

*The 12th Annual*

# **CREDENTIALING RESOURCE CENTER SYMPOSIUM**

*A New Day for Credentialing:*

MOVING FROM VERIFICATION TO COMPETENCY



MAY 14–15, 2009 | CAESARS PALACE | LAS VEGAS, NV


# **Top 5 current credentialing cases: What everyone should know**

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# Kadlec reversed—effect on exclusive contracts

- ❑ Lakeview Hospital entered into an exclusive anesthesia services agreement with Lakeview Anesthesia Associates (LAA)
  - ❑ Dr. Berry was employed by LAA and later became one of its partners
  - ❑ According to the trial and appellate court decisions, when Dr. Berry was discovered to be impaired, Lakeview's CEO confronted LAA about his concern regarding Berry's threat to patients
  - ❑ Shortly thereafter, LAA terminated Dr. Berry because he reported to work in an impaired physical, mental, and emotional state, which prevented him from performing his duties and which put patients at significant risk
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# Kadlec reversed—effect on exclusive contracts (cont'd)

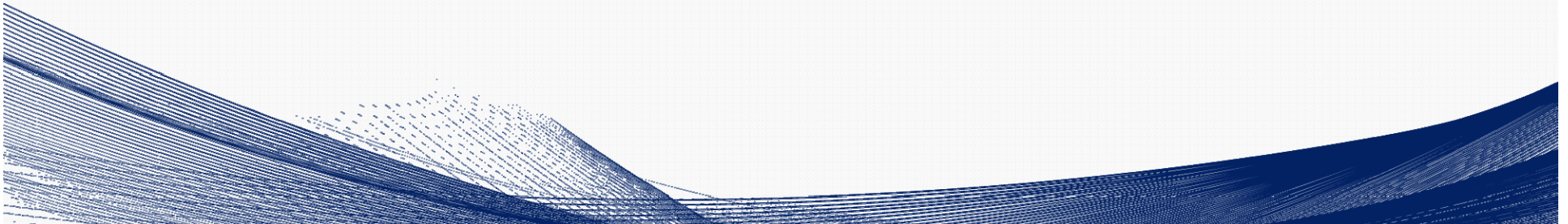
- ❑ Despite clear knowledge and evidence of Dr. Berry's impairment, he was not reported to the state of Louisiana or the Data Bank by the hospital, and no information was given to Kadlec Medical Center
- ❑ Most likely, there was a clean sweep provision in both the Lakeview agreement with LAA and in the LAA agreement with Dr. Berry—physician agrees to waive his or her right to a medical staff fair hearing if terminated by the group or if the group is terminated by the hospital
- ❑ Nothing in the record to show or suggest that any hearing or other form of review took place



# Overview of exclusive contracts

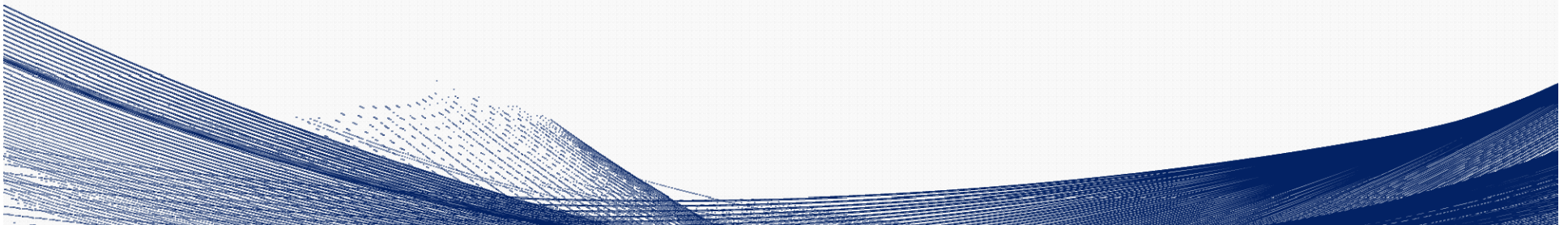
## □ Rationale:

- Provides for the organized provision of hospital-based services (i.e., anesthesia, radiology, pathology, and emergency room)
- Results in 24/7 coverage
- Use of some exclusive group physicians enhances quality and continuity of care
- Avoids cherry picking of better-paying cases and procedures and ensures treatment of Medicaid and indigent care patients
- Allows for better administrative supervision through an incorporated physician group and medical director as opposed to a department chair attempting to organize a group of independent practitioners



