

Peer Review

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January 2015

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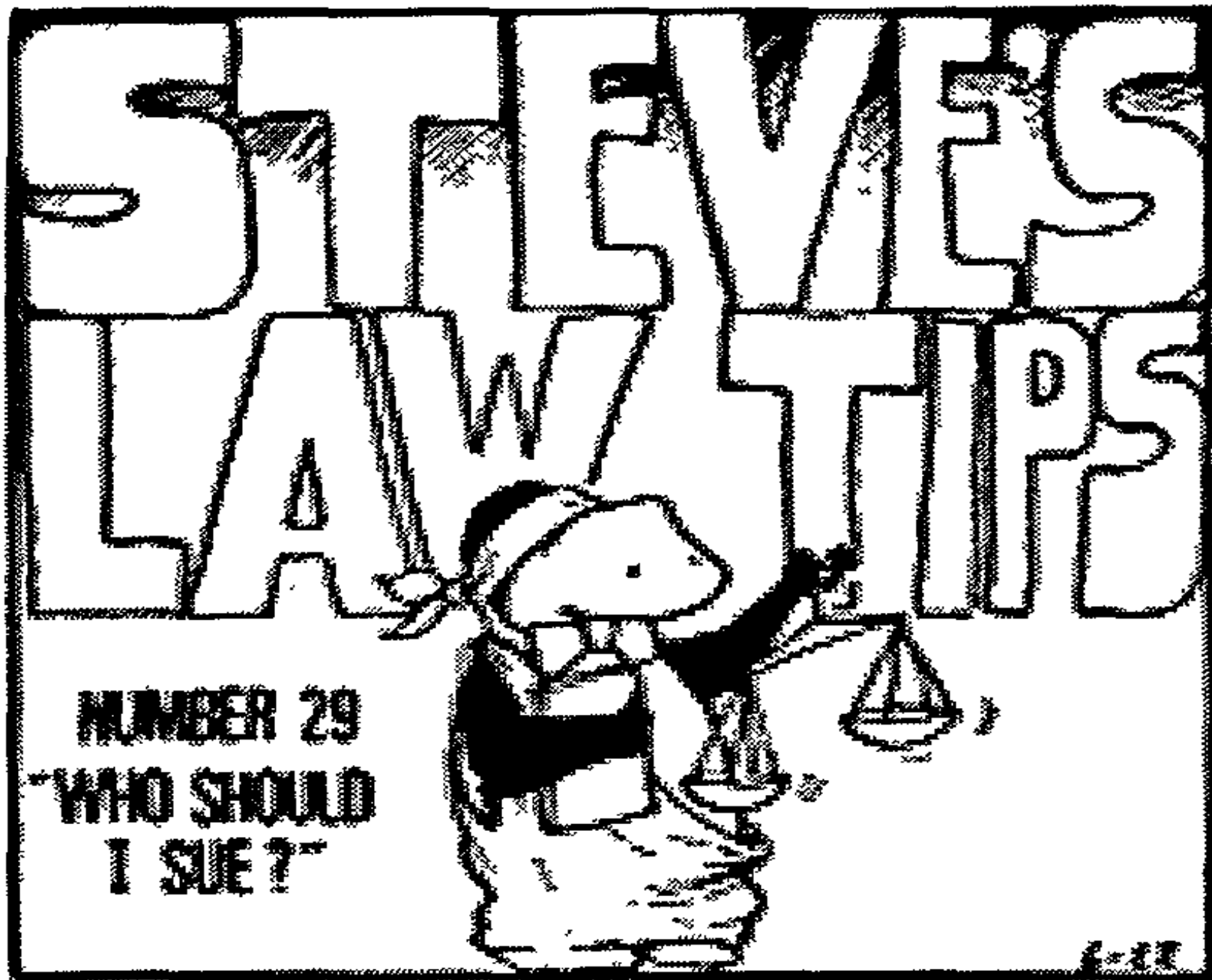


Past Webinars

- http://www.fredlaw.com/practices__industries/health_care/health_law_webinars/
- A link is included in your email.
- If you miss a webinar, it should be posted within a few days.

Why Do Peer Review?

Bloom County teaches a lot about life.



