

What Compliance Professionals Should Know About Peer Review Protections

COMPLIANCE

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Presenters

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Main Focus

- The origins and scope of the peer review privilege
- Best practices for preserving the peer review privilege in internal investigations
- The intersection of peer review privilege, physician employment issues, and compliance concerns



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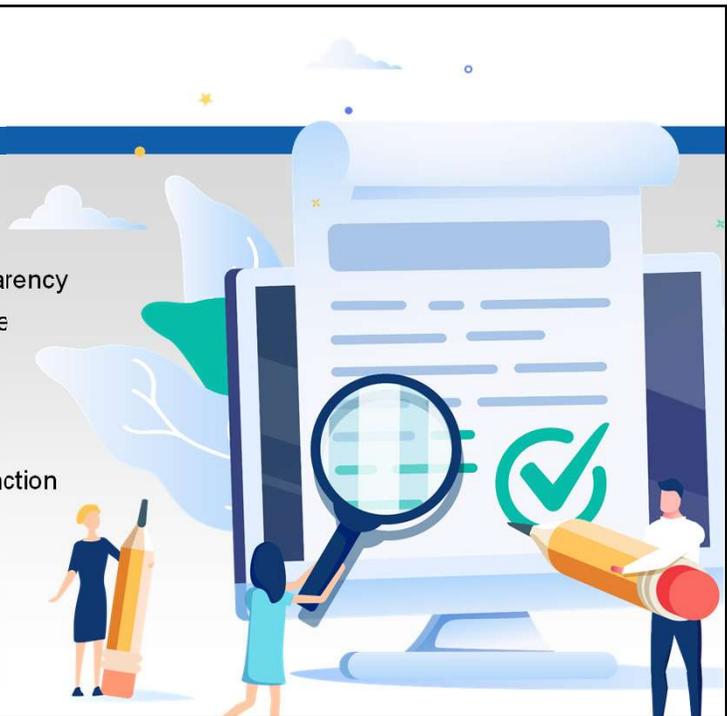
Divergent Paths

Compliance

- Seeks to create a culture of transparency
- Focused largely on fraud and abuse

Peer Review Processes

- Needs confidentiality in order to function
- Focused largely on clinical quality



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Poll 1

How familiar are you with your organization's peer review processes?



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The Origins of Peer Review Privilege

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AMA Code of Medical Ethics Opinion 9.4.1

“Physicians have mutual obligations to hold one another to the ethical standards of their profession. Peer review, by the ethics committees of medical societies, hospital credentials and utilization committees, or other bodies, has long been established by organized medicine to scrutinize professional conduct. Peer review is recognized and accepted as a means of promoting professionalism and maintaining trust. The peer review process is intended to balance physicians’ right to exercise medical judgment freely with the obligation to do so wisely and temperately.”



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CMS Conditions of Participation

- The hospital must have an organized medical staff that operates under bylaws approved by the governing body, and which is responsible for the quality of medical care provided to patients by the hospital 42 CFR § 482.22
- Joint Commission and other accrediting organizations



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Why is Privilege Important?

- FRCP Rule 26(b)(1):

“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any *nonprivileged* matter that is relevant to any party's claim or defense and proportional to the needs of the case...” [emphasis added]
- Analogous state rules



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Privilege Defined

Black's Law Dictionary (11th ed. 2019) defines "**privilege**" as "a special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty..."



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What is the Purpose of the Peer Review Privilege?

“The peer review privilege represents a legislative choice between medical staff candor and the plaintiff’s access to evidence.”

State ex. rel Shroades v. Henry, 187 W.Va. 723, 727, 421 S.E.2d 264, 268 (1992)



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When Does Peer Review Occur?

- Credentialing
- Professional Practice Evaluation
 - Routine/Ongoing
 - Focused Review of Care
- Other Quality Improvement Processes



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Peer Review & Federal Law

- Healthcare Quality Improvement Act of 1986 (HCQIA)
- Patient Safety and Quality Improvement Act of 2005 (PSQIA)



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Health Care Quality Improvement Act of 1986

- Provides immunity to peer reviewers so long as they act in good faith
- Applies only to physicians and dentists



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HCQIA

In Order to Satisfy the Requirements of the HCQIA, Reviewers Must:

1. Take actions only in the reasonable belief that they are in furtherance of quality health care
2. After a reasonable effort to obtain the facts of the matter
3. After adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
4. In the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 USCA §11112(a)(1) – (4)



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HCQIA

Points to Consider:

