

# Advanced Credentialing and Privileging Retreat

TACKLING TODAY'S TOUGHEST  
CREDENTIALING CHALLENGES

Day 1

Greeley | **MEDICAL STAFF INSTITUTE**  
HCPro

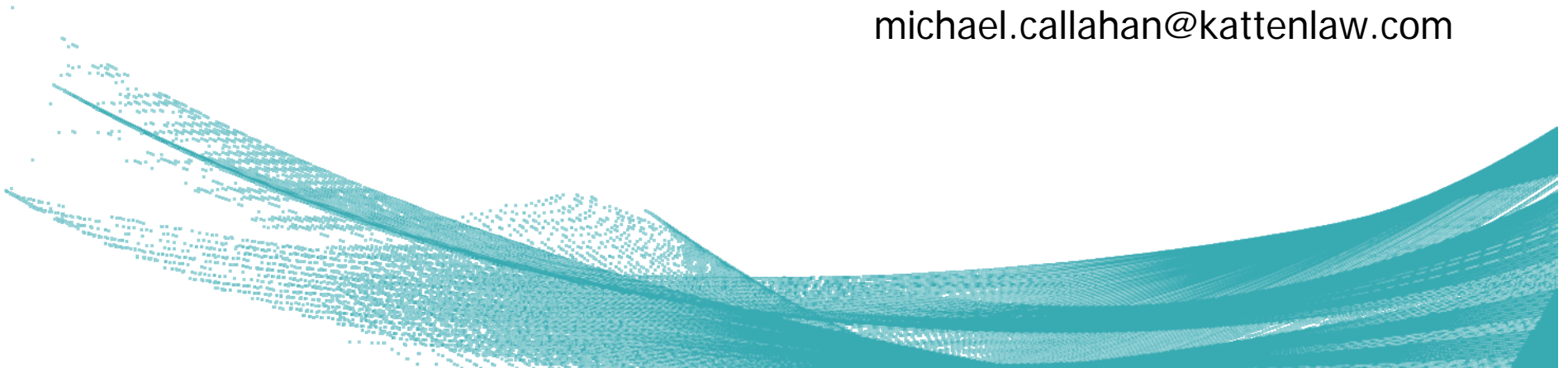


# Significant Cases and Developments

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Lessons learned

Michael R. Callahan  
Katten Muchin Rosenman LLP  
525 W. Monroe • Chicago, Illinois  
312.902.5634  
[michael.callahan@kattenlaw.com](mailto:michael.callahan@kattenlaw.com)



# Data Bank Renders Opinion on Standards for Required Reports

## Question Posed:

- Is a hospital's decision to terminate the membership and clinical privileges of a medical staff member reportable to the Data Bank if based on physician's failure to make required disclosure of partial loss of liability insurance and several misrepresentations in his reappointment application, even though physician had no identified quality of care or behavioral problems at the hospital?



# Factual Background

- Physician in question recently was not reappointed based on his second failure to advise the hospital that he had a change in his insurance coverage.
  - In 2002, he completely lost insurance as a result of a significant number of lawsuits but failed to notify hospital until 3 months after the fact even though he continued to perform surgery.
  - In February, 2006, he negotiated a \$400,000 reduction in his premium conditioned on giving up any coverage for back claims filed between 2/06 and 2/07; payment of a \$100,000 deductible and waiving his right to agree to any settlements.



# Factual Background

- The gap in coverage was only discovered at time of physician's reappointment when hospital found out from another hospital, which was a co-defendant in a malpractice action filed during the gap period, that physician had no coverage.
- After reappointment was denied, he applied to another area hospital for privileges. Physician already was on staff at another hospital in the system.

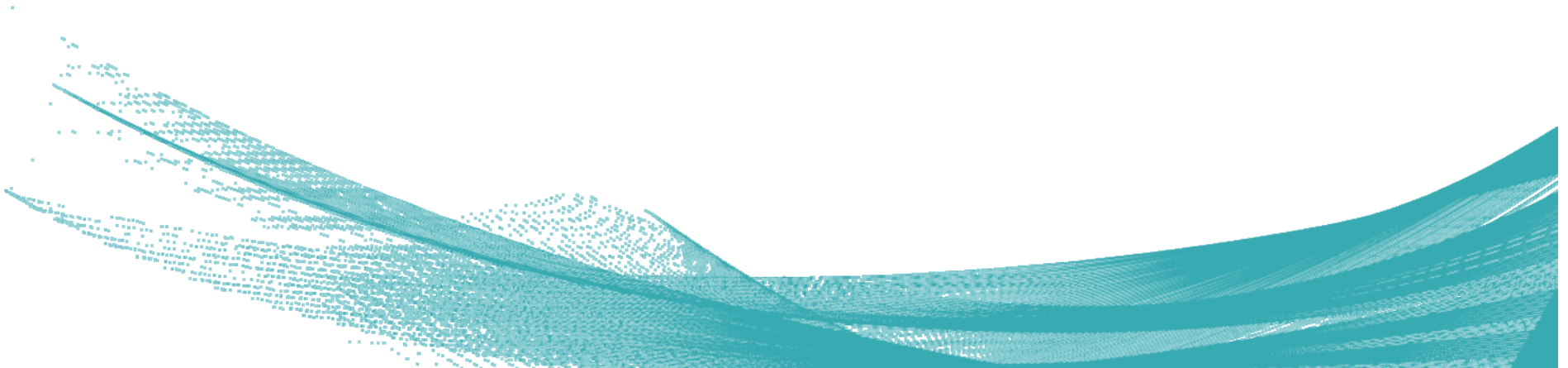


# Factual Background

- A review of the physician's appointment application at the new hospital and this reappointment application at the sister facility revealed the following:
  - Said that he resigned from previous hospital when in fact he was not reappointed. Never gave reason why.
  - Did not disclose insurance gap in coverage for back cases
  - Did not disclose that he had resigned from several hospitals
  - Never reported that he had been automatically suspended for loss of insurance
  - Claimed he was the sole defendant in the insurance gap back case and did not give the case # which made it more difficult for hospital to expose his lack of coverage
  - Never disclosed that he was under investigation in 2006 by the State Licensing Board

# Factual Background

- Letter was sent to NPDB on June 17, 2009 requesting an opinion as to whether termination of privileges and membership for the reasons previously cited was reportable