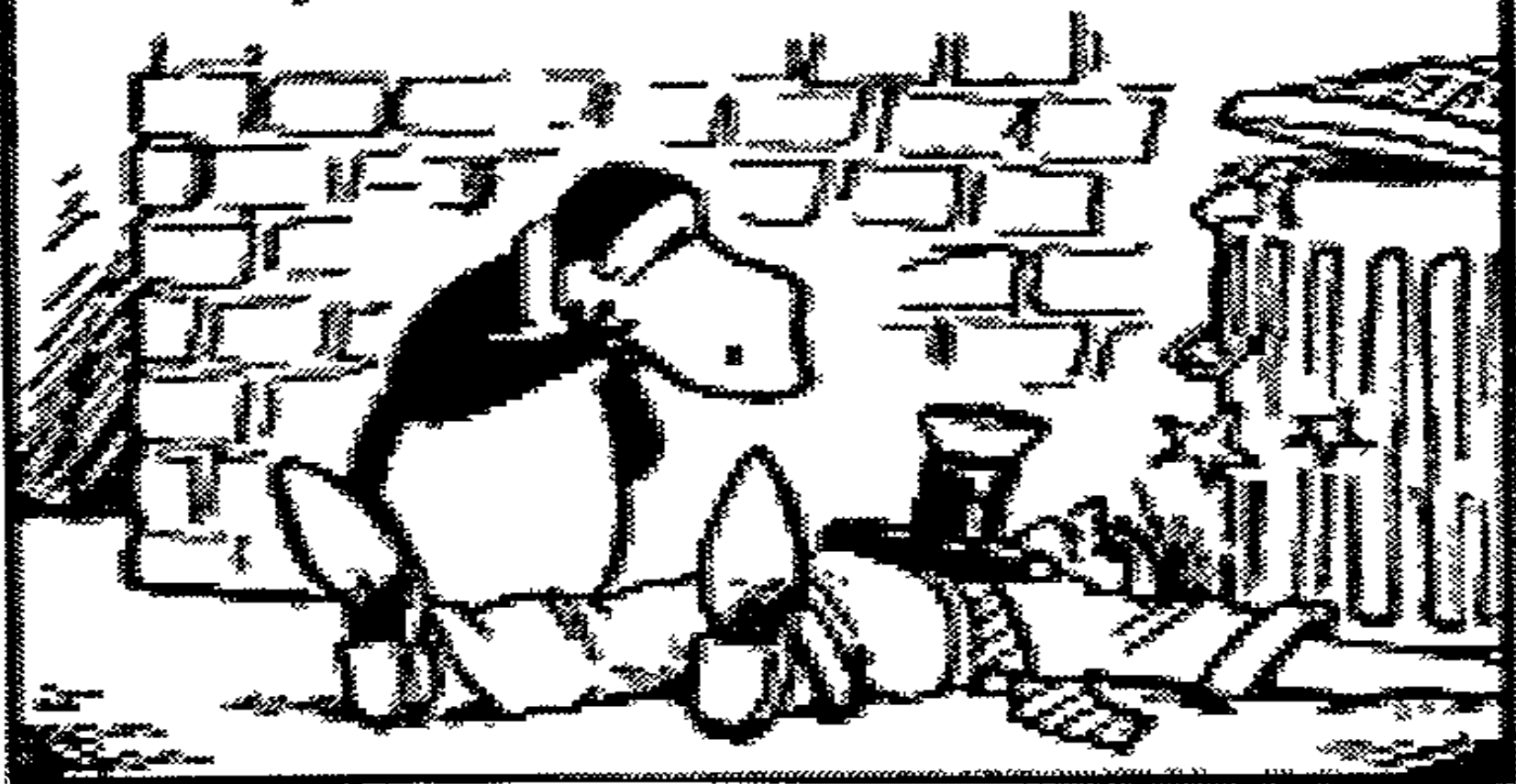
NUMBER 29

WHO SHOULD
I SUE?

GOOD MORNING. TOMMY'S
TIP IS ON EFFECTIVE SWING.
LET'S LOOK AT MY OWN
RECENT EXAMPLE...



ON APRIL 17TH, THE PLAINTIFF, ME, WAS BRUTALLY ATTACKED BY ACTOR SEAN PENN AFTER I ACCIDENTALLY AND NOT ON PURPOSE SNAPPED A PICTURE OF HIM. THE QUESTION: WHO SHOULD I SUE?



...SEAN?