- The Act limits liability for damages only
- It does **not** apply to civil rights actions (*i.e.*, discrimination claims)
- Some courts have held that it does not create a federal peer review privilege for documents, statements or information used in physician peer review



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Patient Safety & Quality Improvement Act of 2005

- Lead to the creation of Patient Safety Organizations (PSOs)
- Legal privilege and confidentiality for patient safety work product (PSWP)



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Patient Safety & Quality Improvement Act of 2005

PSWP means “any data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements--

(i) which--

(I) are assembled or developed by a provider for reporting to a patient safety organization and are reported to a patient safety organization; or

(II) are developed by a patient safety organization for the conduct of patient safety activities;

and which could result in improved patient safety, health care quality, or health care outcomes; or

(ii) which identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a patient safety evaluation system.”

42 USC §299b-21(7)(A)

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Patient Safety & Quality Improvement Act of 2005

- PSWP does not include “information that is collected, maintained, or developed separately, or exists separately, from a patient safety evaluation system...”

42 USC §299b-21(7)(B)(ii)



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Peer Review Around the Country

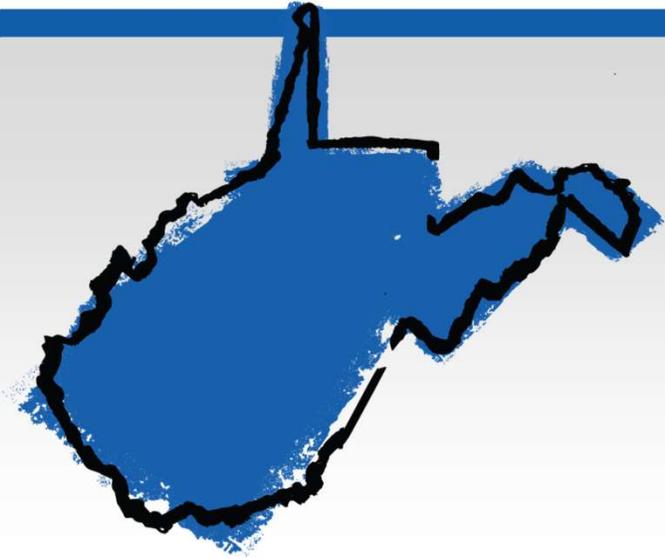
- All 50 states and the District of Columbia recognize some form of medical peer review privilege
- Federal courts are divided, but many do not recognize peer review privilege, especially in discrimination and anti-trust cases



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State Law Examples

- West Virginia
 - W.Va. Code §30-3C-3
- Florida
 - F.S.A. §395.0193
 - Amendment 7



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Potential Statutory Exceptions

Examples:

- Criminal proceedings
- Medical licensing boards



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Documents Generally NOT Privileged

- Medical records
- Patient complaints
- Employment records (separate from credentialing file)
- Administrative/Business records
- Anything that was NOT created at the request of a peer review entity or as part of an identifiable peer review process



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Questions to Consider

- Does your state have broad or narrow peer review protections?
- What types of entities or organizations are entitled to claim peer review privilege under your statute?
- What types of documents or other information are protected by your peer review statute?
- Does the statute protect testimony before the peer review entity?
- Are there any statutory exceptions to the peer review privilege?
- Are there any provisions regarding waiver of the privilege?
- Does your statute provide immunity in any form?



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Poll 2

Have you read your state's peer review statute?



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Peer Review In Action
The Case of Dr. Sawbones

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The Case of Dr. Sawbones

The Credentialing Process:

1. Neutral References
2. History of Large Malpractice Verdicts
3. Lapse of Board Certification



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The Case of Dr. Sawbones

Two Years Later:

- Ongoing Professional Practice Evaluation reveals a high complication rate compared to peers
- Peer Review Committee institutes a focused review of surgical procedures
- Specialized practice requires the expertise of an external reviewer



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The Case of Dr. Sawbones

Action:

Based upon the recommendation of the peer review committee, the Medical Executive Committee votes to terminate Dr. Sawbones' clinical privileges.



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The Case of Dr. Sawbones

Things to consider following professional review action:

- Right to Appeal and Fair Hearing Procedures
- Reporting Obligations
- Employment Status
- Potential Litigation



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Does Privilege Apply?

