

# CONSEQUENCES OF ADVERSE CREDENTIALING DECISIONS

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IAMSS  
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# OVERVIEW

- Consequences
  - Medical staff membership and privileges
  - Employment and contracts
  - NPDB reports
  - Licensure
  - Payer credentialing
- Practitioner response
  - Various claims
- Defenses
  - Reasonable decision consistent with bylaws standards and process
  - HCQIA
  - Peer Review Privilege
  - Volunteer Protection Act
  - Non-profit Director Immunity
  - Idaho Tort Claims Act
  - Local Antitrust Act
  - Waivers and Releases
  - Insurance

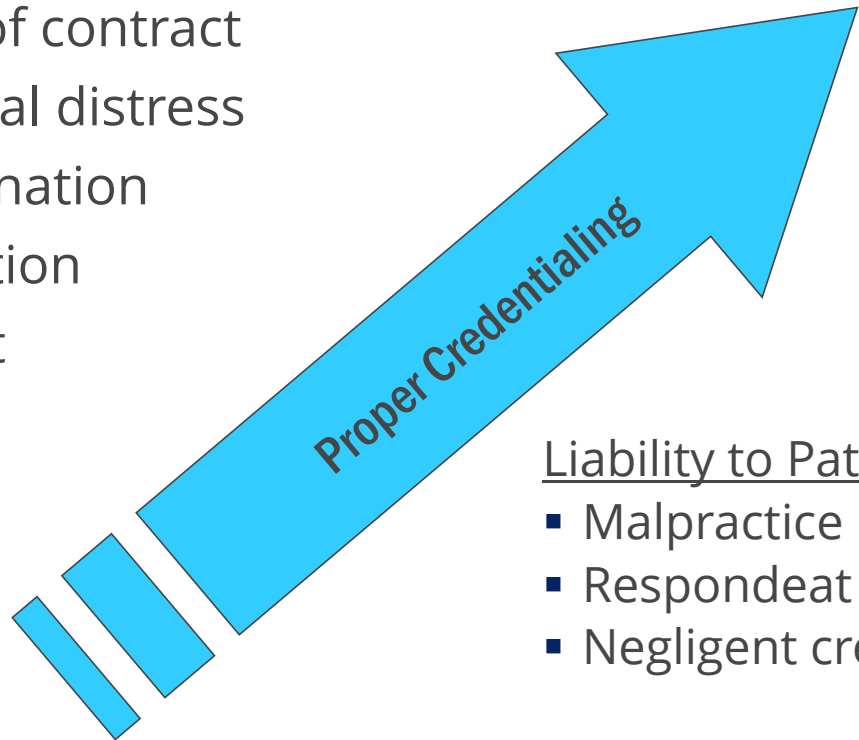
# WRITTEN MATERIALS

- Health Care Quality Improvement Act (“HCQIA”), 42 USC 11101 et seq.
- Idaho Peer Review Statute, IC 39-1392a to -1392
- Sample Medical Staff Bylaws
- Sample Supplement to Credentialing Application
- Sample Authorization and Release
- Sample Checklist for Credentialing and Privileging
- Stanger, *Charting the Credentialing Course*
- Stanger, *Licensing Board Stipulations: Beware Unanticipated Consequences*, <https://www.hollandhart.com/licensing-board-stipulations-beware-unanticipated-consequences>
- Stanger, *Idaho Peer Review Privilege*, <https://www.hollandhart.com/idaho-peer-review-privilege>

# CREDENTIALING

## Liability to Practitioner

- Due process violation
- Breach of contract
- Emotional distress
- Discrimination
- Defamation
- Antitrust
- Etc.