NO. JAMES LOVE FAMOUS PEOPLE. PLUS, HE'D PROBABLY RETURN TO BEAT UP THE PLAINTIFF AGAIN. NEVER SUE PSYCHOPATHIC CELEBRITIES.

SEAN'S
WIFE?



NO. TRUE, LIVING WITH MADONNA MIGHT
MAKE MOST ANYONE IRRITABLE, BUT PROVING
LIABILITY WOULD BE DIFFICULT. PLUS, SHE
TOO MIGHT RETURN TO BEAT UP THE PLAINTIFF.



..NO. ALTHOUGH HE GOT THE PLAINTIFF
INTO THIS MESS, HE'S ALSO DEAD BROKE.
NEVER, NEVER, NEVER SUE FOUR PEOPLE.

...THE NIKOLTA
CAMERA CO.?



YES! A MAJOR CORPORATION WITH GOBS
OF LIQUID CASH, IT WAS CRIMINALLY NEG-
LIGENT IN NOT PUTTING STICKERS ON THEIR
CAMERAS WHICH READ: "WARNING: PHYSICAL
INJURY MAY RESULT FROM PHOTOGRAPHING
PSYCHOPATHIC HOLLYWOOD HOTHEADS."

I PLAN
TO ASK FOR
\$10 MILLION...

AMERICA!
LAND OF THE
LAWSUIT!!
GOD BLESS HER!!



© 1994

Why Do Peer Review?

- Bloom County teaches a lot about life.
- To whom do you owe duties?
 - Patients.
 - Your professionals.
 - OTHER patients/the community?
 - Hospitals/Clinics you work with?
 - Hospitals/Clinics entering relationships with one of your former doctors?
 - Insurers?

Why Do Peer Review?

- Quality is focus.
- It may facilitate some awkward but necessary conversations.
- May improve your employment review process.
- Risk management.

What Is the Peer Review “Privilege?”

- Critical self-examination privilege/5th Amendment.
- Federal law limits claims by the person reviewed.
- State laws generally focus on claims by patients.
- Note that there are strict legal technicalities. State law is very, very important, and varies widely. It is often not entirely logical, nor drafted clearly.
- Note it may be a PROTECTION, not a PRIVILEGE. It may be ILLEGAL to release info.

What Is the Peer Review “~~Privilege~~” Protection?”

- Focus is on legal protection, not “social protection.”
- The focus on quality, including non-payment for adverse events, will likely increase the value of candid discussion.

Clinics vs. Hospitals

- Hospitals **MUST** have a process. Clinics **SHOULD** have a process.
- Hospitals have bylaws and Joint Commission obligations.

Health Care Quality Improvement Act

- A federal statute.
- Focuses on antitrust/anticompetitive concerns.

“Health Care Entity” under HCQIA

- A **hospital** that is licensed to provide health care services by the State in which it is located,
- An **entity** (including a health maintenance organization or group medical practice) **that provides health care services and that follows a formal peer review process** for the purpose of furthering quality health care (as determined under regulations of the Secretary), and

“Health Care Entity” under HCQIA

- A professional society (or committee thereof) of physicians or other licensed health care practitioners that follows a formal peer review process for the purpose of furthering quality health care (as determined under regulations of the Secretary), as long as the society has not within the previous 5 years, been found by FTC/court to have engaged in any anti-competitive practice restricting the practice of licensed health care practitioners.

- 42 USC 11151

“Formal Process”

- The regulations (45 CFR 60.3) define *Formal peer review process* as “the conduct of professional review activities through formally adopted written procedures which provide for adequate notice and an opportunity for a hearing.
- Clinics must decide if they want a hearing.

Health Care Quality Improvement Act

If a professional review action (as defined on slides 22-23) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section—

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action, shall not be liable

Health Care Quality Improvement Act

in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. and the Civil Rights Acts, 42 U.S.C. 1981, et seq. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 15c of title 15, where such an action is otherwise authorized.

“Action” under HCQIA

A “review action” is based on competence/professional conduct but excludes:

- the physician’s association, or lack of association, with a professional society or association,
- the physician’s fees or the physician’s advertising or engaging in other competitive acts intended to solicit or retain business,
- the physician’s participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis,

“Action” under HCQIA

- a physician’s association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional, or
- any other matter that does not relate to the competence or professional conduct of a physician.