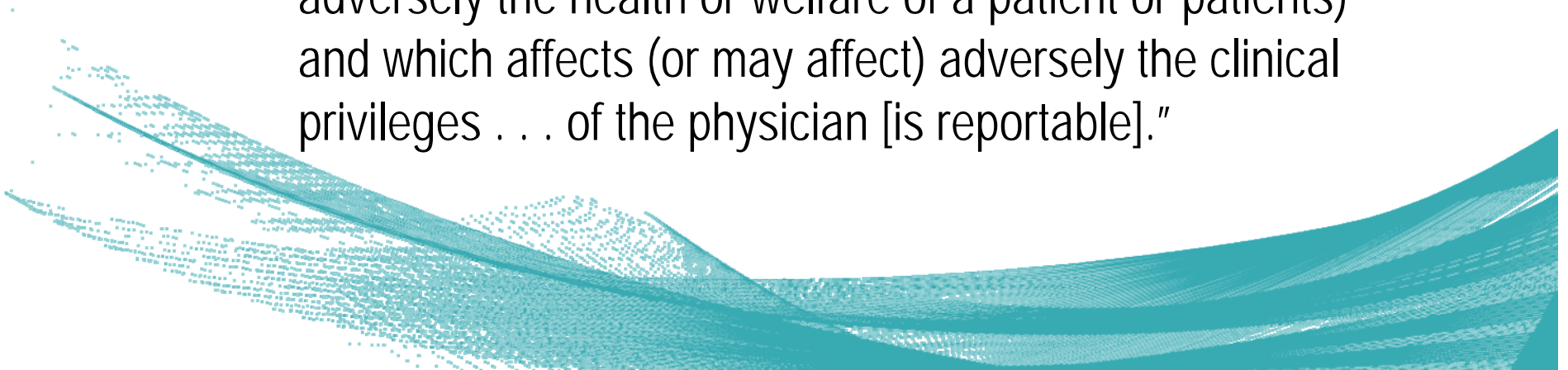


# Factual Background

- On July 3, 2009, Darryl Gray, Director of the Division of Practitioner Data Banks, rendered the following opinion:

- Reaffirmed that:

“An action or recommendation of a professional review body which is taken or made in the conduct of a professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients) and which affects (or may affect) adversely the clinical privileges . . . of the physician [is reportable].”





# Factual Background

- This “standard is applied broadly.”
- “The definition reaches conduct that not only adversely affects patients, but also actions that have the potential for ‘adversely affecting patients’.”
- “The standard is not whether quality of care issues have been raised about a particular provider.”
- “The adverse credentialing decision is reportable to the NPDB if it is in effect for more than 30 days.”

- This means termination, suspension, summary suspensions, reductions in privileges and mandatory consultations requiring prior approval.



# Factual Background

- “The NPDB views intentional misrepresentations to the hospital body making determinations about clinical competence of providers as almost per se as having the potential to adversely affect the health or welfare of a patient.”
- Other comment in letter:
  - “Failure to complete medical records generally is related to a physician’s professional competence or conduct and almost always has the potential to adversely affect a patient’s health or welfare.”
- Staff advised that the Guidebook will be updated by end of the year.

See Attachments 1, 2 and 3



# Lessons Learned

- Standard for reporting is whether conduct in question "affects or could affect" adversely the health or welfare of patients
- Actual adverse harm need not be shown
- Purposeful failure to disclose pertinent information which could affect decision on whether or not to grant membership/privileges is reportable
- Repeated failures to complete records, aside from final physician signature, should be reported if suspension exceeds 30 days



# Liu vs. Board of Trustees of the University of Alabama

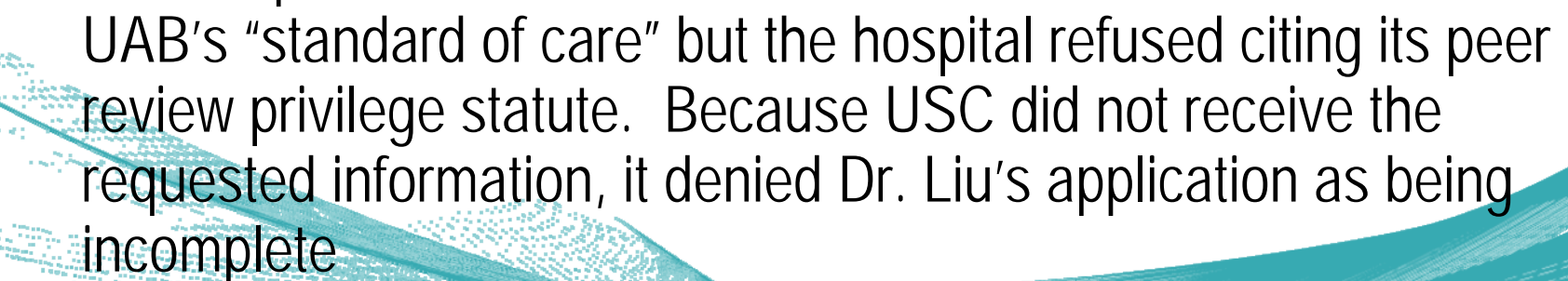
## **Eleventh Circuit Finds Refusal to Provide Peer Review Information Was Constitutional, Does Not Implicate HCQIA**

### Factual Background

- Plaintiff was a cardiologist and a tenured Associate Professor of Medicine at the University of Alabama, Birmingham ("UAB")
- In 2001, his clinical privileges were summarily suspended and a peer review investigation of his clinical privileges was initiated. Dr. Liu submitted his resignation before the investigation was completed and UAB filed a Data Bank report because he resigned during the pendency of this investigation.