Quality Care

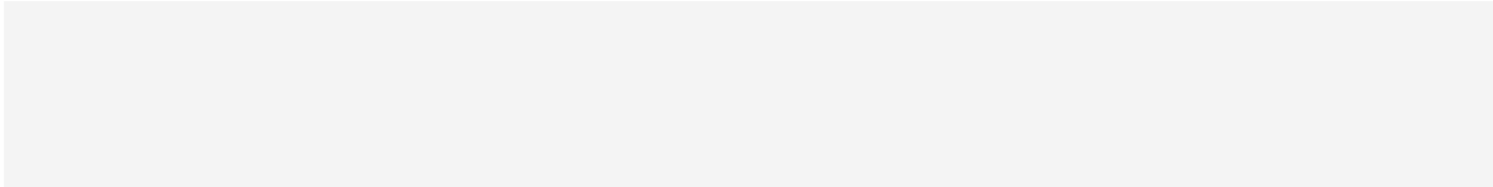
Quality Workplace

## Liability to Govt

- State licensure
- COPs
- Accreditation

## Liability to Patient

- Malpractice
- Respondeat superior
- Negligent credentialing



Special Reports > Exclusives

# Doc Wins \$4.75M in Fraud, Defamation Case Against Hospital

— Ob/gyn said she was wrongly accused of substance abuse

by Amanda D'Ambrosio, Staff Writer, MedPage Today February 5, 2020



A doctor in Indiana won \$4.75 million in a defamation and fraud lawsuit against her former employer, [according to the jury verdict](#).

# ADVERSE CREDENTIALING

## Initial Appointment or Reappointment

- Denial
- Restriction or limitation
- Probation
- Conditions on privileges
- Reduction in privileges
- Others?

## Corrective Action

- Investigation
- Peer review results
- Informal
  - Collegial intervention
  - Voluntary limitation or surrender
- Formal
  - Suspension
  - Probation or proctorship
  - Restriction or limitation
  - Termination

# NATIONAL PRACTITIONERS DATA BANK ("NPDB")

- Must report action against physician or dentist if:
  - Action adversely affects privileges for more than 30 days and is based on competence or conduct adversely affecting patient care.
  - Voluntary surrender or restriction of physician privileges while physician is under investigation for incompetence or professional conduct, or in return for not conducting an investigation.
  - Suspension in effect for more than 30 days.
  - Revision or modification of such action.
- May report actions against other licensed health care practitioners.

(42 USC 11133)



# NPDB

- NPDB remains on black mark against physician or dentist
  - Reports available to credentialing organizations, e.g., facilities in which they seek privileges, employers, payers, licensing boards.
- Physician or dentist may be required to self-report such actions in response to queries.
  - Employers
  - Payers
  - Others
- *Manner in which action is handled may affect report.*

Consequently,  
knowledgeable  
physicians and dentists  
will fight to avoid or  
minimize NPDB reports.

# NPDB

- No liability for making NPDB report so long as report is made “without knowledge of the falsity of the information contained in the report.” (42 USC 11137(c))
  - *Brown v. Presbyterian Healthcare* (10<sup>th</sup> Cir. 1996): hospital not immune where it improperly checked “incompetence/malpractice/negligence.”
- *Be careful what you include in report.*
- *Consider checking “other” and writing appropriate description.*
- *Modify the report as appropriate.*

# LICENSING BOARD REPORTS

- Licensing boards may require reports of adverse actions against providers, e.g.,
  - Idaho Board of Medicine. (IC 39-1393)
  - Others?
- Licensing boards are required to report to the NPDB.
- Licensing boards may require providers to self-report actions against the provider.
- Licensing boards from other states will almost certainly pick up on the action.
  - Launch their own investigation.
  - Impose reciprocal discipline or stipulations, e.g., in Idaho, a physician may be disciplined due to the “[i]nability to obtain or renew a license to practice medicine, or revocation, suspension, or other discipline of a license to practice medicine by any other state... unless it can be shown that such action was not related to the competence of the person to practice medicine....” (IC 54-1814(10)).