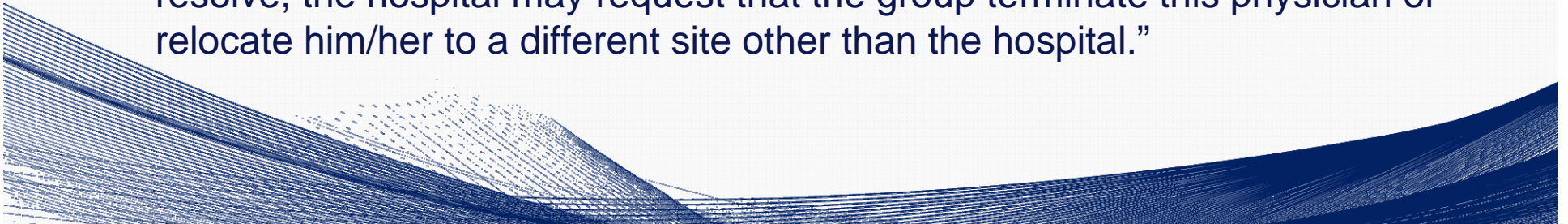
# Overview of exclusive contracts (cont'd)

- Easier to remove an individual physician and/or group based on contract terms that usually avoid the need for any fair hearing or investigation into quality-of-care issues
- One result of these clean sweep provisions is that physicians are usually allowed to walk away without a Data Bank or state report
- This allows the physician greater flexibility in terms of finding a new position
- Because there usually is no investigation or fair hearing and, therefore, less documentation to confirm a quality-of-care or impairment issue, hospitals usually are reluctant to report or to give an adverse response on a questionnaire



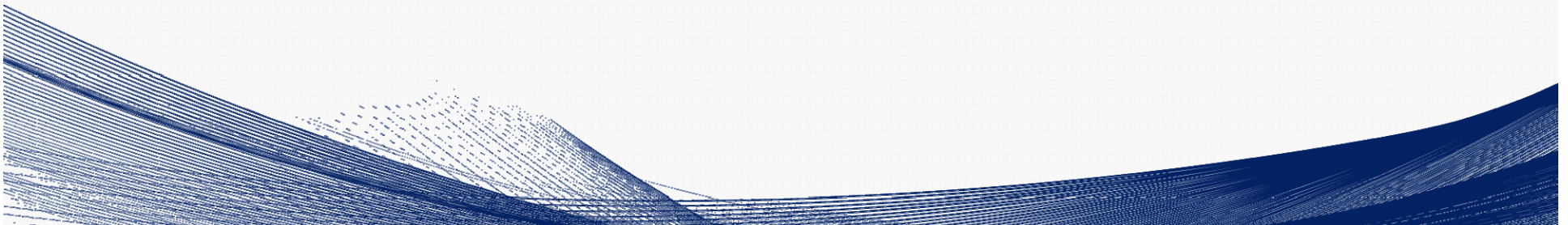
# Some key contract terms

- ❑ Clean sweep provision:
- ❑ “As a condition of obtaining and maintaining this exclusive services agreement, the group and each shareholder or employed physician within the group agrees to waive all fair hearing and appeals rights set forth in the hospital’s medical staff bylaws. If there is a conflict between this contract term and the bylaws, the contract shall prevail. Group shall be required to incorporate this waiver provision into its physician agreements and shall provide to the hospital a signed waiver of hearing rights form for each physician.”
- ❑ Hospital right to request termination or removal from hospital site:
- ❑ “In the event that the hospital can document any patterns of substandard care or disruptive behavior in violation of the code of conduct which the group has not addressed in a manner acceptable to the hospital, after providing prior notice and an opportunity for the physician or group to resolve, the hospital may request that the group terminate this physician or relocate him/her to a different site other than the hospital.”



# Some key contract terms (cont'd)

- There are many variations of this provision, depending on the bargaining leverage of the hospital and group and sometimes the level of influence exerted by the medical staff
- These variations can include:
  - ❑ A requirement that there be some type of review process for any identified quality or behavioral issue which is independent of the bylaws before a termination/transfer request can be made
  - ❑ A requirement that the physician in question is entitled to some limited hearing or review rights separate from the fair hearing procedures under the bylaws
  - ❑ Some groups may be able to negotiate that all bylaw hearing and appeals rights apply—such agreements are in the distinct minority



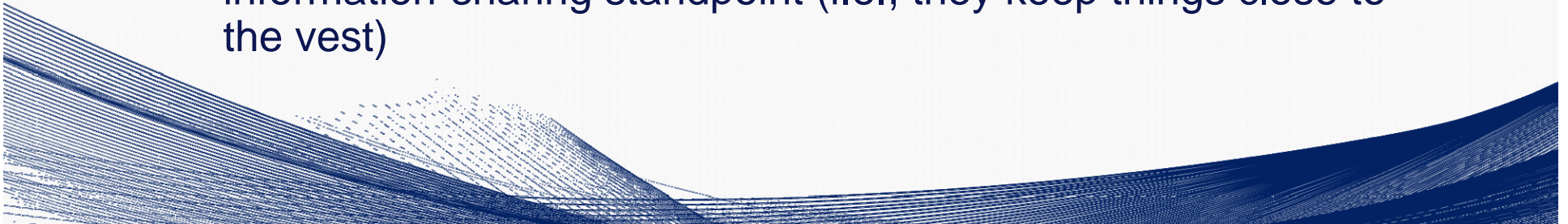


# Some key contract terms (cont'd)

- Right of hospital to seek periodic outside review:

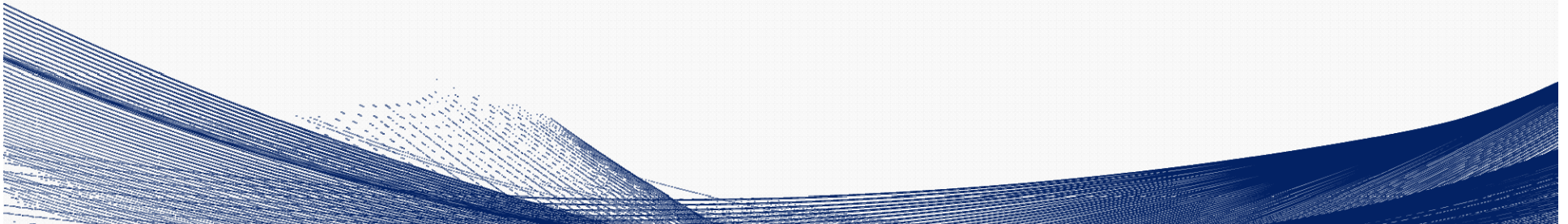
“Hospital, at any time, shall be entitled to seek and retain an independent, outside review of any of the department’s/group’s cases, outcomes, utilization, quality assurance, and other information relating to compliance with hospital policies and its obligations under this agreement. Group shall also comply with all performance improvement, quality assurance, credentialing and privileging, and other related policies and procedures adopted by the hospital and shall report any findings, studies, reports, and incidents involving any quality of care, quality assurance, or behavioral issues which may adversely affect patient care.”

  - Although groups typically comprise the entire department, they still operate under a group mentality from an operations and information-sharing standpoint (i.e., they keep things close to the vest)



# Some key contract terms (cont'd)

- It is not easy for a physician to sit in judgment of another physician. It is even more difficult when the physician is your partner.
- This reality gives rise to inherent conflicts of interest which need to be monitored.
- Group should be obligated to report to the MEC and/or other appropriate committee any adverse findings.
- Group should be requested to comply with the requirements imposed on all departments and department chairs.
- Should consider sending out random cases for periodic review and share results with group in order to maintain quality healthcare services.

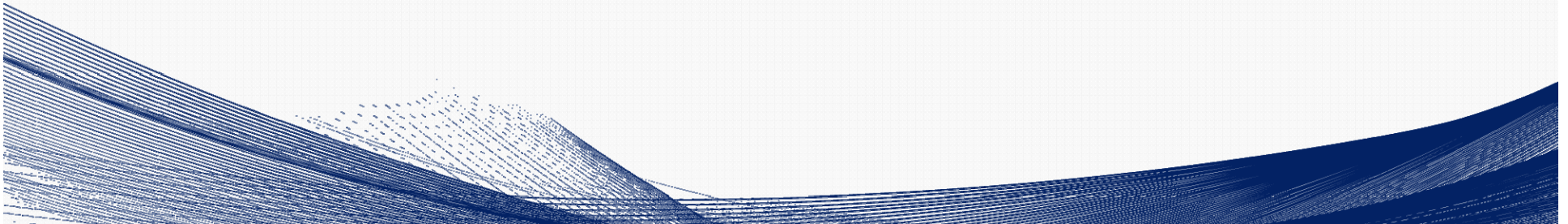


# Resulting “Kadlec” problems

- ❑ As a result of clean sweep and similar provisions, hospitals and groups take the easy way out and avoid any investigation or corrective action under the bylaws when quality-of-care or behavioral/impairment issues are suspected or initially identified
- ❑ Because documentation is limited at best and/or because a physician is not given a fair hearing before termination, hospitals rarely if ever report these individuals to the state or to the Data Bank

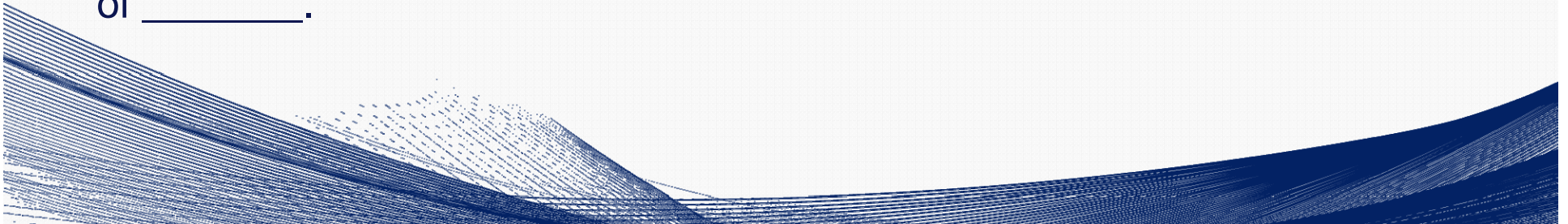
# Resulting “Kadlec” problems (cont’d)