In Evaluating Whether Privilege Applies, a Court May Look to:

- Governing documents, such as medical staff bylaws
- Factual information regarding the peer review function of a committee or organization
- How information has been maintained by the organization
- Who has been given access to the information

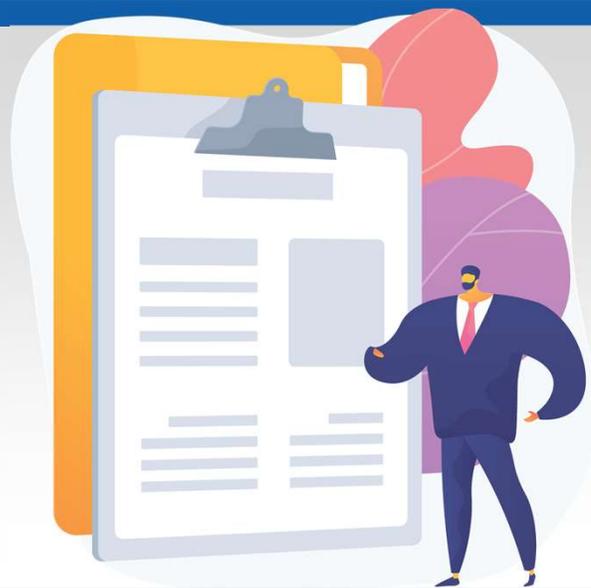


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Best Practices

Protecting the Peer Review Privilege

- Review and understand your organization's policies and processes for peer review
- Mark documents and communications as "Confidential and Privileged/Peer Review"
- Never share peer review information with anyone outside of the formal peer review process
- Never share information through personal devices or email accounts



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The Intersection of Compliance & Peer Review

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Retaliation & Culture

- Peer review processes can be fertile ground for retaliation
- Bylaws should allow medical staff leadership to address retaliation
- Emphasis on collegial culture and professionalism
- Ineffective peer review processes can breed compliance issues



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False Claims Act

- Unlawful to submit claims for payment to Medicare or Medicaid that are false or fraudulent
- Fines of up to three times the programs' loss plus \$11,000 per claim filed
- Don't forget the 60 Day Repayment Window!



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Medical Necessity

- Proper and needed for the diagnosis or treatment of your medical condition
- Provided for the diagnosis, direct care, and treatment of your medical condition
- Meet the standards of good medical practice in the local area and are not mainly for the convenience of you or your doctor



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Southern Hospital

- Colleague turned whistleblower
- Unnecessary cardiac procedures
- Hospital allegedly failed to act upon reports and evidence in their own internal review processes
- 1.9 million dollar settlement

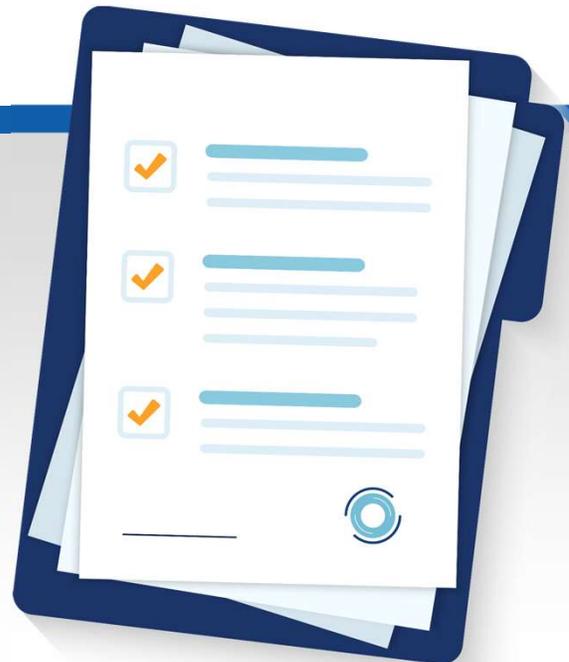


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Southern Hospital

“Providers . . . have a separate, independent and on-going duty to review the practices and procedures of the physicians they credential, assess those activities in light of applicable standards of care, and consistently act in whatever manner is necessary to ensure the medical necessity of procedures and the accuracy and integrity of every claim the hospital submit.”

– U.S. Attorney Donald Washington



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Mid Atlantic Hospital

- Colleagues turned whistleblowers
- Unnecessary cardiac procedures among other claims
- Problematic peer review process
- 22 million dollar settlement

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Poll 3

Are you worried yet?



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Compliance Training for Peer Review Participants

- Understand False Claims Act and 60 Day Repayment Rule
- Identification of medical necessity issues
- Compliance reporting



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Sampling Resource

- Provide assistance when random sampling is needed
- Prevent “cherry picking”
- Strengthen integrity
- Withstand government scrutiny



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Relationships

- Medical Affairs
- Medical Staff Leadership
- Quality
- Risk Management
- Safety
- General Counsel
- Board



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Questions?



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Thank You for Joining Us

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