# LICENSING BOARD REPORTS

- Licensing boards will often offer to resolve complaints by entering stipulations with providers.
  - Providers may want to agree to the stipulation to avoid further costs and distractions or potentially worse penalties.
- **Beware the consequences:**
    - NPDB report
    - Reciprocal actions by other licensing boards
    - Adverse employment action
    - Adverse credentialing actions
    - Adverse payer actions
    - Specialty boards
    - Future disclosures in response to questions on applications

# PAYOR CREDENTIALING

- Self-reporting in response to initial or renewal of credentialing.
  - “Have you ever been the subject of an investigation...”
  - “Has any adverse action been taken against your privileges or medical staff membership...”
- Some payers require providers to affirmatively self-report adverse action against them.
  - Failure to report may be independent basis for adverse action.
- Payers often automatically deny or terminate participation agreements if provider is the subject of an adverse action.
  - Know payer requirements.
  - Ensure you comply with any appeal process if you intend to challenge the determination.

# PAYOR CREDENTIALING

## Idaho's Any Willing Provider Statute

- “Any managed care organization ... shall be ready and willing at all times to enter into care provider service agreements with all qualified providers of the category or categories which are necessary to provide the health care services covered by an organization if the health care providers: are qualified under the laws of the state of Idaho, desire to become participant providers of the organization, meet the requirements of the organization, and practice within the general area served by the organization.
- “Nothing in this section shall preclude an organization from refusing to contract with a provider who is unqualified or who does not meet the terms and conditions of the organization’s participating provider contract or from terminating or refusing to renew the contract of a health care provider who is unqualified or who does not comply with, or who refuses to comply with, the terms and conditions of the participating provider contract including, but not limited to, practice standards and quality requirements....”

(IC 41-3927)

# ADVERSE EMPLOYMENT OR CONTRACT ACTION

## Existing Employers

- Adverse action may constitute grounds for termination of employment or independent contractor agreement.
  - Contract may expressly allow same
  - Provider may be unable to fulfill contract duties without privileges

## Future Employers

- Provider will likely be required to disclose adverse action thru application process.
- Employer will likely discover the adverse action during due diligence.
  - NPDB reports
  - Interview prior employers or facilities
  - Credentialing

# ADVERSE EMPLOYMENT OR CONTRACT ACTION

- Common terms contract terms
  - Representations and warranties
    - No prior adverse actions
    - Obligations to self-report adverse actions
  - Qualifications, e.g.,
    - Unrestricted license to practice medicine
    - Medical staff membership and clinical privileges in good standing
    - Credentialed with relevant payers
  - Bases for termination, e.g.,
    - Failure to satisfy qualifications
    - Loss or restriction on license to practice
    - Termination or restriction on medical staff membership or clinical privileges
    - Failure to obtain credentialing with payers
    - Failure to report certain incidents or adverse actions
  - Termination of contract may result in automatic termination of medical staff membership and/or privileges without fair hearing process



# RESPONDING TO CREDENTIALING INQUIRIES

- Idaho Peer Review Statute:

- “The furnishing of information ... to any health care organization or the receiving and use of such information and opinions shall not subject any health care organization or other person to any liability or action for money damages or other legal or equitable relief. ... Any health care organization may receive such disclosures, subject to an obligation to preserve the confidential privileged character thereof and subject further to the requirement that such requests shall be made and such use shall be limited to aid the health care organization in conducting peer review.

(IC 39-1392c)

- Not required to respond to credentialing inquiries.
- If respond:
  - Make sure the info you provide is absolutely accurate.
  - Do not mislead, including making misleading omissions.
  - Check your facility policies re responding to queries.

# KADLEC MED. CTR. V. LAKEVIEW ANESTHESIA ASSOCIATES (LA. 2005)

- Lakeview Associates terminated a physician's employment because of misconduct. The physician sought a locum tenens position at Kadlec Medical Center. Kadlec sent detailed credentialing inquiry to Lakeview. Rather than disclose the circumstances concerning the termination, Lakeview reported that the physician was an excellent clinician. A year later, the physician was involved in significant malpractice case that resulted in large verdict against Kadlec.
- Kadlec sued Lakeview for misrepresentation.
- Trial: jury awarded \$8.2 million to Kadlec.
- Appeal: Lakeview had no affirmative duty to disclose; however, once it disclosed misleading information, it had a duty to clear up the misapprehension.

