

Summary of Peer Review Protections

There are numerous protections which limit the liability faced by physicians who engage in peer review activity. However, physicians are not absolutely immune from liability. If peer review functions are performed carelessly or are undertaken for anti-competitive purposes, the adversely affected parties may bring a successful legal challenge. On the other hand, **there is no liability for peer review conducted following proper procedures in good faith for the purpose of promoting quality patient care.**

Protections available for peer review activities include all of the following:

Protections for Peer Review Actions

California Law

- 1) **Absolute immunity** from liability under California law if the physician subject to review does not complete the existing peer review hearing procedures. *Westlake Community Hospital v. Superior Court* (1076) 17 Cal.3d 465, 131 Cal. Rptr.90.
- 2) **Absolute immunity** from liability under California law if the physician fails to obtain a court determination that the peer review decision was either procedurally or substantively defective. To state it another way, if the peer review activity was procedurally fair and the liability for peer review activity. Code of Civil Procedure § 1094.5.
- 3) Even if a case survives the two hurdles set forth above, peer reviewers are immune from liability under California law if the action was taken:
 - a) without malice;
 - b) after a reasonable effort to obtain the facts; and
 - c) in the reasonable belief the action was warranted by the facts found. Civil Code § 43.7.

Note: See also Health & Safety Code §§ 1370.1 (re HMOs), Insurance code § 10133 (for Alternative Rate Insurers), and Insurance Code § 11512 (for Nonprofit Hospital Service Plans).

- 4) Even if the case survives all three hurdles set forth above, peer reviewers are immune from liability under California law for all but economic damages (that is, the physician's out of pocket loss, not including damages for "pain and suffering", "loss of consortium" or other non-economic damages) if:
 - a) an 805 report was made; and
 - b) the action was not "knowingly and intentionally taken for the purpose of injuring a person" or infringing on their rights.

Note: For hospitals to obtain this immunity, they must act after a recommendation of the medical staff.

POLICY TITLE: SUMMARY OF PEER REVIEW PROTECTIONS

Federal Law

Immunity from liability under state and most federal laws, including the federal antitrust laws, is available when the action was taken:

- 1) to further quality care;
- 2) after a reasonable effort to obtain the facts;
- 3) after an adequate notice and fair hearing; and
- 4) in the reasonable belief that the action was warranted after reasonable investigation and hearing.

Health Care Quality Improvement Act, 42 U.S.C. §§ 11101 et seq., 11112.

Protections for Peer Review Communications

California Law

- 1) **Absolute immunity** from liability under California law for communications of information to any hospital, medical staff, professional society, other peer review committee or underwriting committee, medical school, professional licensing board, or to the Senior Assistant Attorney of the Health Quality Enforcement Section (of the Department of Justice) when the communication is intended to aid in the evaluation of the qualifications, fitness, character or insurability of a physician or other health care practitioner. **Civil Code § 43.8.**
- 2) **Absolute immunity** from liability under California law for communications made "in the initiation of course of any other proceeding authorized by law and reviewable pursuant to Chapter 2...of the Code of Civil Procedure." This provision applies broadly to protect communications to medical staff and other peer review committees and regulatory bodies such as the Medical Board of California in connection with the initiation of conduct of credentialing or disciplinary proceedings. However, it does not apply to communications made to individuals not properly concerned with credentialing or disciplinary functions. **Civil Code § 47.**
- 3) **Qualified immunity** from liability under California law for statements made without malice to an interested person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, of (3) by one who is requested by the interested person to give the information. **Civil Code § 47.**
- 4) **Absolute immunity** for civil or criminal liability under California law for communications in a report to the Medical Board or California. **Business & Professions Code § 805(d).**
- 5) **Absolute immunity** from liability under California law is provided for communications made to the Medical Board of California, to the Board of Podiatric Medicine or to the Department of Justice indicating that a board licensee may be guilty of unprofessional conduct or may be impaired because of alcohol or drug abuse or mental illness. **Business & Professions Code § 2318.**
- 6) The Medical Board of California must provide **legal representation** to any person that it contracts with to provide expertise to the Division of Medical Quality in the evaluation of the

conduct of licensee, who is sued for defamation in connection with opinion with opinions rendered, statements made, or testimony given to the Division of committee or its representatives. **Business and Professions Code § 2317.**

- 7) The Medical Board of California must provide legal representation to any person sued for defamation in connection with a report to the Diversion Evaluation Committee or the Medical Board regarding a licensee's participation in the Diversion program. **Business and Professions Code § 2370.**

Federal Law

Near-absolute immunity from liability under state and federal law is provide for persons who communicate information to any hospital, medical staff, professional society or other peer review body regarding the competence or professional conduct of a physician or dentist. The immunity applies absent a deliberate lie. **Health Care Quality Improvement Act, 42 U.S.C. § 11111.**

