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Legal Opinion

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EXISTING LAW PROTECTS ALL HOSPITAL ADVOCATES FOR BETTER, SAFER, AND LESS COSTLY PATIENT CARE

As our members know too well, physicians and nurses who speak up for better quality, safer and less expensive patient care typically become victims of a retaliatory healthcare culture. Our system protects bad practitioners and medical errors because that combination increases hospital revenue. Because hospital peer review controls the process, the ruling cliques that run hospitals have protected high revenue physicians and their friends, while trashing “outies,” reformers, and patient advocates.

Doctors who attempt to improve care, cut costs, or are seen as economic competitors, can be "sham peer reviewed" and falsely reported to the National Practitioner Data Bank, ending their hospital or medical careers. Courts have interpreted due process standards in the Health Care Quality Improvement Act (HCQIA) so favorably to peer reviewers that shammed physicians seldom obtain relief, even when the courts identify bad faith by the hospital and the peer reviewers (Mathews v. Lancaster Gen. Hospital, 87 F.3d 624, 635 (3rd Cir. 1996).

SSI has determined that not only have court decisions perverted HCQIA's purpose (see dissent in Austin v. McNamara, 979 F.2d 728, 739-743 (9th Cir. 1992) [Congress intended "to encourage good faith professional review activities. . ."]), but courts and healthcare attorneys have overlooked important state and federal laws that should have been decisive in every case that involved physicians and nursing staff.

Since 1993, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO, pronounced JAY-CO) has required all accredited hospitals to ensure due process and overall fairness to peer reviewed physicians. Courts, however, mistakenly focused on HCQIA, ignoring JCAHO's prescribed standards and procedures – including continuing updates – out of failure “to connect the dots.”

Last July, Congress connected those dots and determined that JCAHO's hospital and medical staff appointment and peer review standards are the law that governs. That was done by a section in the Medicare bill, which passed despite a Presidential veto. In the words of the Joint Commission's July 16, 2008 press release:

. . . [T]he provision removes the unique deeming authority that the Medicare statute has specifically given the Joint Commission's hospital accreditation program since 1965.

Look for SSI's future reports that will explain why and how the Joint Commission's standards and procedures for accreditation, including the constant updates that the Commission has been authorized to promulgate and enforce, should have been integrated into the due process and related standards of HCQIA from the moment it was effective.