(537 F.3d 412 (5<sup>th</sup> Cir. 2008))

# SPECIALTY BOARD ACTION

- Specialty boards may take action against provider who has been the subject of adverse action.
    - Criteria often require clean history.
    - May cancel or withdraw board certification based on adverse action.
  - Usually subject to appeal process.
- **Beware the consequences:**
    - NPDB report
    - Reciprocal actions by other licensing boards
    - Adverse employment action
    - Adverse credentialing actions
    - Adverse payer actions
    - Specialty boards
    - Future disclosures in response to questions on applications

# MALPRACTICE PREMIUMS OR COVERAGE

- Adverse action may affect malpractice premiums or coverage.
  - Depends on claims and carrier

# PRACTITIONER RESPONSE

# COMMON PHYSICIAN CLAIMS

- Breach of contract
- Failure to follow bylaws
- Defamation
- Misrepresentation
- Intentional interference with economic advantage
- Intentional interference with contract
- Negligent infliction of emotional distress
- Discrimination
- Antitrust
- Unfair competition
- Racketeering
- Anything else they can dream up...

Additional claims against public entities:

- Violation of due process
  - Liberty interest
  - Property interest
- Violation of civil rights
  - First amendment free speech
- Others?

## *POLINER V. TEXAS HEALTH SYS.* (TEX. 2006)

- Hospital summarily suspended cardiac cath lab privileges of physician after medical peer review raised concerns.
  - Physician sued for defamation and other claims.
  - Trial court: jury awarded \$366,000,000 in damages.
  - Appeal: hospital and defendants were entitled to HCQIA immunity.
- (537 F.3d 368 (5<sup>th</sup> Cir. 2008)).

# DEFENSES



# FOLLOW YOUR BYLAWS AND POLICIES

- Courts usually do not second guess organization's decision if:
  - Followed standards in bylaws and statutes.
  - Based on legitimate, documented reasons
    - Patient care or facility operations
    - NOT arbitrary or capricious
    - NOT improper motive, e.g., discrimination, anti-competition, retaliation, etc.
- From legal liability standpoint, the process is more important than the decision.

# MILLER V. ST. ALPHONSUS (IDAHO 2004)

- *Facts:* St. Als denied medical staff privileges due to physician's alleged history of disruptive behavior.
- *Held:* Court upheld St. Als' decision.
  - Bylaws do not constitute a contract.
  - Hospital must comply with statutes and bylaws that required bylaws and hearing process.
  - Hospital gave the process due in statute and bylaws.

# IDAHO SUBSTANTIVE STANDARDS

- “The criteria utilized for granting medical staff membership shall be reasonable...”

(IC 39-1395)

- “Privileges must be granted only on the basis of individual training, competence, and experience.”
- “The medical staff, with governing body approval, must develop and implement a written procedure for determining qualifications for medical staff appointment, and for determining privileges.”
- “The governing body must approve medical staff privileges within the limits of the hospital’s capabilities for providing qualified support staff and equipment in specialized areas.
- “Reappointment procedures must include a means of increasing or decreasing privileges after consideration of the member’s physical and mental capabilities.”

(IDAPA 16.03.14.250)

# IDAHO PROCEDURAL STANDARDS

- “The process for considering applications for medical staff membership and privileges shall afford each applicant **due process.**”

(IC 39-1395)

- “A formal written procedure shall be established for appointment to the medical staff.”
- “Applicants for appointment, reappointment or applicants denied to the medical staff privileges shall be **notified in writing.**”
- “There shall be a **formal appeal and hearing mechanism** adopted by the governing body for medical staff applicants who are denied privileges, or whose privileges are reduced.”

(IDAPA 16.03.14.200)

The med staff bylaws, rules and regulations shall contain:

- “A procedure for appointment, granting and withdrawal of privileges.”
- A mechanism for **hearings and appeals** of decisions regarding medical staff membership and privileges.

(IDAPA 16.03.14.250).

# FOLLOW YOUR BYLAWS AND POLICIES

Ensure your credentialing decisions:

- Are based on documented, legitimate reasons.
  - Not unreasonable, arbitrary, capricious or discriminatory.
- Are consistent with the process and standards in applicable statutes, bylaws, rules and regulations, and accreditation requirements.
- If vary from bylaws or policies, secure provider's consent to process.