Protection From Discovery

Exemption from discovery is provided under California law for the proceedings and records of the committees of organized medical staffs, medical societies, peer review bodies who make Section 805 reports, and other enumerated peer review committees having the responsibility of evaluation and improvement of the quality of care. This exemption is not applicable to actions brought by physicians or other health care practitioners challenging a staff privileges determination, or to certain actions against insurance carriers. In addition, the protection may not apply to the proceedings of ad hoc groups which are not formally "organize," to statements made outside of the peer review committee meeting, such as in the halls of at social engagements, or to statements which members of peer review committees voluntarily divulge to the plaintiff. **Evidence Code § 1157 et seq.**

Note: *See also Evidence Code §§ 1156 and 1156.1* (re Morbidity/Mortality Studies), **Evidence Code § 1157.5** (re Foundations and Professional Standards Review Organizations) and **Evidence Code § 1157.7** (re Local Government Agency Review). *See also Health & Safety Code §§ 1370 and 1370.1* (re HMOs and other Knox-Keene plans), **Insurance Code § 10133** (re Alternate Rate Insurers), and **Insurance Code § 11512** (re Nonprofit Hospital Service Plans).

Insurance

Participants in peer review activities may be covered under the liability insurance policies of entities for which peer review is conducted (e.g. hospitals, medical societies, PROs) Such insurance can be invaluable in that it generally provides that insurers must defend the insured and bare the cost that defense. Unfortunately, it routinely costs tens of thousands for dollars to defend a lawsuit, even when immunity applies to ensure the peer review an early victory. Physicians are encouraged to inquire about the availability of such insurance.

Guidelines for Reducing the risk of Peer Review

POLICY TITLE: SUMMARY OF PEER REVIEW PROTECTIONS

There are a number of steps that physicians can take to reduce significantly the liability risk of peer review activities and the detrimental impact of lawsuits based on such activity:

- 1) Conduct a rigorous, ongoing peer review process that stresses timely, constructive educational dialogues between physicians in a continuous attempt to improve the quality of patient care. Medical staffs and other peer review bodies with this type of peer review system should rarely have to resort to a formal disciplinary process.
- 2) Do not use the peer review process for anti-competitive purposes. Physicians must examine their motives, and should not participate in disciplinary activity not undertaken in the pursuit of quality patient care. Under no circumstances should a direct competitor be permitted to serve on a peer review-hearing panel.
- 3) Amend the peer review hearing procedures to conform to the requirements of Business and Professions Code §§ 809 et seq. (SB 1211 and the safe harbor provisions of the Health Care Quality Improvement Act. [See "Note" above regarding CMA's model documents.]
- 4) Conduct peer review in conformance with the medical staff bylaws.
- 5) Obtain insurance covering peer review activity, including at least the defense costs of an antitrust claim. Although insurance policies are unlikely to cover antitrust damages, a number of policies will provide a legal defense to a lawsuit containing antitrust claims. Physicians may find that their professional liability policies and/or hospital or health facility peer review coverage already provides this protection.

Comparative Chart Immunities and Procedural Protections

The chart reproduced on the next page compares and contrasts California immunities with those provided under the federal Health Care Quality Improvement Act. Differences in procedural safeguards are also noted.

POLICY TITLE: SUMMARY OF PEER REVIEW PROTECTIONS

Peer Review System Protections California Law vis-à-vis the Federal Health Care Quality Improvement Act

I. Whistleblower Protections

California

Civil Code Section 43.8 Absolute immunity for communications intending to aid in the evaluation of qualifications, fitness, character, or insurability.

HCOIA

Qualified immunity - no liability for report if made without knowledge of falsity.

II. Peer Review Immunities

California

- 1) Civil Code Section 47.3
Immunity only if
 - a) Action taken without malice
 - b) Action taken after reasonable effort to obtain facts
 - c) Action taken in reasonable belief action warranted by facts found
- 2) Civil Code Section 43.97
Immunity from all by economic damages if:
 - a) 805 report made
 - b) After recommendation of medical staff
 - c) Action not "knowingly and intentionally taken for the purpose of injuring a person" or infringing on their rights
- 3) Immunity if physician doesn't exhaust remedies
- 4) Immunity if physician fails to obtain court determination the decision was procedurally of substantively defective
- 5) Immunity if decision was procedurally fair and decision supported by substantial evidence in light of whole record

HCOIA

- Immunity only if
- a) Action intended to further quality care
 - b) Action taken after reasonable effort to obtain facts
 - c) Action taken in reasonable belief action warranted after reasonable investigation and hearing

Nothing comparable

Nothing comparable

Nothing comparable

Nothing comparable

III. Procedural Protections

California

Notice
Access to evidence upon which charges are based and all documents presented to panel
Right to record
Right to representation - not necessarily attorney
Call, examine and cross-examine witness
Unbiased panel
Burden of proof - peer review body must make substantial showing in support of decision
Any additional rights in bylaws

HCOIA "safe harbor"

Notice
Nothing comparable
Right to record
Right to attorney
Call, examine and cross-examine witness
Panel not "in direct economic competition"
Nothing comparable
Nothing comparable

