

Peer review in Texas

BY ANDREA SCHWAB, JD, CPA

The medical profession established formal mechanisms for reviewing and evaluating the professional services provided by physicians more than a century ago. Physicians who join other physicians to judge their colleagues' professional work do so to further an important process of self-regulation.

Although the system assures physicians under review that they will have sympathetic understanding of their professional problems, its primary function is to benefit the public by improving quality of care, promoting safety, and upholding medical standards. The purpose of medical peer review is "protection of an evaluative process, not mere records."¹

A physician's involvement on a peer review committee often raises questions about his or her potential liability. Texas statutes and case law interpreting those statutes provide guidance in determining the permissible scope of professional review activities and in predicting possible liability from the proper conduct of such activities. Ethical and legal principles also provide additional guidance.

Medical peer review is the evaluation of medical and health care services, including evaluation of the qualifications and professional conduct of professional health care practitioners and of patient care provided by those practitioners.² It can include evaluating the merits of a complaint regarding a practitioner, the accuracy of a diagnosis, the quality of care provided, or the qualifications of a practitioner.³

Federal and state laws encourage the peer review process by providing limited immunities and privileges to peer review members and participants.⁴

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Medical peer review committee

The Texas Medical Practice Act provides protections to a "medical peer review committee" of a "health care entity."⁵ The definitions of these two terms are very important in determining whether the committee and individuals involved may obtain the protections provided in statute.

A health care entity is defined to include:

- A hospital;
- An entity that provides or pays for medical care or health care services and follows a formal peer review process to further quality medical care or health care;
- A professional society or association of physicians that follows a formal peer review process to further quality medical care or health care;
- An organization established by a professional society or association of physicians, hospitals, or both that collects and verifies information concerning the qualifications, competence, or performance

of licensed health care professionals; or

- A health care collaborative certified under Chapter 848, Insurance Code.⁶

A medical peer review committee is a committee, governing board, or medical staff of a health care entity that operates under written bylaws and is authorized to evaluate the quality of medical and health care services or the competence of physicians.⁷ It is imperative that a medical peer review committee adhere to its bylaws to obtain the full benefit of statutory immunity and privileges.

Some question whether an accountable care organization

(ACO) would be considered a health care entity under current law. The definition provided above, however, could arguably encompass an ACO if it is determined to be "an entity that provides or pays for medical care or health care services and follows a formal peer review process to further quality medical care or health care."

Another issue will be whether a Texas "collaborative" would have peer review protections. During the special session of the 82nd Legislative Session, the Texas Legislature passed Senate Bill 7, which authorizes a health care collaborative to provide or arrange for health care services.⁸ In an attempt to ensure that a collaborative receives the protections of peer review, SB 7 specifically amended the definition of a health care entity in section 151.002(a)(5), Occupations Code, to include "a health care collaborative certified under Chapter 848, Insurance Code."⁹

Furthermore, SB 7 entitles a physician to basic due process before a complaint against the physician is resolved or before the physician's association with the collaborative is terminated.¹⁰

Peer review privilege

The purpose of the medical peer review privilege is to promote the improvement of health care and the treatment of patients through review, analysis, and evaluation of the work and procedures of various medical entities and their personnel.¹¹

The peer review privilege generally provides that each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.¹²

The Texas Supreme Court has held that "the medical peer review privilege will be strictly interpreted."¹³ The court explained that the medical privileges are important in promoting free discussion in the evaluation of health care professionals and health services, but the right to evidence is also important, and, therefore, privileges must be strictly construed.

The right to the privilege must therefore be established. If a committee does

not fall within the definition of a medical peer review committee of a health care entity, or if the person invoking the privilege does not provide sufficient evidence that he or she is entitled to the privilege, then the privilege will not apply.

A recent Texas court case, *In re Higby*, addresses such a situation.¹⁴ In that case, a physician sued another doctor for defamation over statements made in a complaint to a physician specialist association's grievance committee. The defendant physician asserted that his statements to the committee were privileged, but the trial court ordered him to answer deposition questions about his communications to the grievance committee.

An appellate court subsequently held that the defendant physician was not entitled to the privilege because he failed to offer any evidence that the physician specialist association was a health care entity authorized to evaluate the competency of physicians or that the association or its grievance committee followed a formal peer review process to further quality medical care.