# HEALTH CARE QUALITY IMPROVEMENT ACT ("HCQIA")

- HCQIA provides immunity for most claims arising from credentialing action **against physician** if the action is taken:
  - In reasonable belief that action furthered quality care,
  - After reasonable effort to obtain facts,
  - After adequate notice and hearing procedures, and
  - In reasonable belief that action warranted by the facts.
- Hospital presumed to have complied; physician must rebut.
- Hospital process is deemed to be fair if:
  - Proper notice given
  - Hearing before a fair-minded officer or panel
  - Physician has right to present evidence
  - Physician receives written recommendation

Ensure your  
bylaws or policies  
comply with HCQIA  
standards

(42 USC 11101 et seq.)

# HEALTH CARE QUALITY IMPROVEMENT ACT ("HCQIA")

- Suspensions
  - Suspension  $\leq$  14 days pending investigation: no due process required
  - Immediate suspension to avoid imminent danger to health of individual so long as subsequent notice, hearing or other adequate procedures.
- Suspensions  $>$  30 days must be reported to NPDB.

(42 USC 11101 et seq.)

# LAURINO V. SYRINGA GENERAL (IDAHO 2005)

- *Facts:* Physician with provisional staff membership denied privileges following fair hearing process involving independent hearing officer. Physician sued hospital, trustees, and chief of staff for \$2,000,000.
  - Breach of contract
  - Violation of due process
  - Intentional infliction of emotional distress
  - Intentional interference with contract
  - Antitrust
  - Defamation
  - Injunction



# LAURINO V. SYRINGA GENERAL (IDAHO 2005)

- *Held:* Court dismissed all claims on summary judgment.
  - HCQIA barred all claims except violation of due process.
  - Hospital's hearing satisfied due process.
  - Hospital awarded \$120,000 in attorneys fees.
- *Moral:* document legitimate reasons and fair hearing process.

# HCQIA

- In some cases, may decide NOT to go through full fair hearing process, e.g.,
  - Failure to satisfy basic qualifications where there is no real dispute as to issues, e.g.,
    - Adverse licensure action
    - Loss of malpractice insurance
    - Exclusive contract
  - Non-physician providers
    - HCQIA only applies to physicians and dentists
    - But may be required to give some kind of due process per hospital licensing regulations.
  - Adverse action against contracted providers
    - Ensure contract allows for automatic termination of privileges
- Consider using expedited process, e.g., notice and chance to submit written response.
- Consider risk and need for HCQIA immunity.

# IDAHO PEER REVIEW IMMUNITY

- **“Immunity from civil liability.** The furnishing of information or provision of opinions to any health care organization or the receiving and use of such information and opinions shall not subject any health care organization or other person to any liability or action for money damages or other legal or equitable relief.”

(IC 39-1392c)

- Does not extend to ultimate credentialing decision by hospital. (*Harrison v. Binnion* (Idaho 2009))
  - Participants in peer review: immune
  - Hospital: not immune

# IDAHO PEER REVIEW PRIVILEGE

- **“Records confidential and privileged. ... [A]ll peer review records shall be confidential and privileged, and shall not be directly or indirectly subject to subpoena or discovery proceedings or be admitted as evidence, nor shall testimony relating thereto be admitted in evidence, or in any action of any kind in any court or before any administrative body, agency or person for any purpose whatsoever.”**

(IC 39-1392b)

- **“A hospital, in-hospital medical staff committee, ... and maker of a confidential communication [relating to peer review] has a privilege to refuse to disclose and to prevent any other person from disclosing the confidential communication.”**

(Idaho R. Evid. 519(b))

# IDAHO PEER REVIEW PRIVILEGE

- Applies to all records, evidence, reports, investigations, etc. of “health care organization” used to improve health care, e.g.:
  - Credentialing and privileging
  - Quality assurance, improvement, safety investigation
  - Professional review relating to professional competence and conduct of practitioner
- Does not apply to underlying medical records upon which peer review is based.

