# South Dakota's Peer Review Law

## What does South Dakota's Peer Review Law mean for physician practices?

South Dakota's peer review law provides legal protections for peer review committees. This includes any committee of a licensed healthcare facility or any committee comprised of physicians within a group medical practice, or any other organization of physicians formed pursuant to state or federal law that engages in peer review activity.[1] Many physician practices and clinics, however, don't appreciate the benefits of instituting peer review within their organizations.

## Frequently Asked Questions

### Why is peer review important?

Peer review is ultimately a way to protect patients and improve the quality of patient care. Under South Dakota's peer review law, "peer review activity" is the procedure by which peer review committees monitor, evaluate, and recommend actions to improve the delivery and quality of services within their respective facilities, agencies, and professions, including recommendations, consideration of recommendations, actions with regard to recommendations, and implementation of actions. Peer review activity and acts or proceedings undertaken or performed within the scope of the functions of a peer review committee include:

- Matters affecting membership of a health professional on the staff of a healthcare facility or agency,
- The grant, delineation, renewal, denial, modification, limitation, or suspension of clinical privileges to provide healthcare services at a licensed healthcare facility,
- Matters affecting employment and terms of employment of a health professional by a health maintenance organization, preferred provider organization, independent practice association, or any other organization of physicians formed pursuant to state or federal law,
- Matters affecting the membership and terms of membership in a health professional association, including decisions to suspend membership privileges, expel from membership, reprimand, or censure a member, or other disciplinary actions,
- Review and evaluation of qualifications, competency, character, experience, activities, conduct, or performance of any health professional, including the medical residents of a healthcare facility; and
- Review of the quality, type, or necessity of services provided by one or more health professionals or medical residents, individually or as a statistically significant group, or both.[2]

Having a formal peer review policy and process in place provides legal protection for peer review communications. The proceedings, records, reports, statements, minutes, or any other data whatsoever, of any peer review committee relating to peer review activities are not subject to discovery or disclosure in civil suits or under any other provision of law and are not admissible as evidence in any action of any kind in any court or arbitration forum, except as provided. No person in attendance at any meeting of any peer review committee is required to testify as to what transpired at such meeting. The prohibition relating to the discovery of evidence doesn't apply to deny a physician access to or use of information upon which a decision regarding the person's staff privileges or employment was based.[3]

Peer review protections don't apply to observations made at the time of treatment by a healthcare professional present during the patient's treatment or to patient records prepared during the treatment and care rendered to a patient who is a party to an action or proceeding concerning the care and treatment of the patient. No member of a peer review committee,

[1] S.D. Codified Laws § 36-4-42.
[2] S.D. Codified Laws § 36-4-43.
[3] S.D. Codified Laws § 36-4-26.1

board of directors or group covered by the peer review privilege who participated in deliberations relating to peer review activities involving the subject matter of the action, may testify as an expert witness for any party in any action for personal injury or wrongful death, the subject matter of which is the care and treatment of the patient. Notwithstanding participation in peer review activities, a healthcare professional observing or participating in the patient's treatment and care may testify as a fact or expert witness concerning that treatment and care but may not be required to testify as to anything protected by the peer review privilege.[4]

While most of us are familiar with peer review in the hospital setting, other healthcare entities, including a physician practice or clinic, can conduct professional peer review under the law. But many practices don't take advantage of the legal protections under the peer review law. When practices are asked if they discuss cases regularly, have morbidity and mortality conferences, receive patient complaints, or have experience with a physician who may be impaired, often the answer is yes. But when asked whether a practice has a formal peer review process with policies in place to address these activities, often the answer is no.

Without the legal protections afforded by having these policies and procedures in place, conversations, emails, and text messages about a patient's care, a patient complaint, or a provider's professional conduct are not protected under the peer review privilege. They may need to be disclosed in a subsequent lawsuit involving a patient's care.

## What does peer review involve?

To conduct peer review pursuant to federal and state law, a physician practice or clinic must adopt and adhere to written policies and procedures governing its peer review committee.[5] Copic has developed a peer review checklist of what is required under South Dakota law as well as template peer review policies and procedures to assist practices in establishing their peer review programs. These template policies should be reviewed by an attorney who can add information specific to the practice.

The federal HCQIA law applies to both hospitals and group medical practices that provide healthcare services and follow a formal peer review process for the purpose of furthering quality healthcare.[6]

Federal HCQIA grants immunity from damages liability with respect to actions taken by professional review bodies, to the review body, any member or staff to the body, contractors, and participants, provided the action was taken:

- In the reasonable belief that it was in the furtherance of quality healthcare,
- After making a reasonable effort to obtain the facts of the matter,
- After adequate notice and hearing procedures are afforded to the physician involved, and
- In the reasonable belief that the action was warranted by the facts after a reasonable effort to obtain facts and after following procedures that are fair to the physician under the circumstances.[7]

Any person who provides information to a professional review body regarding the competence or professional conduct of a physician is not liable in damages under any state or federal law, as long as that person does not knowingly provide false information.[8] South Dakota's peer review protections are very similar to HCQIA. Under South Dakota law, there is no monetary liability on the part of, and no cause of action for damages may arise against, any member of a duly appointed peer review committee engaging in peer review activity comprised of licensed physicians, or against any duly appointed consultant to a peer review committee or to the medical staff or the governing board of a licensed healthcare facility for any act or proceeding undertaken or performed within the scope of the functions of the committee, if the committee member or consultant acts without malice, has made a reasonable effort to obtain the facts of the matter under consideration, and acts in reasonable belief that the action taken is warranted by those facts.[9]