- Filing a report to the Data Bank without a hearing would deny a hospital the immunity protections under the Health Care Quality Improvement Act (HCQIA)
- Filing a report without documentation or proof may subject hospital to defamation or other legal claims
- For these same reasons, hospitals are reluctant to give a bad reference or to provide adverse information in response to third-party inquiries
- If hospital provides a truthful response to a third-party inquiry, the question will be asked as to why it did not report the physician to the Data Bank or to the state
- The result, as in Kadlec, is that an impaired or unqualified physician will eventually obtain a position at an unsuspecting facility because they are not able to make a truly informed decision



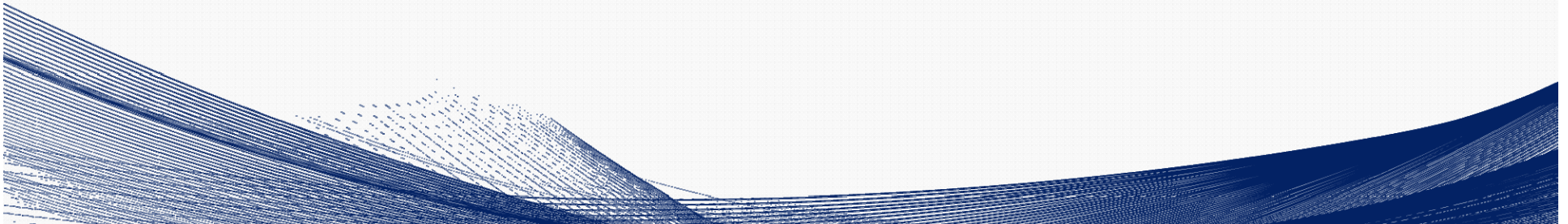
# An alternative contract provision to consider

“In the event that any physician member of the group has been identified, through any source, as evidencing quality-of-care or behavioral issues which may or have had an adverse effect on patient care or which are in violation of the code of conduct, the hospital shall have the option of pursuing either formal corrective action under the bylaws or the procedures identified under the code of conduct or the physician wellness committee. If the hospital chooses any of these options, the physician shall be required to participate in the applicable process and shall be afforded all hearing and other rights as identified in the bylaws or relevant policies. If, at any time, the physician refuses to participate or chooses to resign from the group or the medical staff, the hospital will determine whether it has a statutory obligation to report this resignation to the National Practitioner Data Bank and/or the state of \_\_\_\_\_.”



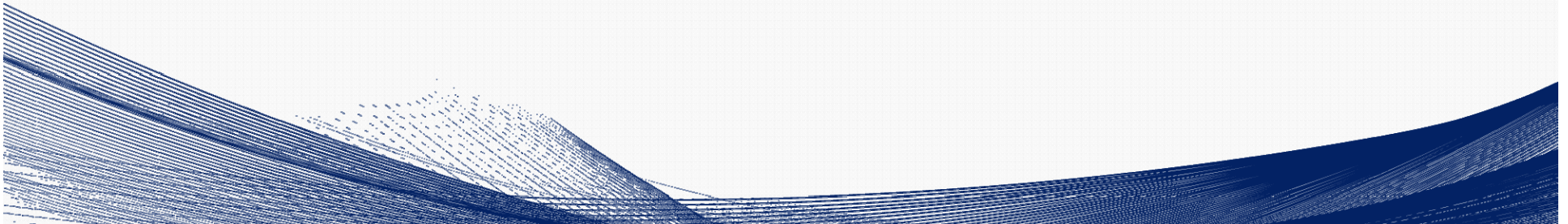
# An alternative contract provision to consider (cont'd)

- ❑ Hospitals need to decide whether they will simply turn their heads and let an impaired or unqualified physician resign without any Data Bank or other reports or to pursue the various corrective action and other options available under the bylaws and related policies
- ❑ The proposed contract language gives the hospital the option of whether to simply request termination/transfer as per the terms of the agreement without going through a hearing or other investigative process or to allow for a true analysis and assessment of the physician in the hopes of getting him or her back on track in order to stay with the group
- ❑ Option also allows appropriate documentation in the event that the physician needs to be terminated and reported




# An alternative contract provision to consider (cont'd)

- For example, if the physician in question is simply very difficult to get along with but is not impaired or is not a substandard practitioner, hospital can simply request termination/transfer if efforts to improve behavior and professionalism have failed because no Data Bank report would be required
- This is a more balanced approach which the group and individual physicians, along with the medical staff, may embrace



# An alternative contract provision to consider (cont'd)

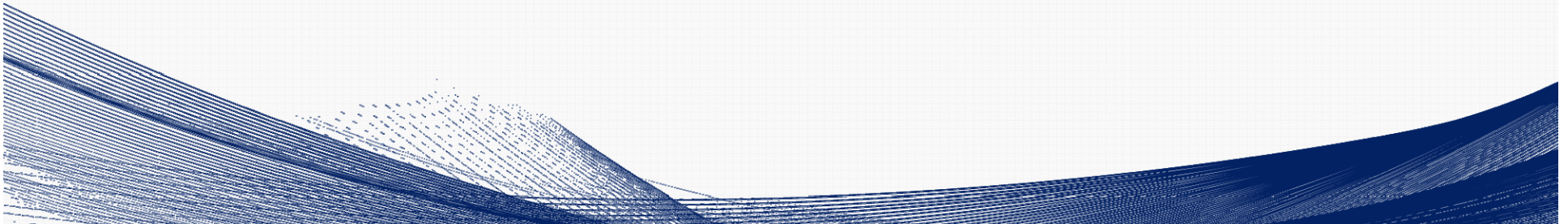
## □ Advantages:

- Gives hospital an option on how to deal with a physician who is or may be impaired or unqualified.
  - If internal bylaw procedures followed (i.e., corrective action, code of conduct, physician wellness), it allows for a fairer and more balanced approach to dealing with identified problems and will provide the same fair hearing and other rights which are given to independent members of the medical staff.
  - If the process eventually results in a decision to terminate or suspend a physician, after going through the fair hearing procedures, hospital will have sufficient documentation to support a report and therefore can take advantage of the HCQIA and other immunity protections.
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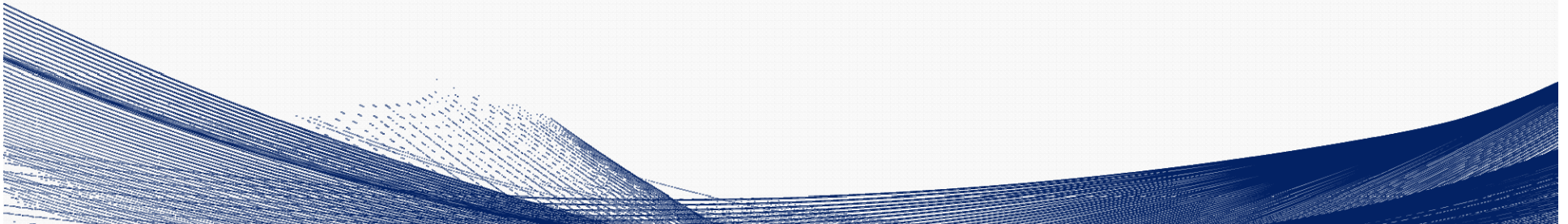
# An alternative contract provision to consider (cont'd)

- Hospital industry will be placed on notice about the impaired/unqualified practitioner.
- Reduces, if not eliminates, a Kadlec-type claim against the hospital for not disclosing nature of physician problem.
- Disadvantages:
  - Adds an administrative burden that otherwise is avoided by simply having a clean sweep provision.

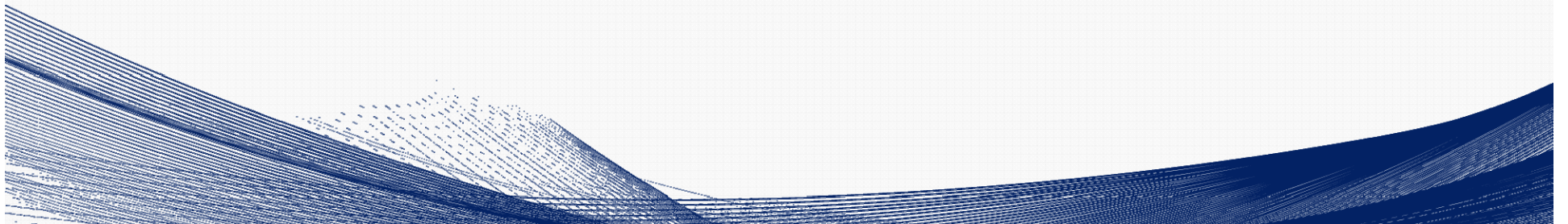


# An alternative contract provision to consider (cont'd)

- Because there may not be sufficient documentation of an impairment or adequate evidence of substandard care, hospital may be able to justify its decision to cut a deal or to allow the physician to resign or be terminated without a report.
- Because the suggested clause gives the hospital the option of which course to take, can the hospital be criticized for simply terminating rather than pursuing one of the other options? In other words, does inclusion in the agreement require the hospital to take this option?
- Group might try to argue that it too should have this option and/or the medical staff may try to exert some pressure to make the option reciprocal.