# IDAHO PEER REVIEW PRIVILEGE

- Idaho courts have consistently enforced the privilege. (See, e.g., *Montalbano v. St. Als* (Idaho 2011); *Verska v. St. Als* (Idaho 2011); *Nightengale v. Timmel* (Idaho 2011); *Murphy v. Wood* (Idaho App. 1983))
- Practical result: severely limit a practitioner from suing based on actions taken in peer review proceeding.
  - Can't obtain discovery of relevant facts.
  - Can't introduce documents, witnesses or facts from peer review proceeding.

# PEER REVIEW PRIVILEGE

- **Maintain the confidentiality of peer review information, documents and proceedings at all costs!**
- May waive privilege by intentional or perhaps inadvertent disclosures.
- May open the door to lawsuits.

# IDAHO PEER REVIEW PRIVILEGE

- Custodian of peer review records must not disclose them except as authorized by law.

(IC 39-1392c)

- Hospital that requests or receives peer review info must keep info confidential except:
  - For peer review activities, including disclosing them to others involved in peer review activities;
  - For medical purposes; or
  - To defend itself in case physician who was subject to peer review sues hospital.

(IC 39-1392b and -1392c)



# IDAHO PEER REVIEW PRIVILEGE

## Maintaining the privilege

- Adopt and consistently follow a policy or practice against disclosure of peer review information.
  - Encourages participation in our peer review
  - Disclosures jeopardize integrity of peer review
- Designate entities as a peer review committee.
  - Bylaws, rules and regulations
  - Appointments, correspondence, and minutes
- Remind participants of importance of privilege.
- Mark documents as protected by the privilege.
- Obtain HIPAA business associate agreements if disclose to persons outside hospital (e.g., attorney, peer reviewer, etc.).

# IDAHO PEER REVIEW PRIVILEGE

- Peer review is not subject to Public Records Act.
- Plaintiff in malpractice action may obtain limited information concerning peer review activities. (See IC 39-1392e)
- Peer review may be discoverable in federal court.
- May decide to waive privilege to defend hospital in litigation and obtain HCQIA immunity.
- **So beware what you put in writing despite peer review**
  - Document legitimate reasons
  - Do not include or consider improper factors

# VOLUNTEER PROTECTION ACT

- Protects volunteers in non-profit and govt entities from liability if:
  - Receive no more than \$500/year in compensation.
  - Authorized by law to engage in activities.
  - Act within scope of duties.
- Does not apply to:
  - Willful, criminal or reckless misconduct
  - Violent, sex, or hate crimes
  - Claims by hospital against volunteer
  - Civil rights violations
  - Injunctions

(42 USC 14501)

# IDAHO NON-PROFIT VOLUNTEERS

- Protects directors and volunteers who serve in non-profit corporation if:
  - Serve without compensation
  - Act within course and scope of duties and at direction of corporation
- Does not apply to
  - Willful, wanton, fraudulent or knowingly unlawful act
  - Intentional breach of fiduciary duty
  - Extent insurance applies.
  - Intentional breach of fiduciary duty or loyalty.
  - Bad faith or intentionally unlawful acts.
  - Acts in which director derived personal benefit.
  - Motor vehicle claims.

(IC 6-1605)

# IDAHO TORT CLAIMS ACT

- Protects state actors from certain tort claims.
  - Policy or planning decisions.
  - Certain intentional torts, e.g., assault, battery, defamation, fraud, interference with contract, etc.
- Does not apply to:
  - Actions outside course and scope of duties.
  - Malicious or willful misconduct.
  - Federal claims.
  - Non-tort claims, e.g., claims based on contract or statute.
- Provides certain procedural protections.
  - Plaintiff must file notice of tort claim within 180 days.
  - Shortened statute of limitations.
  - Cap on damages.

(IC 6-901 et seq.)

# RELEASES AND WAIVERS

- Include in:
    - Bylaws
    - Credentialing applications
    - Contracts
  - Address
    - Authorization to release records
    - Waiver and release of liability arising out of credentialing matters
    - Confidentiality of credentialing and peer review matters
- May not be enforceable
  - But better than not having them.
    - May be enforced.
    - May dissuade physician from pursuing.

