

Testifying with Immunity or Impunity: How Far Should the HCQIA Go to Protect the Confidentiality of Peer Review?

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The Health Care Quality Improvement Act

- Federal law passed in 1986
- Rationale
 - To restrict incompetent physicians from moving from State to State without disclosure or discovery of previous performance
 - To encourage peer review by providing immunity to those who participate



Mandate

- Any time
 - Any entity
 - makes payment
 - in settlement of
 - or in satisfaction of
 - a judgment in a medical malpractice action or claim
 - shall report to the Secretary of Health and Human Services

Mandate, continued

- If a Board of Medical Examiners
 - Revokes or suspends,
 - Or otherwise restricts,
 - A physician's license, or
 - Censures, reprimands, or places a physician on probation,
 - For reasons relating to
 - the physician's professional competence or professional conduct,
 - or to which a physician's license is surrendered,
 - The information must be reported.

The National Practitioner Data Bank

- Collects and maintains the reported information
- Protects the confidentiality of the information
 - No public access
- Provides the information to hospitals
 - Whenever a physician or licensed health care practitioner applies to be on the medical staff or for clinical privileges at a hospital.
 - Every two years regarding physicians or practitioners who are currently on the medical staff or who have been granted clinical privileges at the hospital.

The Grant of Immunity

- The HCQIA promise
 - Physicians who reveal incompetence will enjoy immunity for their testimony
- The cornerstone of the Act
 - Congress intended “to provide incentive and protection for physicians engaging in effective professional peer review.”
 - To protect physicians from liability for reporting

Immunity or Impunity?

- Physicians' criticism
 - The Act protects *all* testimony
 - Testimony that is true;
 - Testimony that is false;
 - Testimony that is given to achieve economic gains;
 - Testimony that is given to achieve power.
- The Act's answer
 - The HCQIA does not protect knowingly false testimony.

What is “knowingly false” testimony?

- A matter of proof:
 - How does a physician facing the end of his/her career prove “knowingly false” testimony?
- Who is being protected?
- Are the goals of the Act being met?