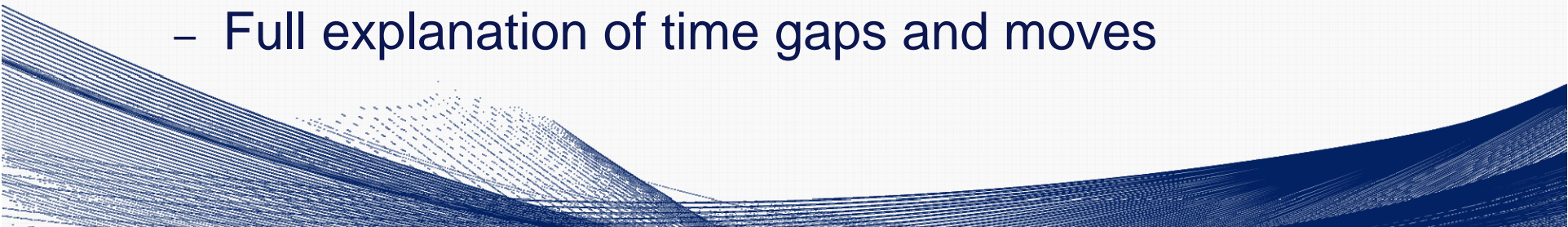
# Other observations and comments



# Kadlec reversed—effect on credentialing

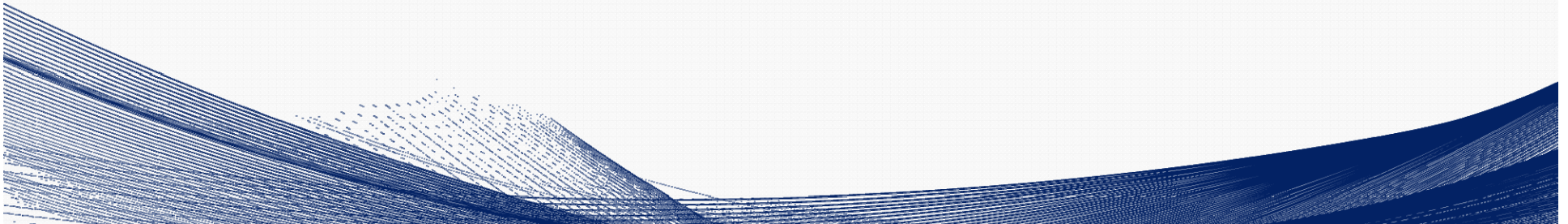
- ❑ Avoiding information errors:
- ❑ Peer reference forms:
  - Compare forms to best practice
  - Review state-mandated information
  - Make sure all forms of corrective and remedial action are captured by the questions
  - Reprimand
  - Probation
  - Voluntary relinquishment of privileges
  - Withdrawal of applications
  - Monitoring
  - Proctoring

# Kadlec reversed—effect on credentialing (cont'd)

- Mandatory consultations with and without prior approval
  - Reductions in privileges
  - Concurrent review of cases
  - Administrative suspensions
  - Adverse licensure decisions
  - Adverse employment decisions
  - Transfers
  - Resignations
  - Full explanation of time gaps and moves
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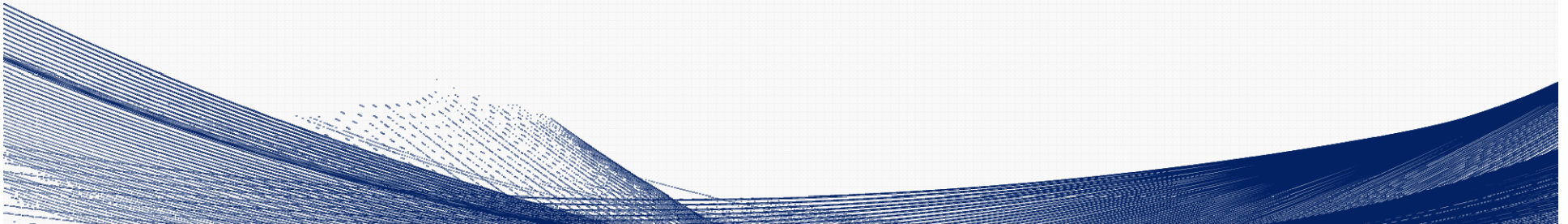
# Best practice for professional references

- ❑ Do not allow partners/relatives to provide sole references.
- ❑ Multiplicity of professional references: program directors, department chairs, section chiefs, officers, etc.
- ❑ Not a sufficient response that hospital will not provide requested information. Burden is to produce.
- ❑ Applicant obligated to provide any and all information updates responsive to the application questions during the pendency of the application.
- ❑ Application should include an absolute waiver of liability and release form which must be signed by the physician as a condition of processing the application (Exhibit C).



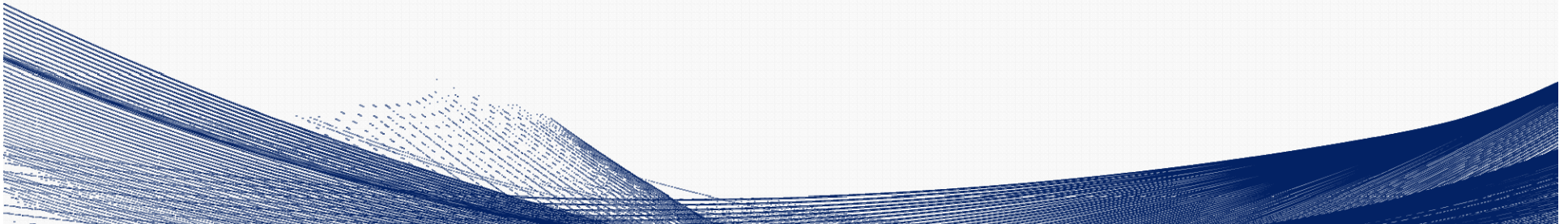
# Best practice for professional references (cont'd)