# Factual Background

- After his resignation, Dr. Liu applied to the University of Southern California Hospital ("USC"). USC requested that UAB forward certain peer review information so that it could properly evaluate the NPDB report
  - A recommendation was provided indicating that Dr. Liu was placed on probation because his "performed procedures, planned procedures, certain aspects of medical care, and his hospital chart documentation were not within the standard of care at our institution."
  - USC requested additional information in order to determine UAB's "standard of care" but the hospital refused citing its peer review privilege statute. Because USC did not receive the requested information, it denied Dr. Liu's application as being incomplete
- 

# Factual Background

- Liu was eventually granted clinical privileges at several other Los Angeles hospitals
- Liu filed suit against UAB arguing that its refusal to provide peer review information to USC (1) obstructed the “essential purpose” of HCQIA; and (2) violated his 14<sup>th</sup> amendment right to substantive and procedural due process and to equal protection by interfering with his right to pursue his chosen profession
- The trial court dismissed all claims



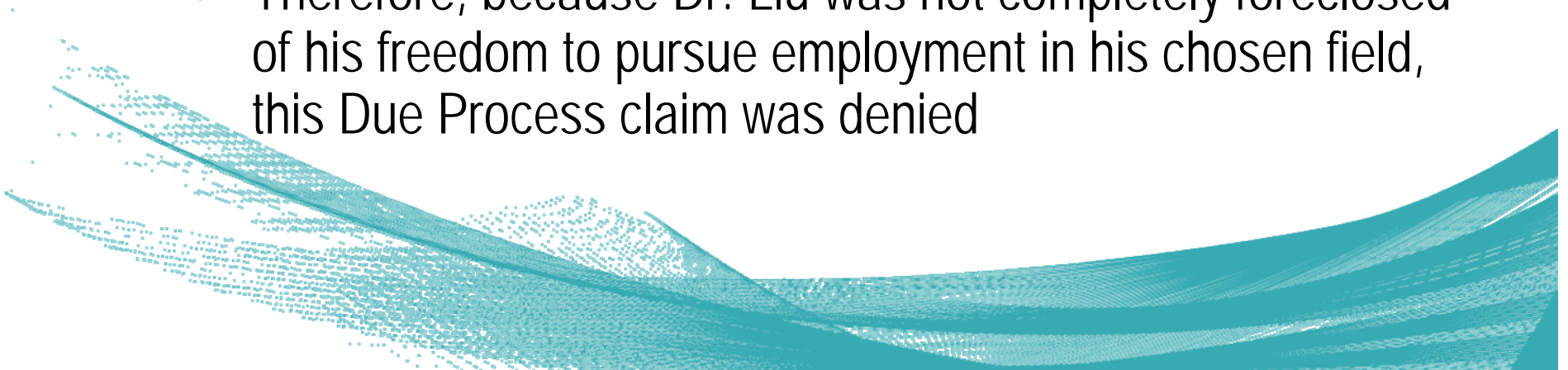
# Appellate Court Decision

- Dr. Liu argued that reliance on Alabama's peer review statute as a basis for not responding to USC's request for additional peer review information undermined the Supremacy Clause of the Constitution in that it thwarted HCQIA's purpose of preventing the movement from state to state by incompetent physicians, as well as to facilitate the frank exchange of peer review information without civil reprisal
- The court disagreed that the Alabama confidentiality statute interfered with any purposes under HCQIA, and further noted that nothing under HCQIA requires health care entities to provide peer review information to hospitals or other credentialing authorities above and beyond what is required in a Data Bank report



# Appellate Court Decision

- Because Alabama's decision to rely on the peer review privilege as a basis for refusing to provide additional detail does not conflict with HCQIA, the Court ruled that this statute does not violate the Supremacy Clause
- Although Alabama was a state facility, thereby potentially implicating protection under the Due Process Clause of the 14<sup>th</sup> amendment and his right to pursue a profession, it was undisputed that Dr. Liu received staff privileges at one or more other California hospitals
- Therefore, because Dr. Liu was not completely foreclosed of his freedom to pursue employment in his chosen field, this Due Process claim was denied





# Lessons Learned

- Most states, as was the case in Kadlec, hold that there is no duty whatsoever to respond to these appointment/reappointment inquiries, but if a response is provided, it must be truthful and complete and cannot purposefully or negligently mislead the other party
- HCQIA also does not require disclosure beyond Data Bank reporting requirements
- When responding to third party inquiries, hospitals and medical staffs need to determine whether they are prohibited from releasing information which is protected under their peer review confidentiality statute or other restrictions



# Cole vs. St. James Health Care

## Montana Supreme Court Upholds Preliminary Injunction Blocking Hospitals From Changing Physician's Medical Staff Status

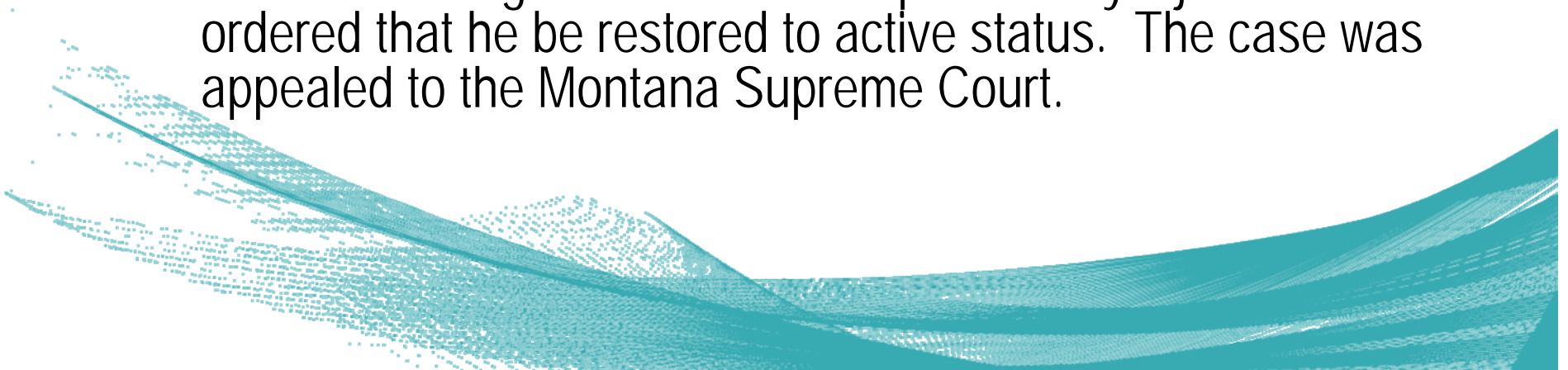
### Factual Background

- Dr. Jesse Cole challenged a decision made by St. James Health Care ("Hospital") after it changed his medical staff status from "active" to "consulting" without Dr. Cole's permission and without providing him prior notice
- Cole's request to appeal this decision was denied and was apparently made as a result of an investigation conducted by the hospital through an attorney