Ideally, medical practices will address any issues through peer review before they reach the stage where they

[4] S.D. Codified Laws § 36-4-26.2.
[5] 42 U.S.C. § 11112; 45 C.F.R.§ 60.3; S.D. Codified Laws § 36-4-43.
[6] 42 U.S.C. 11151(4).
[7] 42 U.S.C. § 11112(a).
[8] 42 U.S.C. § 11111(a)(2).
[9] S.D. Codified Laws § 36-4-25.

determine that a physician is unsafe to practice. In South Dakota, a licensee is required to report to the medical board any of the acts included as unprofessional conduct.[10] "Unprofessional conduct" includes habits of intemperance or drug addiction that affect the licensee's practice of the profession; sustaining any physical or mental disability which renders the further practice of a licensee's profession dangerous; and any practice or conduct which tends to constitute a danger to the health, welfare, or safety of the public or patients or engaging in conduct which is unbecoming a person licensed to practice medicine.[11] Under the ethical standards and conduct regulations, a physician must uphold the standards of professionalism and "strive to report physicians deficient in character or competence" to appropriate entities.[12]

Peer review allows a more full and fair assessment of a provider, and an opportunity for them to address any educational deficiencies or behavioral health issues so they can practice safely and don't need to be reported to the medical board. South Dakota law authorizes a physician wellness program and health professionals assistance program which is a confidential program designed to monitor and manage the treatment and continuing care of a health professional who may be unable to practice with reasonable skill or safety, or whose practice poses a risk to the public, if the professional's mental health or substance use related issue or disorder is not appropriately managed.[13]

While it is very unlikely that a provider's care will rise to the level of reporting an adverse professional review action to the medical board, a practice's policy needs to address the due process requirements under federal HCQIA and South Dakota's peer review law.[14] This allows for a fair hearing for the provider if a peer review committee recommends that the practice's governing board take an adverse professional review action.

The practice will need to identify what peer review activities fall within the policy. Some examples include the review of

- patient safety incidents, including near-misses
- unscheduled patient returns
- patient complaints
- cases identified through screening by quality indicators
- reported unprofessional conduct
- concerns regarding a possible impaired provider

## Implementing Peer Review at Your Medical Practice

Practices that have successfully utilized peer review and had positive experiences share common themes. Foremost, these practices have developed a culture of understanding that the purpose of peer review is not to hinder or punish practitioners. Instead, they believe it allows them to continually improve the quality of care, treatment, and services provided as well as protect the safety of the patients they treat and ensure the best possible outcomes.

When implementing peer review, it can be important to dispel a common misunderstanding among physicians that all reviews of a physician will be reported to the medical board. The reality is that they are reported only if:

- the findings of an investigation indicate that a physician lacks competence, or has exhibited inappropriate professional conduct **AND**
- the professional review committee recommends an action to adversely affect the person's membership or privileges with the practice **AND**
- after a fair hearing process, the governing board takes a final professional review action that adversely affects the clinical privileges of the physician for more than 30 days or accepts the surrender of clinical privileges while the physician is under investigation or in return for not conducting such an investigation or proceeding.[15]

Recommendations for additional education or treatment for behavioral health issues where there is no final adverse action would not need to be reported. Knowing this enhances the participation of clinicians. An example of how peer review facilitated a practice's improving its patient safety follows.

[10] S.D. Codified Laws § 36-4-30.1.
[11] S.D. Codified Laws § 36-4-30.
[12] S.D. Admin. R. 20:47:08:01.
[13] S.D. Codified Laws § 36-2A-1(2); Health Professional Assistance Program at https://www.mwhms.com/hpap; S.D. Codified Laws § 36-2A-18; SD Physician Well-Being Program at https://www.mwhms.com/pwbp.
[14] 42 USC § 11111(a)(1); 42 USC § 11112(a); S.D. Codified Laws § 36-4-25.
[15] 42 U.S.C. § 11133(a).

## Case Study

*A middle-aged patient complaining of persistent hacking cough a week after recovering from influenza was worked into a busy clinician's schedule during the afternoon. The patient was evaluated and treated with a codeine cough suppressant and told to return if symptoms worsened. Just five hours later, the patient felt much worse and went to the emergency department and was diagnosed with bi-lobar pneumonia and admitted to the ICU due to hypoxia, hypotension, and presumed sepsis.*

*The peer review committee at the clinic reviewed the medical care and noted that vital signs had not been performed at the time of the clinic visit. Although there is no way to know definitively whether the vital signs would have been abnormal, they presumably would have been and could have provided a clue that the patient was more severely ill than he appeared. The peer committee investigated further and learned that vital signs had not been performed on nearly half of acute visits not just for this doctor, but clinic wide. They discovered a workflow challenge for acute visits that made it difficult for medical assistants to check vital signs and this system failure was subsequently corrected. Now, nearly 100% of acute visits to the clinic have vital signs checked, which almost certainly has improved patient safety and outcomes.*

In this case, and in many other examples, peer review protections have helped physician practices and clinics, with physicians' buy-in and assistance, identify and address problems to prevent adverse patient outcomes. The medical literature is rich with examples where proactive peer review, such as in the case above, and a culture of patient safety has resulted in a reduction in medical liability claims.

Many practices have found that the protections under peer review promote a culture of patient safety and continuous improvement, and when the practices work to educate their practitioners about how and why the peer review process works, they can help facilitate use of this valuable tool.