- ❑ Application should make clear and require that physician signs and attests to the accuracy of the information.
  - Avoids the “my assistant filled it out” excuse
- ❑ If physician does not sign, then do not process the application.
- ❑ Low threshold to pick up phone.
- ❑ For impairment, consider specific questions:
  - Formal accusations
  - Disruptive behavior
  - Unprofessional conduct
  - Asked to seek evaluation or counseling



# Best practice for professional references (cont'd)

- Need to comply with ADA for employment
- Form of questions important to avoid discrimination
- Authorization to review rehab records
- ❑ If hospital or other professional references do not respond, application is not processed unless information can be obtained from reliable and independent source.
- ❑ If physician provides false, misleading, or incomplete information, application deemed withdrawn!



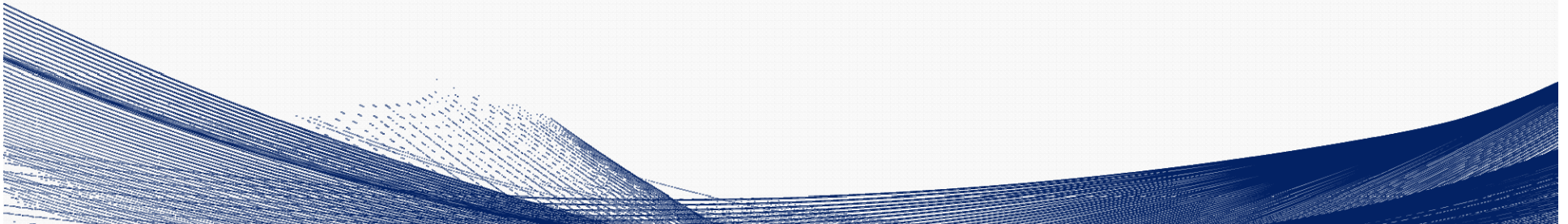


# Avoiding information errors: Red flags

- Red flags:
  - Resignation as partner from group
  - Gaps in CV, particularly with employment or medical staff membership
  - Moved significant distances or has moved a lot over professional career
  - Change of specialties
  - Requesting fewer privileges than normally granted under a core privileging system

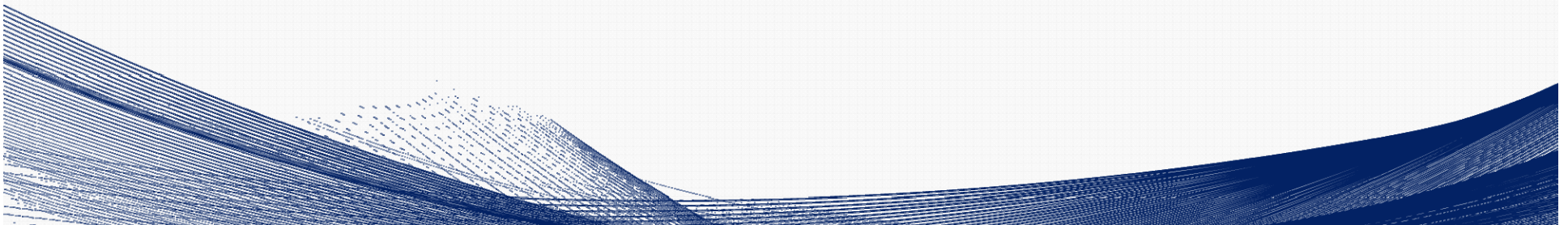
# Avoiding information errors: Red flags (cont'd)

- Gaps in insurance coverage, change in carriers, reduction in coverage
- Profession liability history
- Reference letters are neutral
- Category ratings are “poor,” “fair,” or “average”
- Response from hospital simply gives dates of service or very limited information



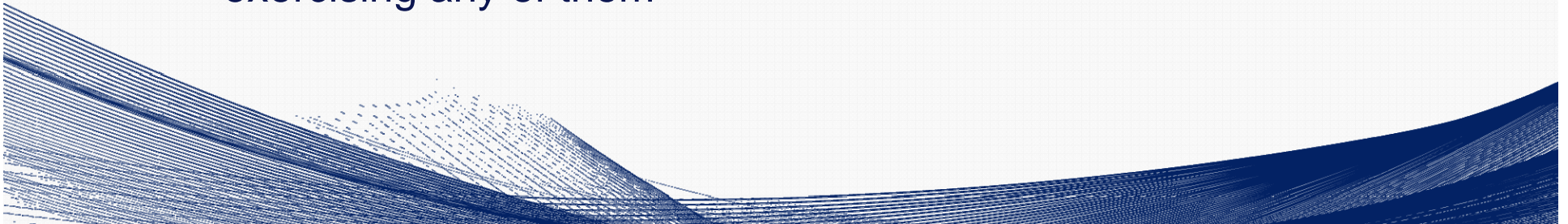
# Placing the burden on the applicant

- ❑ Burden of proof policy
- ❑ Failure to meet burden will result in:
  - Withdrawal of application
  - Decision not to process
  - Declaration of incomplete application
- ❑ Physician not entitled to fair hearing under these circumstances