42 U.S. Code § 11151(9)

Protection for Those Providing Information to Professional Review Bodies

Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is **false** and **the person** providing it **knew** that such information was false.

42 USC 11111(a)(2)

Protection for Those Providing Information to Professional Review Bodies

In general For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken—

- (1) in the reasonable belief that the action was in the furtherance of quality health care,
- (2) after a reasonable effort to obtain the facts of the matter,
- (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

Protection for Those Providing Information to Professional Review Bodies

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be **presumed to have met the preceding standards** necessary for the protection set out in section 11111(a) of this title **unless** the presumption is **rebutted by a preponderance of the evidence.**

State Laws

- Prevent reviews from being discovered by patients.
- Typically have highly technical requirements.
- Generally protect only deliberations and documents created BY the process.
- Generally allow the reviewed practitioner access to the data.
- May or may not allow Medical Boards access to data. KS, WI, SD explicitly allow Bd access.

This Is Hard

Nebraska defines a peer review committee as “UR committee, QA committee, performance improvement comm., tissue comm., or other committee established **by the governing board of a facility** which is a health care provider that does either:

1) conducts professional credentialing or quality review activities involving the competence of, professional conduct of or quality of care provided by a health care provider, including both an individual who provides health care and an entity that provides health care....”

Neb Rev. Stat. 71-7910

This Is Hard

- Nebraska defines a health care provider as:
 - a facility licensed under the Health Care Facility Licensure Act
 - A health care professional licensed under the Uniform Credentialing Act
 - An organization or association of health care professionals licensed under the Uniform Credentialing Act.
 - Neb Rev. Stat. 71-7907

What is a “facility” in NE?

Health care facility, defined. Health care facility means an ambulatory surgical center, an assisted-living facility, a center or group home for the developmentally disabled, a critical access hospital, a general acute hospital, **a health clinic**, a hospital, an intermediate care facility, an intermediate care facility for the mentally retarded, a long-term care hospital, a mental health center, a nursing facility, a pharmacy, a psychiatric or mental hospital, a public health clinic, a rehabilitation hospital, a skilled nursing facility, or a substance abuse treatment center.

Neb Rev. Stat. 71-413.

It gets even harder

- Health clinic does not include (a) a health care practitioner facility (i) unless such facility is an ambulatory surgical center, (ii) unless ten or more abortions, as defined in subdivision (1) of section 28-326, are performed during any one calendar week at such facility, or (iii) unless hemodialysis or labor and delivery services are provided at such Facility.....
 - Neb Rev. Stat. 71-416

Choose Your Slide Title:

Suggestions include: “We’re not in Kansas Anymore” or “You’ve Now Entered the Twilight Zone.”

- Health care practitioner facility means the residence, office, or clinic of a practitioner or group of practitioners credentialed under the Uniform Credentialing Act or any distinct part of such residence, office, or clinic.
 - Neb Rev. Stat. 71-414

SD Limits Clinic Peer Review to Physicians

Peer review committee defined. For the purposes of §§ 36-4-25, 36-4-26.1 and 36-4-43, a peer review committee is one or more persons acting as any committee of a state or local professional association or society, any committee of a licensed health care facility or the medical staff of a licensed health care facility, **or any committee comprised of physicians within a medical care foundation, health maintenance organization, preferred provider organization, independent practice association, group medical practice, provider**

SD Limits Clinic Peer Review to Physicians

sponsored organization, or any other organization of physicians formed pursuant to state or federal law, that engages in peer review activity. **For the purposes of this section, a peer review committee is also one or more persons acting as an administrative or medical committee, department, section, board of directors, shareholder or corporate member, or audit group, including the medical audit committee, of a licensed health care facility.**

S.D. Codified Laws 36-4-42.

MN a Bit Different

"Review organization" means a nonprofit organization acting according to clause (l), a committee as defined under section 144E.32, subdivision 2, or a committee **whose membership is limited to professionals, administrative staff, and consumer directors**, except where otherwise provided for by state or federal law, and which is established by one or more of the following: a hospital, **a clinic**, a nursing home, an ambulance service or first responder service regulated under chapter 144E, one or more state or local associations of professionals, an organization of professionals from a particular area or medical institution, a health maintenance organization as defined in chapter 62D,to gather and review information relating to the care and treatment of patients for the purposes of:

Minn. Stat. Ann. 145.61 Subd. 5

Iowa: How long have you been a “member?”