The court did not express an opinion on whether the grievance committee served as a "medical peer review committee" for purposes of obtaining the protection, but because the appellate court did not have evidence to establish whether a privilege applied, it upheld the trial court's ruling to produce the information. (TMA filed an amicus curiae brief in support of the privilege asserted by the specialty society and defendant physician at the Texas Supreme Court, but the Texas Supreme Court declined to hear the case.)

Qualified immunity

Statutory immunity provisions, applicable to medical peer review committees and health care entities for events during medical peer review, protect both actions and statements in peer review and the impact or effect of those actions.¹⁵ Members of the committee have protections, as do individuals who provide information to the committee.

It is important to note, however, that the actions to be protected must be performed without malice. Specifically, the Texas Occupations Code provides: "A

cause of action does not accrue against a member, agent, or employee of a medical peer review committee or against a health care entity from any act, statement, determination or recommendation made, or act reported, *without malice*, in the course of medical peer review."¹⁶ It also provides: "A person, medical peer review committee, or health care entity that, *without malice*, participates in the medical peer review or furnishes records, information, or assistance to a medical peer review committee or the board is immune from any civil liability arising from that act."¹⁷

A physician may be afforded limited immunity protections under the federal Health Care Quality Improvement Act (HCQIA).¹⁸ HCQIA says no person or entity is liable in any civil action over any required report unless they know the information is false. The immunity does not apply to civil rights suits or actions brought by the United States or a state's attorney general.

Although the term "malice" is not used, HCQIA also requires the participants to act in good faith. HCQIA provides protection if the professional review action is taken in the reasonable belief that the action furthered the quality of health care; after a reasonable effort to obtain the facts of the matter; after due process procedures are afforded to the physician involved, including adequate notice of complaints, a fair hearing, and an availability of appeals; and *in the reasonable belief* that the action was warranted after a reasonable effort to obtain the facts and after meeting the requirements of due process.

Summary

The purpose of the peer review process is an honorable one in keeping with a long tradition of self-policing to maintain the integrity of the medical profession and to protect patients. The law offers some protections which, although not absolute, should provide some comfort to the physicians participating on such committees that they are largely protected if they act without malice and give the accused due process.

An organization should formally outline its peer review process and ensure

that it strictly follows its process every time it engages in peer review. These protections, however, are not absolute, and individuals are free to file lawsuits with only a nominal filing fee. Even if a defendant is ultimately successful, the defense of a lawsuit can be costly and burdensome. ■

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References

1. *In re Living Centers of Texas, Inc.*, 175 S.W.3d 253 (Texas 2005).
2. Texas Occupations Code § 151.002.
3. Texas Occupations Code § 151.002(a) (7).
4. Health Care Quality Improvement Act of 1986, 42 USC § 11111 et. seq.; Medical Practice Act, Texas Occupations Code § 160.001 et. seq.; Texas Health & Safety Code §161.033 and § 161.023.
5. Texas Occupations Code § 160.007; Texas Occupations Code § 151.002; *In re Higby*, 324 S.W.3d 740 (Texas App.-Houston [1st Dist.] 2010, pet. denied).
6. Texas Occupations Code § 151.002(a) (5).
7. Texas Occupations Code § 151.002(a) (8).
8. Senate Bill 7, 82nd Legislature, 1st Spec. Sess. (Texas 2011).
9. *Id.* at § 4.06.
10. *Id.* at § 4.01 (adding § 848.110, Title 6, Insurance Code).
11. *Family Med.-U.T. v. Ramirez*, 855 S.W.2d 200, 202-03 (Texas App.-Corpus Christi 1993), overruled on other grounds, *Mem'l Hosp.-The Woodlands v. McCown*, 927 S.W.2d 1 (Texas 1996) (orig. proceeding).
12. Texas Occupations Code § 160.007.
13. *In re Living Centers of Texas, Inc.*, 175 S.W.3d at 258.
14. *In re Higby*, 324 S.W.3d 740 (Texas App.-Houston [1st Dist.] 2010, pet. denied).
15. See Texas Occupations Code § 160.010; Texas Health & Safety Code §161.033 and § 161.023. See also Health Care Quality Improvement Act, 42 U.S.C. § 11137 (c) and § 11111(a).
16. Texas Occupations Code § 160.010(b) (emphasis added).
17. Texas Occupations Code § 160.010 (c) (emphasis added).
18. 42 U.S.C. § 11137(c) and § 11111(a).

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