-law remedies. Other professionals—teachers, architects, attorneys, and accountants—aren't forced to give up their right to sue.

Before 1986, physicians had a right to combat improper peer review by filing suits that charged breach of contract, interference with contractual relations, defamation, and antitrust violations. Now, a physician is allowed to sue under HCQIA only if he can show that hospital bylaws were violated or that the reviewers acted in bad faith. But reviewers need afford only minimal notice and hearings, and it's extremely difficult to prove bad faith, especially when hospitals are allowed to keep their proceedings confidential. Courts rarely allow discovery to let the physician probe for bias.

There are serious flaws in the peer review process, starting with the fact that it lacks consistent standards. Hospital bylaws are written by attorneys to shield hospitals, and they offer physicians only the barest protection. The burden of proof is often turned on its head: The doctor must prove his innocence. A lot of the time, the physician isn't even allowed to know who initially filed an allegation against him.

Many peer reviewers are novices, who apply their own subjective ideas of what constitutes the appropriate standard of care. Sometimes they're not even in the same specialty as the doctor being reviewed.

The due process requirement offers only limited protection. A doctor has a right to a hearing, but there are plenty of pitfalls. Some physicians don't understand how serious the process is. For example, bylaws may state that a disciplined doctor must request a hearing in writing within a specified time—and that if he doesn't, he loses his chance to challenge an adverse decision.

Hospital bylaws frequently demand that a doctor applying for privileges sign a document releasing the institution from liability in the event of a peer review action. A doctor's right to counsel at the hearing is often restricted. There is only the pretense of fairness, not the substance.

It would be unfair to say that peer review committees go out of their way to target particular types of doctors. But it's unquestionably true that solo practitioners lacking political support are frequently victims of arbitrary peer review actions based on inadequate evaluation of their care. Physicians in large groups, who have politically connected mentors and colleagues, can often deflect disciplinary actions. A solo physician doesn't have the same resources. Similarly, doctors who are new on staff and haven't developed

## THE WAY I SEE IT

strong relationships are on the hot seat. So are physicians who do procedures that are new or different.

The HCQIA immunity enables peer reviewers to be arbitrary. Since there's little risk of being successfully sued, they're more likely to defer to a colleague's desire to oust another physician. And through creation of the data bank, HCQIA has increased the stakes of unfair decisions. Although there is a process for the disciplined doctor to dispute the data bank report, the damage it does may be too difficult to overcome. In the case of a summary suspension, a doctor's career can be crippled before he even gets a hearing.

I have a concrete suggestion that could ease things. So long as hospital officials elect to be

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**If we remove peer reviewers' legal immunity, a greater sense of fair play would be injected into the process.**

involved in credentialing, they are going to be subjected to the threat of litigation. One alternative would be to create an agency within each state that would be responsible for credentialing and for removing physicians' hospital privileges. This would free hospital officials from the credentialing process and eliminate the need for immunity from peer review suits.

Such an agency, perhaps operating under the state board of medical examiners, would apply uniform rules of due process and standards of proof. The physician should have a right to challenge an adverse decision in court. Similar administrative procedures are already in place regarding license revocation.

I know many physicians distrust medical boards as much as they distrust peer reviewers—perhaps with good reason. But it makes little sense to have each hospital duplicate efforts in credentialing, and there's a need to enhance the fairness of the review system.

Obviously, we need a peer review system to protect patients from physicians who clearly represent a danger. If we remove legal immunity, and the biases it encourages, a greater sense of fair play would be injected into the process. ■

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