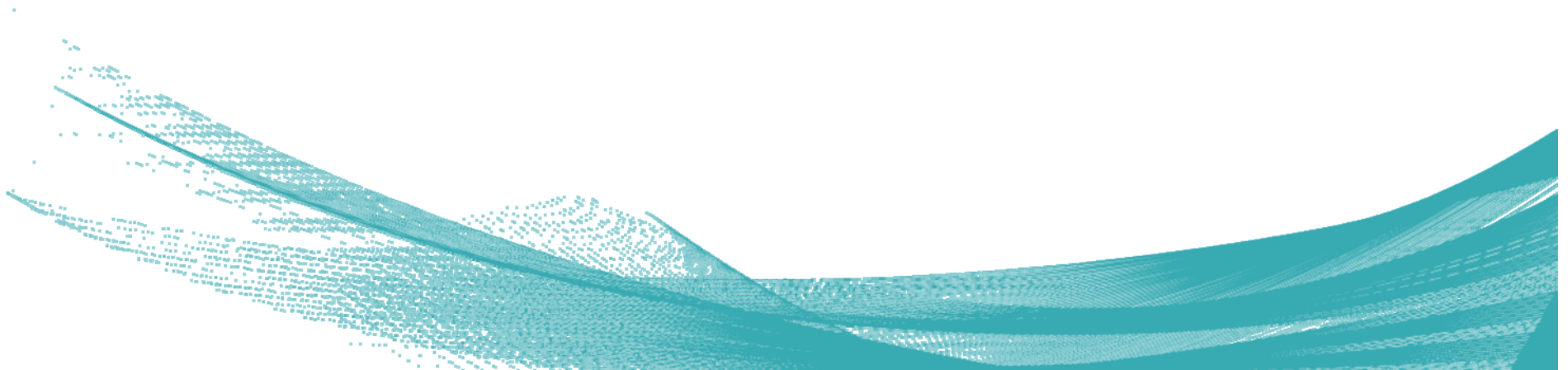
# Factual Background

- Cole argued that the medical staff bylaws constituted a contract and that the bylaws required (1) a 3 month prior notice before reducing the medical staff members' privileges; (2) right to a hearing and appeal upon request; and (3) that any investigation of a physician was to be conducted by a medical staff peer review committee and not an independent attorney
- Based on his argument that the hospital breached these enforceable bylaw provisions, Cole requested a preliminary injunction to prevent the hospital from taking further adverse action against him and from making a Data Bank report.
- The trial court granted Dr. Cole a preliminary injunction and ordered that he be restored to active status. The case was appealed to the Montana Supreme Court.



# Montana Supreme Court Decision

- The question on appeal in this case was whether the trial court “manifestly abused its discretion” in granting the injunction rather than reviewing the substantive merits of the underlying lawsuit
- Based on this substantial deference standard, the Supreme Court held that the trial court did not abuse its discretion when it found that the hospital had violated the bylaws
- Court also determined that there was the likelihood of irreparable injury to Dr. Cole if the hospital issued a Data Bank report



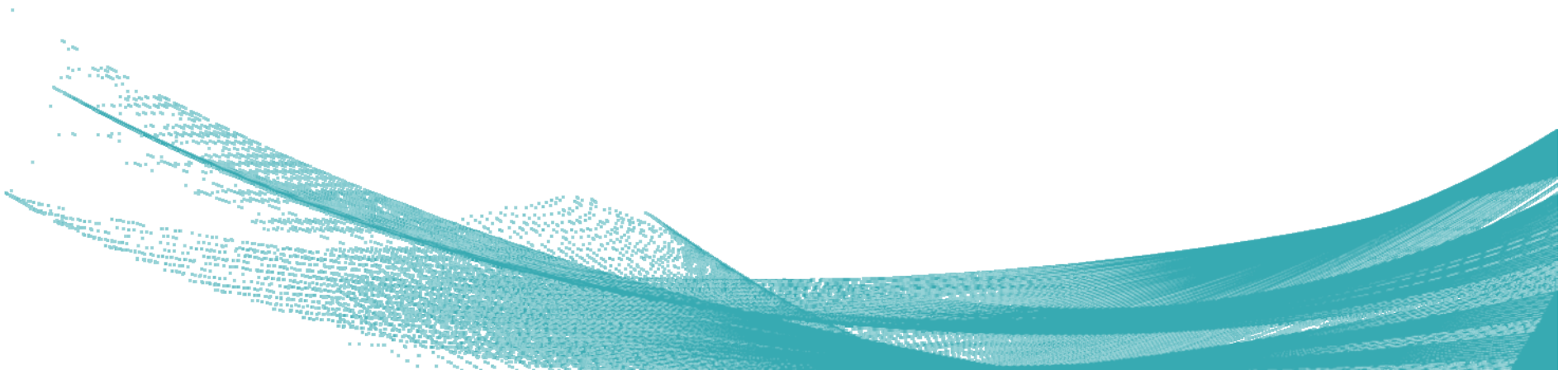
# Lessons Learned

- Although courts almost never interfere in the internal peer review, privileging and credentialing decisions made by hospitals and medical staffs, one must substantially, if not perfectly, comply with your medical staff bylaws and related procedures in order to avoid judicial intervention or reversal of these internal decisions
- Whenever a hospital and medical staff do not follow their bylaws and procedures, courts become highly suspect as to the true motives behind the decision, particularly where a report to the Data Bank is implicated



# Lessons Learned

- Most physicians will challenge any attempt to file a Data Bank report, particularly if not required or if bylaws were not followed or a fair hearing not provided
- Here, a hospital was alleged to have not provided Dr. Cole prior notice, not provided him with a hearing and appeals right, and did not conduct any peer review proceedings through a medical staff committee