# SAMPLE RELEASE LANGUAGE

- **“Consent to Disclosure.** I hereby authorize Hospital, its medical staff, their agents and representatives, and/or any other person to obtain, disclose or share the following information for purposes of any credentialing or peer review activity involving me: any records or information relevant to my training and education, professional qualifications, ability to provide effective patient care, licensure, character, physical and mental capacity, ethics, behavior or conduct, claims history, eligibility to participate in health care programs, and any other information reasonably relevant to my professional conduct, ability to provide effective patient care, and/or qualifications for medical staff appointment, reappointment, or clinical privileges. I authorize and direct any person with knowledge of such information to fully disclose such information to Hospital, its medical staff, or their representatives. I also authorize and direct Hospital, its medical staff, and their representatives to disclose such information to any person or entity who solicits such information for the purpose of evaluating my qualifications pursuant to a request for appointment, reappointment, or clinical privileges, or any other credentialing, licensing, or regulatory matter. I further agree to execute any documentation reasonably required by Hospital to effect the intent of this provision.”

# SAMPLE BYLAWS LANGUAGE

- **“Confidentiality.** To the maximum extent consistent with applicable law, the Medical Staff and its committees shall constitute a peer review body under Idaho law, and information considered or generated by the Medical Staff, its committees, or its members shall be privileged and confidential, including but not limited to records, reports, minutes, discussions, and any other information collected, generated, utilized or provided for the purposes of evaluating or improving the quality and efficiency of health care or reducing the morbidity or mortality of patients; investigating, evaluating or reviewing the qualifications or competence of Medical Staff applicants, members, or persons who request or have privileges; contributions to clinical teaching or research; or information containing protected health information of patients. Medical Staff members and others bound by these bylaws shall not use such information outside of the credentialing or peer review process or disclose such confidential information unless expressly required by law or with the written authorization of the MEC and/or CEO. Persons who violate this Section shall be subject to corrective action.”



# SAMPLE BYLAWS LANGUAGE

- **“Immunity.** To the maximum extent allowed by law, no member or representative of the Medical Staff or [HOSPITAL] shall be liable to any person for damages or other relief for any decision, opinion, action, omission, statement, or recommendation made within the scope of his or her duties as an official representative of the Medical Staff relating to or arising from the provision of information, opinion, or counsel, or relating to or arising from participation in any credentialing, privileging, quality improvement or peer review activities.”

# SAMPLE BYLAWS LANGUAGE

- **“Releases.** Each practitioner or AHP requesting appointment, reappointment, or privileges shall, upon request of [HOSPITAL], execute general and specific releases when requested by the President, the Credentials Committee Chair, or their respective designees. Failure to execute such releases shall result in an application for appointment, reappointment or privileges being deemed voluntarily withdrawn, and it shall not be further processed.”

# INSURANCE

- Consider whether your insurance provides coverage
  - Board members
  - Med staff officers or others participating in process
  - Witnesses or other participants
- Consider
  - Directors & officers liability insurance
  - Errors & omissions liability insurance
- Check with brokers

# BUT MOST IMPORTANT...

- Ensure your credentialing decisions:
  - Are based on documented, legitimate reasons, i.e., not unreasonable, arbitrary, capricious or discriminatory.
  - Are consistent with the process and standards in bylaws and applicable statutes, rules and regulations, including HCQIA.
- Ensure the decisions are taken in the context of peer review, and maintain peer review privilege at all costs.

# ADDITIONAL RESOURCES

# [HTTPS://WWW.HOLLANDHART.COM/HEALTHCARE-SERVICES](https://www.hollandhart.com/healthcare-services)

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OVERVIEW

MENU

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Search by Keyword

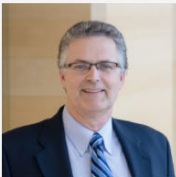
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- Ambulatory surgery centers
- Medical device and life science companies
- Rehabilitation centers
- Extended and eldercare facilities

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# QUESTIONS?

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