



Malpractice Attorney's Guide to Peer Review

PLANTIFF'S BAR: TOP 10 TIPS

- 1 RECOGNIZE PEER REVIEW ISSUES** – Medical peer review (where physicians examine a physician peer to determine whether accepted standards of care have been met) is defined very broadly and can occur at hospitals, health care entities, insurance providers, and even private groups.
- 2 FEDERAL IMMUNITY** – Except for civil rights actions, federal law provides very strong immunity, protecting peer review done with "objective reasonableness." Subjective intent or bias is wholly disregarded.
- 3 STATE IMMUNITY** – Individual states have statutory peer review immunities that typically protect actions taken without fraud or malice. State immunity must be overcome along with federal immunity.
- 4 STATE PRIVILEGES** – No federal peer review privilege exists, but look to state law for protections for peer review materials. Some states absolutely protect all materials with no exceptions, effectively preventing a plaintiff from defeating both federal and state immunity. Other states may have very narrow exceptions but courts may be reluctant to apply exceptions for public policy reasons. If suit can be filed in federal court, consider it.
- 5 BE WARY OF CONTINGENT FEES** – While the facts can appear outrageous and damages can be enormous, these cases rarely survive summary judgment. Enormous factual and legal burden is on plaintiff—not a good contingency-fee formula.
- 6 PEER REVIEW CASES ARE CHALLENGING** – Even if taken on an hourly basis, these cases require specialized knowledge of the law and its unique hurdles. Before they sue, physicians need to fully understand the challenges, including possible payment of the hospital's fees and expenses if unsuccessful.
- 7 NEGLIGENT CREDENTIALING LAWSUIT POSSIBLE** – Depending on state law, a possible cause of action against a hospital for negligent credentialing may exist, but the hurdles of immunity and privilege remain. While some states prohibit the discovery of credentialing applications, use of expert testimony as to the due diligence a reasonable hospital would have done in credentialing may help fill in the gaps.
- 8 UNDERSTAND HOW PEER REVIEW RELATES TO MALPRACTICE ISSUES** – Various state peer review privileges are specifically directed at keeping this information out of your hands. While medical records can be obtained, information regarding initial credentialing, recredentialing, investigation, or discipline taken against physician after the medical care rendered is typically off limits.
- 9 FOCUS ON WHAT INFORMATION YOU CAN OBTAIN AND USE** – Direct questions to a physician may not be prohibited (e.g., were you suspended and when?). If objected to, parse the privilege itself and applicable case law to determine if physician's answers can be used as circumstantial evidence.
- 10 CHECK PUBLIC INFORMATION** – The National Practitioner's Databank (NPDB) requires health care entities report certain adverse actions taken against a physician. While available to state boards and health care entities, this information is not typically available to the public. Instead, search out state board and other public information as this may reveal underlying facts from the initial adverse action.

DEFENSE BAR: TOP 10 TIPS

- 1 DISTINGUISH PEER REVIEW FROM MEDICAL CARE EVENTS** – The actual medical care rendered to a patient is not peer review, but any subsequent review of such medical care by a qualified peer review committee will fall under this broad definition.
- 2 UNDERSTAND APPLICABLE PEER REVIEW LAW** – Peer review law varies by state. Have a general understanding of federal immunity, and specifically know the applicable state immunity as well as what specific peer review materials are privileged.
- 3 UNDERSTAND PUBLIC POLICY REASONS** – These immunities and privileges were created out of strong public policy desire to keep peer review information out of the hands of malpractice plaintiffs, so as to not "chill" the peer review process. When defending the privilege, articulate these important reasons.
- 4 KNOW AND PROTECT YOUR FILE** – State law and applicable case law define what documents and communications are privileged, as no federal privilege exists. Mine the files received from client (including medical records) so that proper privileges are asserted.
- 5 WAIVER IS DIFFICULT, BUT MAKE SURE YOU DON'T** – It is very difficult to waive the peer review privilege, with some states requiring no less than a written waiver signed by an authorized agent of the hospital to do so. That said, be vigilant to protect the materials to avoid even the allegation of common law waiver.
- 6 INVOLVE THE HEALTH CARE FACILITY** – If plaintiff's counsel pursues peer review information, involve the health care entity who conducted the peer review as it typically has the budget, expertise, and desire to defend the privilege.
- 7 ALIGN WITH HOSPITAL, BUT ONLY TO A LIMITED EXTENT** – If you align with the hospital or health care facility, do so only to extent needed to protect peer review materials and defend your malpractice case. Keep in mind that your client may otherwise have conflicts with the facility due to ongoing peer review or credentialing issues.
- 8 DETERMINE WHETHER YOUR PHYSICIAN NEEDS HELP** – Peer review and credentialing is a unique and separate area of the law. Aside from malpractice issues, a physician may need the services of an attorney specializing in peer review, credentialing, and reporting to provide assessment and advice.
- 9 RESIGNING IS VERY RARELY A GOOD OPTION FOR PHYSICIAN** – If a physician looks to you for peer review advice, do not advise resignation, as this may independently trigger a NPDB report. Instead, get help to conclude investigation and determine if resignation can be accomplished without a NPDB report.
- 10 STAKES ARE HIGH AND CONSEQUENCES SERIOUS** – Given interwoven federal and state reporting requirements, an adverse action may have a "domino effect" on physician's status with other hospitals, health care entities, insurance providers, and state boards, which could jeopardize ability to practice at all. Physicians should proceed with caution with the help of a qualified attorney.



KARIN ZANER, ATTORNEY AT LAW
ZANER LAW PC
8117 PRESTON RD., SUITE 300 · DALLAS, TX 75225
1800 LAVACA ST., SUITE 502 · AUSTIN, TX 78701
214-363-5036 O · 214-363-5046 F · 214-236-9956 C
KARIN@ZANER.LAW