# Botvinick vs. Rush University Medical Center

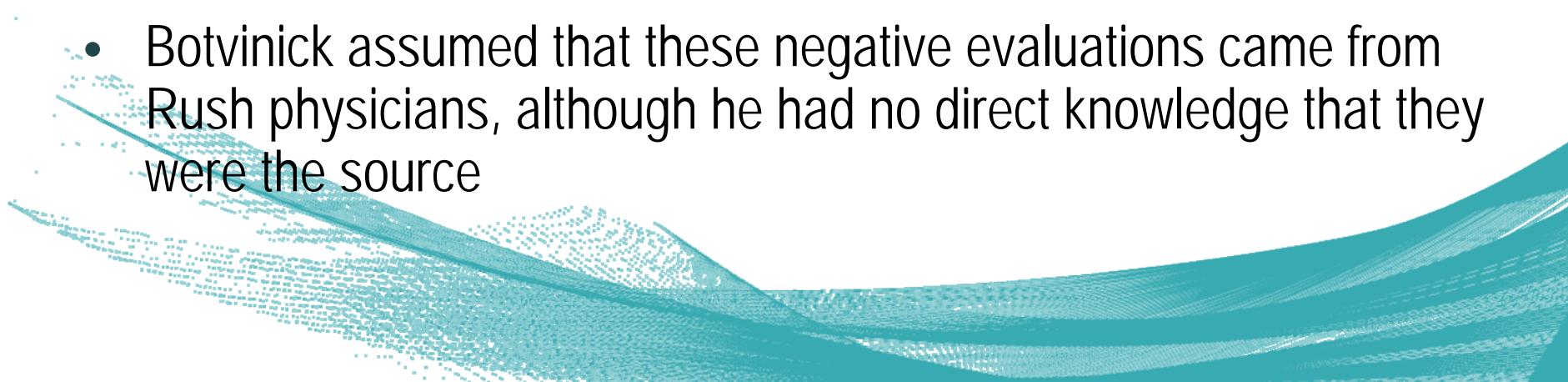
## **Seventh Circuit Rejects Physician's Tortious Interference Claim Alleging Hospital and the Physicians Sabotaged An Employment Opportunity**

### Factual Background

- Dr. Botvinick was a resident in Rush's Anesthesiology Department from 2004 to 2005
- His clinical skills were solid and commendable, but he was accused of delivering uninvited sexually explicit items from a company to another attending physician at Rush as a supposed prank
- Botvinick denied the allegation and apparently Rush never took any formal corrective action against him



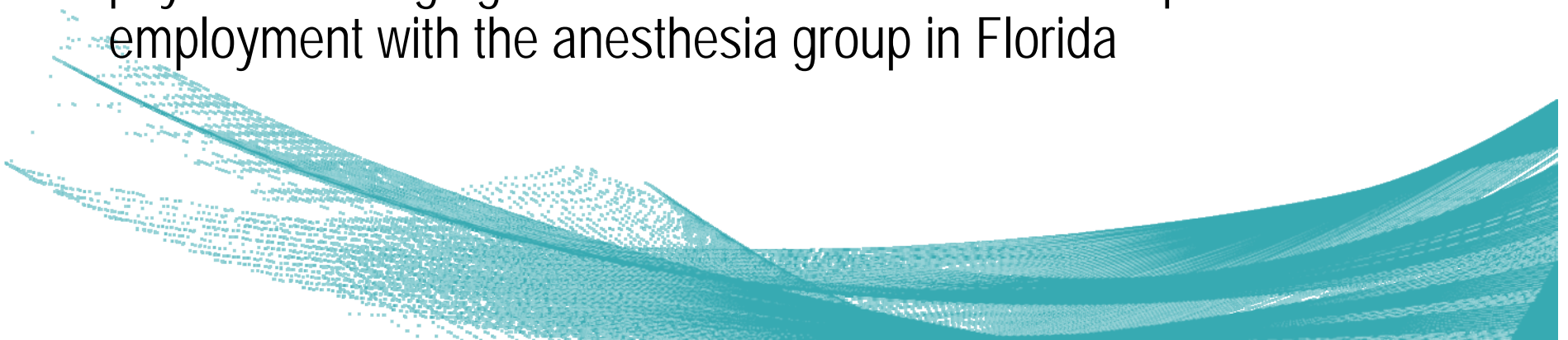
# Factual Background

- Botvinick entered into an employment contract with an anesthesia group in Florida whose physicians practiced at two Florida hospitals
  - Botvinick was given temporary privileges contingent on his obtaining medical staff privileges at these facilities
  - While his application was pending, Dr. Botvinick received a call from members of the Credentials Committee of one of the hospitals advising him that they had received negative evaluations and therefore were terminating his temporary privileges
  - Botvinick assumed that these negative evaluations came from Rush physicians, although he had no direct knowledge that they were the source
- 



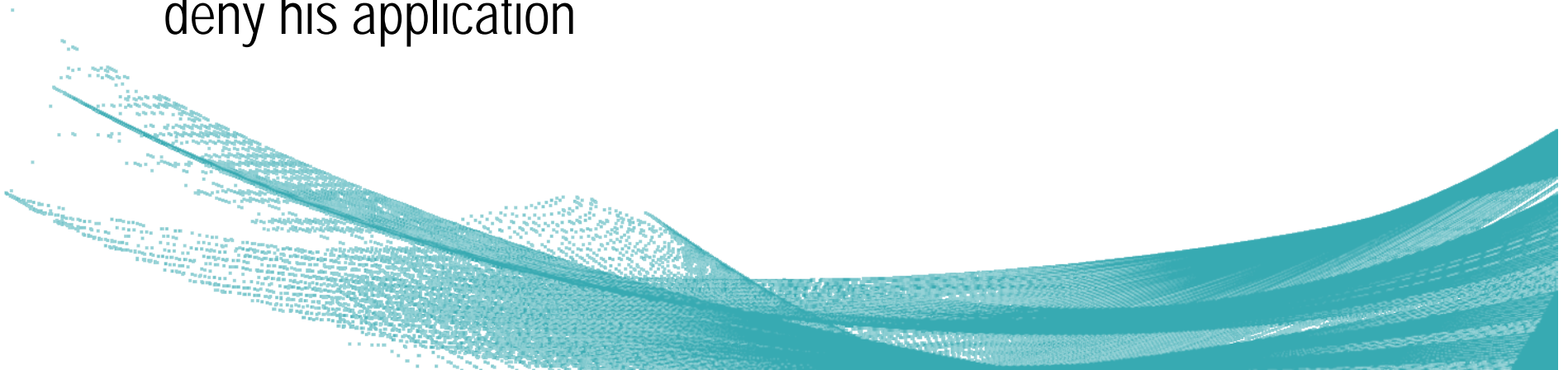
# Factual Background

- A Credentials Committee member requested to talk to the Department Chair at Rush and further, that Botvinick sign a waiver and release form which included an absolute immunity clause for those individuals providing information regarding Botvinick's professional competence and character
- After the Department Chair spoke with the hospital, Botvinick received a letter indicating that the hospital was going to deny his application for privileges. Botvinick then withdrew his application
- Botvinick subsequently filed a lawsuit against a number of Rush physicians alleging tortious interference with his expectations of employment with the anesthesia group in Florida



