

***Credentialing, Peer Review and
Corporate Liability
(Why We Are Our Brothers' Keepers)***

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Learning Objectives

- 1. Understand the reasons for credentialing.**
- 2. Understand the relationship between credentialing and peer review.**
- 3. Understand corporate liability.**
- 4. Understand the relationship between credentialing and corporate liability.**
- 5. Understand statutory confidentiality.**
- 6. Understand statutory immunity.**
- 7. Understand the need to police our own medical staff. »**

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The Reasons for Credentialing

- **Required by:**
 - *JCAHO Medical Staff Standards.*
 - **At initial application.**
 - **At least every two years thereafter.**
 - *Medicare Conditions of Participation.*
- **Arizona law requires hospital Peer Review.**
 - **Peer Review begins with credentialing.**
- **There is no “right” to medical staff membership. »**

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The Requirements of ARS § 36-445

- **Hospitals must organize into committees or other organizational structures to review the professional practices within the hospital,**
 - **For the purpose of reducing morbidity and mortality; and**
 - **For improvement of the care of patients provided in the institution.**
- **Also applies to outpatient surgical centers. »**

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The Concept of Corporate Liability

- **Cases impose an independent duty to verify the qualifications of the Medical Staff.**
- **The hospital may be liable for negligent credentialing.**
 - *Purcell v Zimbelman* (Ct. App. 1972).
 - Hospital not liable for physician's malpractice.
 - Hospital does have independent liability for its negligence.
 - *TMC v. Mizevch* (S. Ct. 1976).
- **Hospitals may be liable for punitive damages. »**

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The Legal Basis For Punitive Damages in Arizona

- **The “Evil Mind” standard: Wrongful conduct guided by evil motives.**
 - **Intentional injury.**
 - **Consciously pursue a course of conduct knowing it creates a substantial risk of significant harm.**
 - **Consciously disregard a substantial and unjustifiable risk of significant harm. »**

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Arizona Public Policy

“Arizona public policy calls for the intervention by hospital and medical staffs between physicians and patients in the interests of sound patient care.”

Scappatura v. Baptist Hospital of Phoenix,
120 Ariz. 204, 584 P.2d 1195 (Ct. App. 1978). »

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Confidentiality in Credentialing

- **ARS § 36-445.01 provides:**
- **All proceedings, records and materials are confidential and not subject to discovery.**
 - **Applies to providers practicing in and applying to practice in facility.**
 - **Exceptions:**
 - **Proceedings before AMB and OBEX.**
 - **Actions by the affected provider against the facility or its medical staff.**
 - **Participants in peer review may not be subpoenaed as witnesses.**
 - **Records of peer review are confidential and inadmissible in court. »**

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Immunity: State and Federal Law

- **ARS § 36-445.02 protects:**
 - **Anyone who makes a decision or supplies information.**
 - **Neither facility nor individuals are subject to suit for denial or limitation of privileges.**
- **Exclusive remedy:**
 - **Injunction to correct action not supported by substantial evidence.**
 - **No money damages.**
- **Healthcare Quality Improvement Act (HCQIA), adopted 1986, provides additional protection. »**

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Loss Of HCQIA Immunity

- **Penalty for failure to report to NPDB.**
 - **Loss of privileges for more than 30 days.**
 - **Surrender of privileges while under investigation.**
- **Violation published in the Federal Register.**
- **Immunity lost for three years.**
- **No effect on state law immunity. »**

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Denial of Application

- **No right to medical staff membership.**
- **Applicant carries the burden to establish criteria for medical staff membership.**
- **Denial usually defined as “Adverse Action.”**
- **Applicant usually entitled to Fair Hearing.**
 - **“Fundamental Fairness”:** notice and right to be heard.
 - **Bylaws determine the right to counsel and the hearing process. »**

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The Fair Hearing

- **Bylaws determine Burden of Proof.**
 - **MEC offers some evidence to support its action.**
 - **Practitioner must show MEC acted arbitrarily or capriciously.**
- **Ad Hoc Committee makes recommendations to MEC.**
- **MEC may accept, reject or modify recommendations.**
- **Practitioner may appeal.**
- **Board makes final decision. »**

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Court Challenge By Practitioner

- **Practitioner may allege:**
 - **Breach of contract (Bylaws).**
 - **Defamation.**
 - **Antitrust violation.**
 - **Civil rights violation.**
 - **ADA violation.**
- **Hospital will assert immunity.**
- **Hospital will seek fees.**
- **Individual members may or may not be named defendants. »**

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Defense of Credentialing Claims