5. *“Peer review committee”* means one or more persons acting in a peer review capacity who also serve as an officer, director, trustee, agent, or member of any of the following:...

c. The medical staff of any licensed hospital....

f. A health care entity, including but not limited to a group medical practice, that provides health care services and follows a formal peer review process for the purpose of furthering quality health care.

Peer Review Investigations

- Do you wait until there is a problem, or do you do them randomly?
- When do you use a summary suspension?
- What is an “investigation?” Resignation during an “investigation” may be reportable.
- Can you use peer review for behavioral issues?
- Can you use peer review for your hiring process? For evaluating a new employee?

Peer Review Investigations

- When do you tell the subject?
- Who should do the investigation?
 - State law issues (must it be a licensee?)
 - Competitors/rivals?
 - Subject matter expertise/specialty?

Potential Reviewers

- Another member of the same group.
- Former partner.
 - Bad Break up?
 - The respected founder of the group.
- A member of the same system in another state?
- CPEP or a similar program?

Peer Review Investigations

- What do you tell witnesses?
- When do you involve counsel?
 - EARLY!! This sounds self serving, but consider the “lost hearing.” Use CAREFUL counsel.
- Can the subject involve counsel?
 - One theory: “its not a hearing” and “have free flowing info.
 - Competing theory: fear stymies communication. Bend over backwards to be fair.

Wisconsin Describes “Good Faith”

In determining whether a member of the reviewing or evaluating organization or the medical director has acted in good faith under sub. (1g), the court shall consider whether the member or medical director has sought to prevent the health care provider or facility and its counsel from examining the documents and records used in the review or evaluation,

Wisconsin Describes “Good Faith”

from presenting witnesses, establishing pertinent facts and circumstances, questioning or refuting testimony and evidence, confronting and cross-examining adverse witnesses or from receiving a copy of the final report or recommendation of the reviewing organization or medical director.

Wis. Stat. Ann 146.37(2)

Can Peer Review Committees Share Info?

- A state law question.
- MN, 145.61 subd 5(p); KS, 65-4915(e), ND 23-34-01(5)(d) clearly allow sharing.
- WI allows the person authorizing the review to share with the subject's employer. 146.38(3m)(b)(1).
- Best done committee to committee, not person to person.

Incident Reports

- Some states explicitly protect them:
 - WI -146.38
 - NE -71-7913
- In many states, it is unclear.
- Best argument if form created by, and sent to, the peer review committee.
- Treat medical incidents different from slip and falls.

Review Your Review

- Are you being fair?
- Are you being consistent?
 - Have you treated other practitioners differently?
 - Are your actions in the review consistent? (Hold that thought....)

Review Your Review

- Reporting Obligations
 - State Board
 - NPDB
 - Insurers/ACOs
 - Hospitals (more likely for the Dr. than group.)
- Foolish consistency vs. foolish inconsistency.

Peer Review Quirks

- Presence of a lawyer may, in some states, render the activity non-peer review.
- A risk manager having records wasn't peer review in Iowa. ***Orgovanyi v. Henry County, et.al.***, No. 0-793 (Iowa Ct. App. 2010)

Peer Review Quirks

- ***Stetson v. Silverman*, 278 Neb. 389 (Neb. 2009)** – A defendant doctor in a medical malpractice action, sought to prevent the plaintiff from obtaining records from his disciplinary proceeding. The court held that the doctor had no standing to assert privilege under Neb. Rev. Stat. § 38-1,106 because the doctor was the subject of the investigation and not the holder of the privilege.
- Nebraska law was subsequently changed.

Peer Review Quirks

- ***Phelps v. PIC*, 282 Wis.2d 69, 99 (2005), rev'd on other grounds, 319 Wis.2d 1(2009)** – The court held that the peer review privilege did not apply to a letter between chairpersons describing concerns with a 1st year resident because (1) the chairperson's investigation described in the letter was not initiated at or performed through the hospital's peer review committee and (2) the intent of the letter was for the narrow purpose of reporting problems and concerns about the resident and was not intended for the broader goal of improving the quality of health care at the hospital.
- Wisconsin law subsequently changed, but.....

Who do you tell if...

- You conclude unnecessary services were provided?
 - Patients?
 - Payors?
 - Future employers?
 - The Board?

QUESTIONS?



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