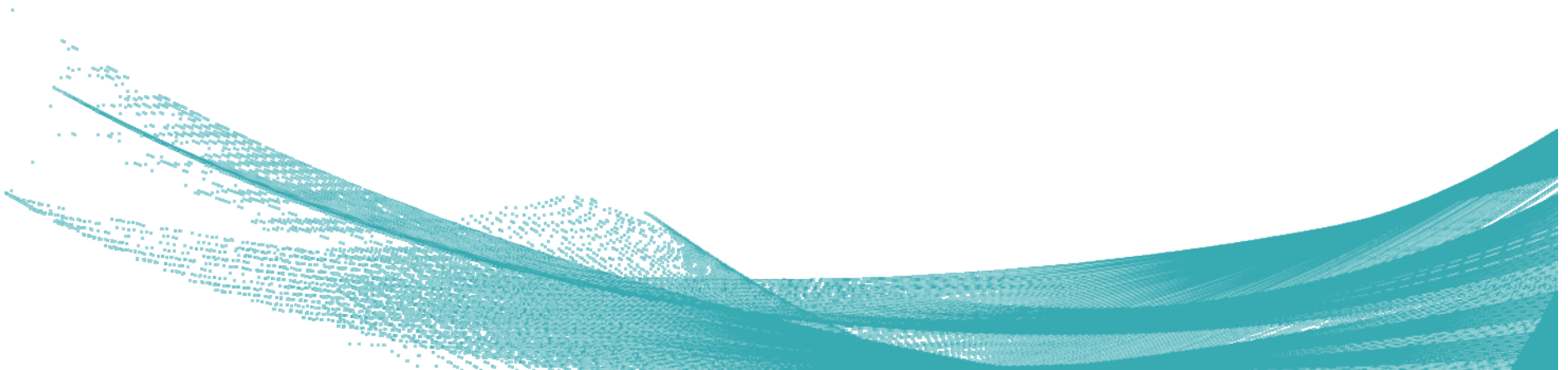
# Factual Background

- Defendants argued that the case should be dismissed on the grounds that the Illinois confidentiality statute prevented Botvinick from using any communications between Rush physicians and the hospital's Credentials Committee as a basis for a tort action
- As a further defense, defendants maintained that the case should be dismissed because they did not provide any written or oral evaluations to the Credentials Committee, other than the Department Chair, and further that no proof was provided that any comments he might have led to the hospital's decision to deny his application

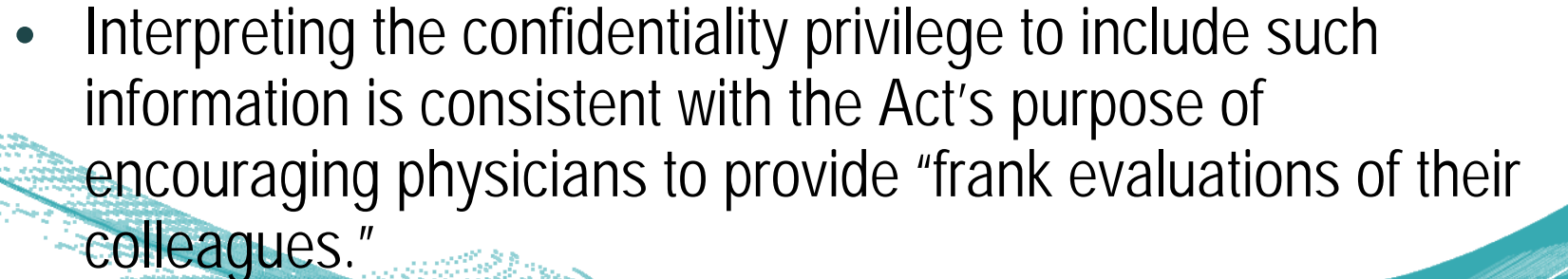


# Factual Background

- The trial court determined that because Botvinick could not establish that the four defendants took any action “towards the party with whom the plaintiff expects to do business” and did not know the source of the negative evaluations, that there was no basis on which to allow the complaint to stand
- With respect to the Department Chair, Botvinick failed to take any discovery from the hospital to determine the basis of why it denied his application, including whether the Department Chair provided any information in which the decision was based



## 7<sup>th</sup> Circuit Decision

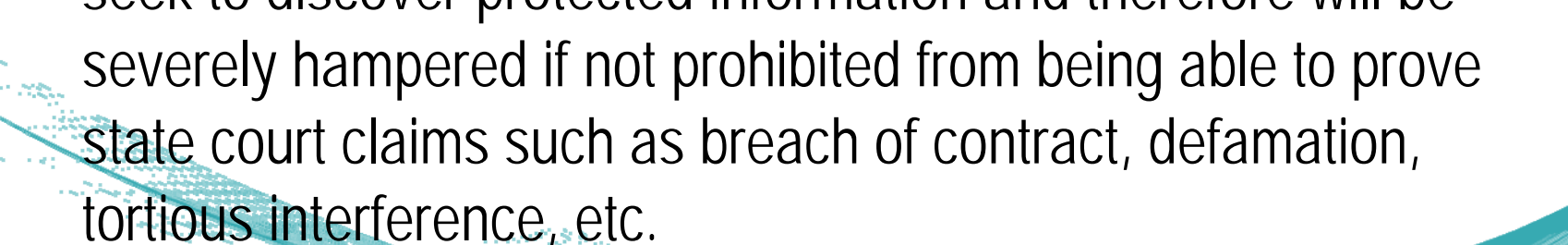
- The Seventh Circuit rejected Botvinick's claim that the Illinois confidentiality statute was limited to information relating to a physician's "professional competence" and therefore did not extend to the alleged pranks by Botvinick against a peer physician at Rush.
  - The Court stated that "a hospital has legitimate interest and information about a prospective doctor's ability to conduct himself honestly and professionally and to refrain from offensive behavior."
  - Interpreting the confidentiality privilege to include such information is consistent with the Act's purpose of encouraging physicians to provide "frank evaluations of their colleagues."
- 