- **Defense provided under Hospital policy.**
- **Potent statutory immunity arguments.**
 - **State: ARS § 36-445.02.**
 - **Remedy limited to injunction.**
 - **Federal: *HCQIA*.**
 - **Presumption of immunity.**
 - **Physician must rebut the presumption by preponderance of evidence. »**

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Requirements of HCQIA

Actions must have been taken:

- (1) in the reasonable belief that the action was in furtherance of quality health care,**
- (2) after a reasonable effort to obtain the facts of the matter, and**
- (3) in the reasonable belief that the action was warranted by the facts known. »**

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HCQIA: Presumption of Immunity

- **HCQIA creates a presumption of immunity.**
- **Practitioner must rebut the presumption.**
 - **“A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in [HCQIA] unless the presumption is rebutted by a preponderance of the evidence.”**
Austin v. McNamara, (9th Circuit 1992).
- **The issue: fundamental fairness. »**

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Limitations on Statutory Protections

- **Bylaws are considered a contract between physician and hospital.**
- **Physicians are entitled to “Fundamental Fairness”**
 - **Reasonable notice.**
 - **Right to be heard.**
- **Hospitals may not deny civil rights.**
- **Physicians may have rights under the ADA. »**

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Americans With Disabilities Act

- **ADA protects people :**
 - **with a physical or mental impairment that substantially limits one or more major life activities;**
 - **with a record of such an impairment or;**
 - **who are regarded as having such an impairment.**
- **Persons discriminated against because they have a known association or relationship with an individual with a disability also are protected. »**

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Americans With Disabilities Act

- **Disabilities are not limited to birth defects, paralysis or injuries.**
 - **Recovering alcoholic or drug addict.**
 - **Persons with HIV/AIDS.**
 - **Persons with various “impairments.”**
- **Exception for “direct threat to the health or safety of others.” »**

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Americans With Disabilities Act

- **Title I applies only to employers.**
 - **Most physicians not hospital employees.**
 - **Civil Rights statutes may still apply.**
- **Title III applies to “Public Accommodations.”**
 - **Hospitals are Public Accommodations.**
 - **May not discriminate on the basis of a disability.**
 - **Recall: Exception for “direct threat to the health or safety of others.” »**

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The Impaired Physician

- **AMA**: The inability to practice medicine with reasonable skill and safety to the patient by reason of physical or mental illness or alcoholism or drug dependency.
- **AMA**: Ethical duty to report impairment. Ethical Opinion E-9.031.
- **JCAHO** requires: a non-discriminatory process to identify and manage matters of individual physician health. »

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The Disruptive Physician

- **AMA**: “Personal conduct , whether verbal or physical, that affects or that potentially may affect patient care negatively constitutes disruptive behavior.”
- **AMA**: “Each medical staff should develop and adopt bylaw provisions or policies for intervening in situations where a physician’s behavior is identified as disruptive.”

AMA Ethics Opinion E-9.045, *Physicians with Disruptive Behavior*.

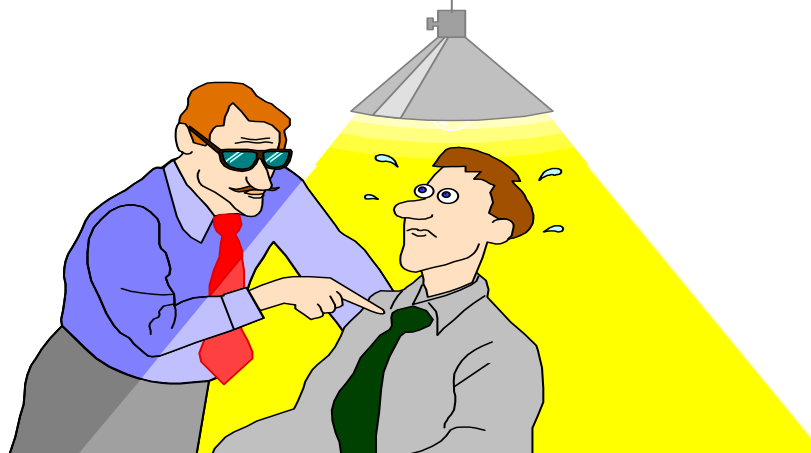
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Policing Our Medical Staff

- **The easy part:**
 - **Compliance with our Bylaws.**
 - **Compliance with state and federal law.**
- **The hard part:**
 - **Dealing with impaired colleagues.**
- **The hardest part:**
 - **Living with the consequences of failing to do so. »**

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QUESTIONS ?



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