# 7<sup>th</sup> Circuit Decision

- The Court also determined that the release form signed by Botvinick, which gave absolute immunity to any party providing information to the hospital regarding the plaintiff's qualifications, credentials, clinical competence, character, ability to perform safely and competently and other relevant factors, also acts as a bar to his litigation
- In response to the plaintiff's argument that he did not intend to immunize defendants from giving false information, the court determined that the release clearly intended a very broad waiver of liability



# Lessons Learned

- It is important for hospitals and medical staffs to understand the scope of their state peer review confidentiality and immunity provisions in order to fully appreciate the extent to which these statutes can be used to defend them in these kinds of appointment, reappointment and peer review disputes
  - By creating a process, procedures and forms that are utilized pursuant to the defined peer review activities under these statutes, plaintiffs will not be able to introduce into evidence or seek to discover protected information and therefore will be severely hampered if not prohibited from being able to prove state court claims such as breach of contract, defamation, tortious interference, etc.
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# Lessons Learned

- Although the Court here did not ultimately rule on whether the absolute immunity provisions in the waiver form barred this lawsuit because the claims failed for other reasons, it is instructive regarding the use of such waivers
- Most waiver of liability forms are contingent on a party's acting "in good faith and without malice." Hospitals and medical staffs should seriously consider the use of absolute waiver forms, rather than qualified waivers in the preapplication, application and reappointment processes.



# Lessons Learned

- When providing responses to third party inquiries, you can comment on quality of care issues as well as a physician's professional conduct
- In addition, medical staff bylaws should include immunity clauses that would apply to all peer review decisions



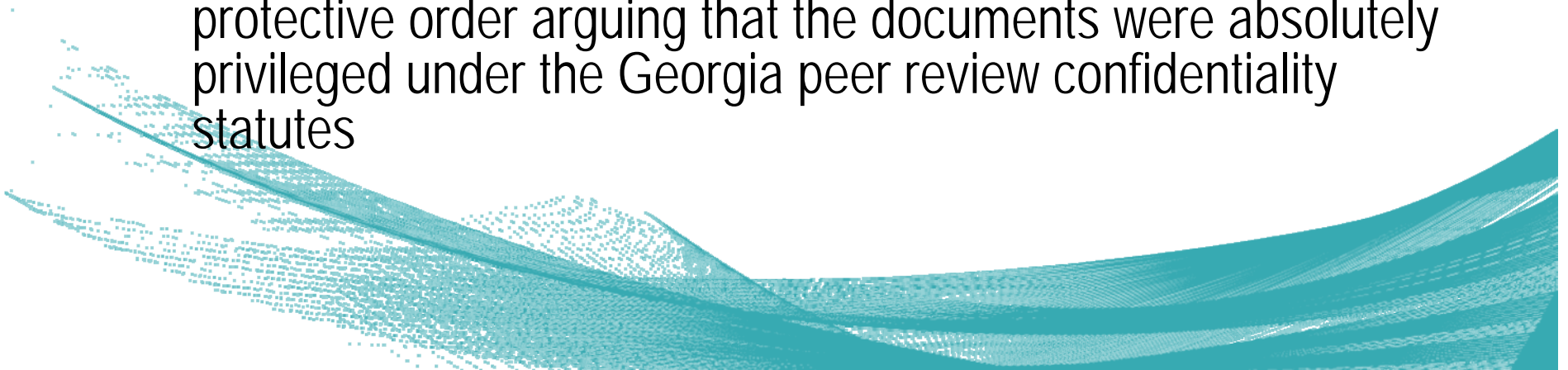


# South Georgia vs. Meeks

## **Georgia Supreme Court Rules that Hospital's Credentialing Files Which do not Involve Physician Performance are Discoverable in Negligent Suit**

### Factual Background

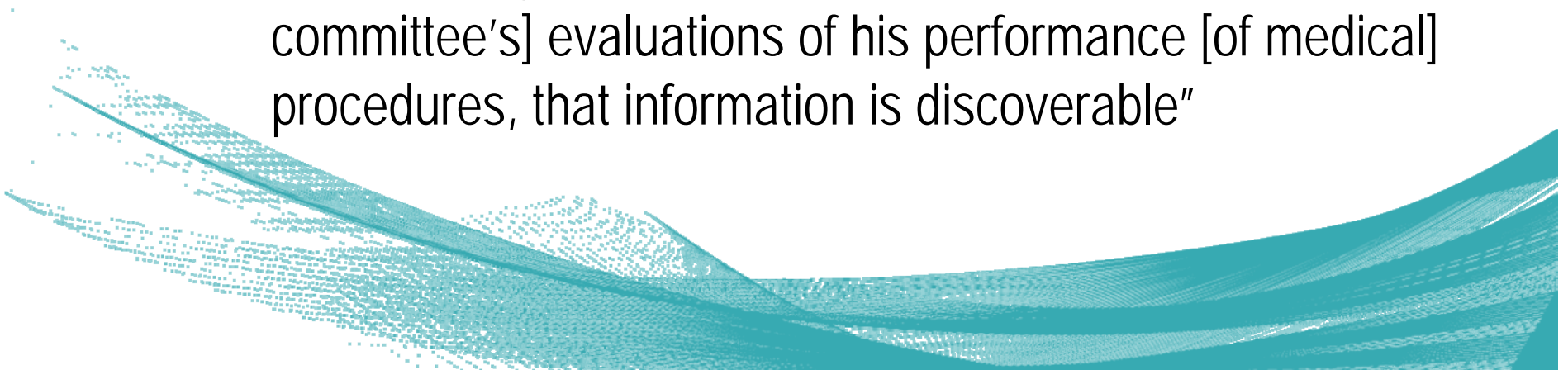
- A malpractice action was filed against a hospital and a cardiologist by the husband of the patient who died during the performance of a cardiac procedure
- In response to the plaintiff's request that the physician's peer review and credential's files be produced pursuant to a discovery request, the hospital filed a motion seeking a protective order arguing that the documents were absolutely privileged under the Georgia peer review confidentiality statutes



# Factual Background

- Trial court ruled in hospital's favor but limited its decision to the information contained in these files.
- On appeal, the Court of Appeals extended the protection to "all proceedings and information of a review organization" and not just what was included in the physical files but further determined:

"to the extent that there is information in [defendant's] credentialing files that does not involve [a peer review committee's] evaluations of his performance [of medical] procedures, that information is discoverable"

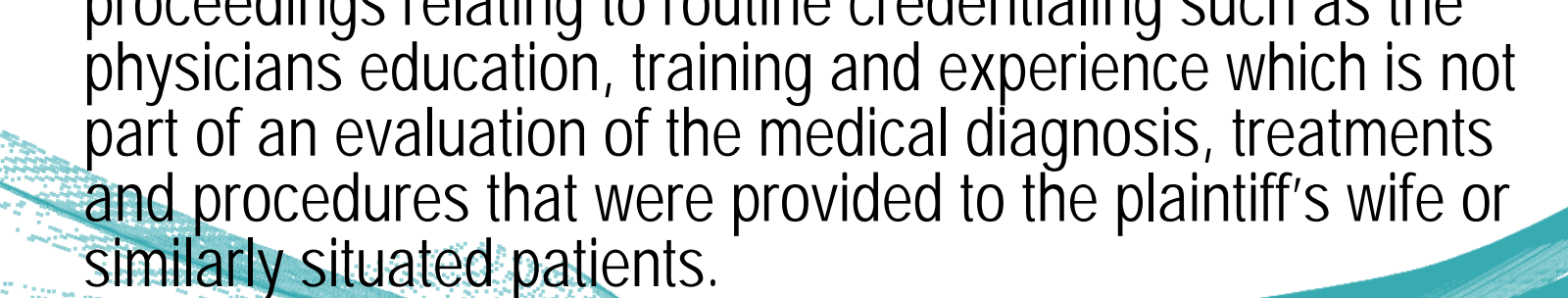


# Georgia Supreme Court Decision

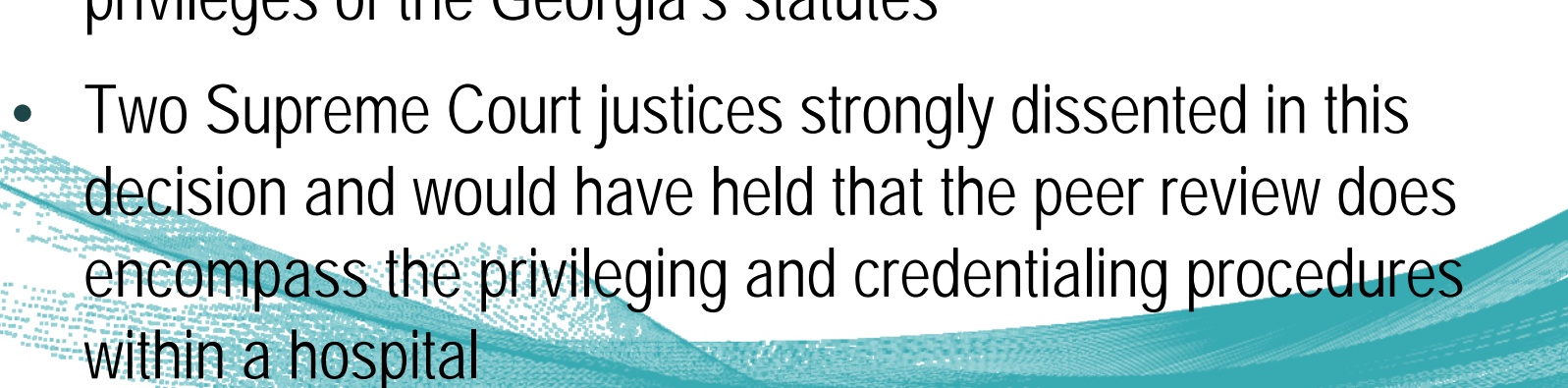
- Court noted that the general rule is that any relevant evidence is subject to discovery and admissibility. Confidentiality statutes cannot be interpreted so expansively as to totally undermine this principle.
- Therefore, peer review confidentiality statutes should be strictly construed and in accordance with statutory definitions.
- The definition of a “medical review committee” is that it:  
“is formed to evaluate and improve the quality of healthcare rendered by providers of health services or to determine that health services rendered were professionally indicated or were performed in compliance with the applicable standards of care or that the cost of healthcare rendered was considered reasonable by the providers of professional health services in the area.”



# Georgia Supreme Court Decision

- “Peer Review’ means the procedure by which professional healthcare providers evaluate the quality and efficiency of services ordered or performed by other professional healthcare providers”
  - “Review Organization’ engages in or utilizes peer reviews and gathers and reviews information relating to the care and treatment of patients for certain specified purposes.”  
(citations to Georgia statutes)
  - The question before the Court was whether the plaintiff was entitled to the actual credentialing process information and proceedings relating to routine credentialing such as the physicians education, training and experience which is not part of an evaluation of the medical diagnosis, treatments and procedures that were provided to the plaintiff’s wife or similarly situated patients.
- 

# Georgia Supreme Court Decision

- Confidentiality privileges did not apply to routine credentialing information
  - To deny access to such information “would needlessly run the risk of barring a plaintiff’s tort action for negligent credentialing”
  - Unless the credentialing information involves the evaluation of the quality and efficiency of actual medical services, it does not come within the peer review and medical review privileges of the Georgia’s statutes
  - Two Supreme Court justices strongly dissented in this decision and would have held that the peer review does encompass the privileging and credentialing procedures within a hospital
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# Lessons Learned

- Most courts have no clear understanding of what steps and analysis is required to determine whether a physician can demonstrate current competency to exercise each and every clinical privilege which they request
- Consequently, it is imperative that a hospital and the medical staff take great effort in educating a court as to what is involved in the entire peer review process when seeking to contest a discovery request for credentialing and peer review information



# Lessons Learned

- As part of this process, hospitals and medical staffs should design their peer review process and procedures as well as to incorporate certain “peer review” definitions, so as to track the language in the confidentiality statutes in an attempt to maximize protections afforded under these provisions
- To reinforce these protections, use of self-serving language such as “privilege and confidential under the state confidentiality statutes” should be used for minutes, communications and other activities which come within the “peer review” definitions



# Lessons Learned

- Although such language may be viewed as self-serving, courts will look to a hospital's actions to determine whether it viewed such information as confidential peer review. If not, it will be difficult to make an after the fact argument regarding protection.
- In addition, hospitals should introduce affidavits or testimony designed to educate the court as to why this information should be treated as confidential in order to supplement the legal arguments presented