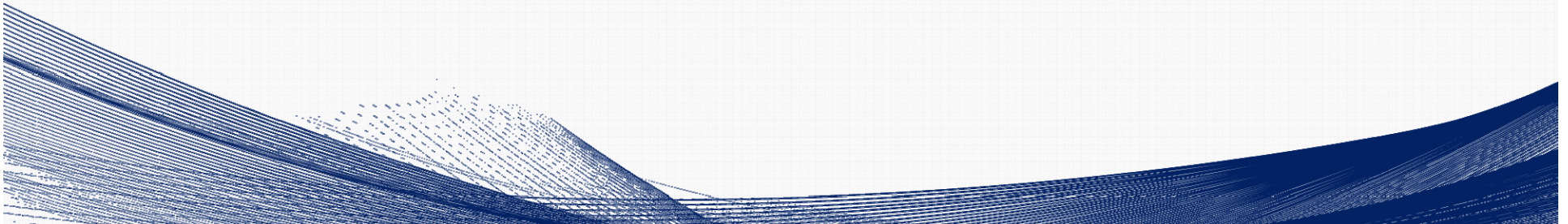
# Best practices for responding and disclosing

- Third party inquiries:
  - Hospitals, surgicenters, managed care organizations, professional associates, and physician groups
  - Inquiries usually are submitted in the form of questionnaires and fill-in-the-blank
    - Forms typically request an explanation if any adverse response to a question is provided
  - Forms usually do not request documents
  - Some questionnaires ask that the physicians be rated in various categories
  - Some disclose privilege list and ask if physician had problems exercising any of them



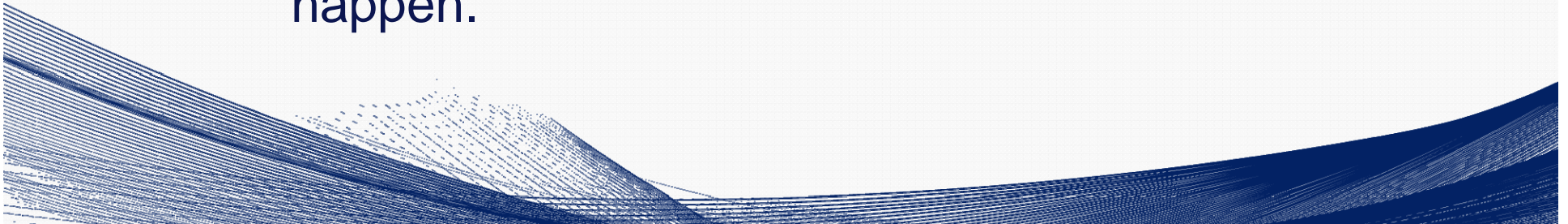
# Best practices for responding and disclosing (cont'd)

- Questions will seek to identify whether physician has been disruptive, has received any form of disciplinary action, has been impaired, has been unprofessional, etc.
- Questions to ask before responding:
  - Are there any limitations on what can be disclosed?
    - State confidentiality/immunity statute
    - Bylaws/policies which may limit the response
    - Hospital cut a deal and has a predetermined response



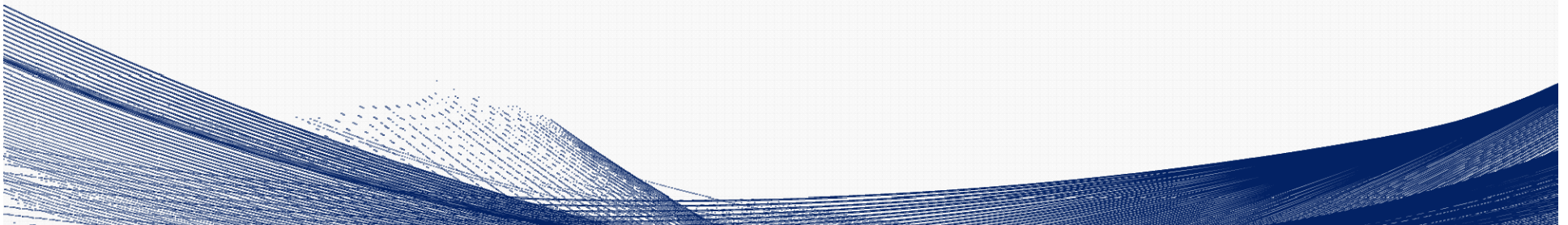
# Best practices for responding and disclosing (cont'd)

- Pending litigation or internal proceedings
- Are there any reporting obligations, and if so, what is scope of required or permissible disclosure?
- What business implications, if any?
- Physician has or is likely to sue depending on response
- How detailed is hospital's documentation in order to support the response?
  - If not documented, if no paper trail, it did not happen.



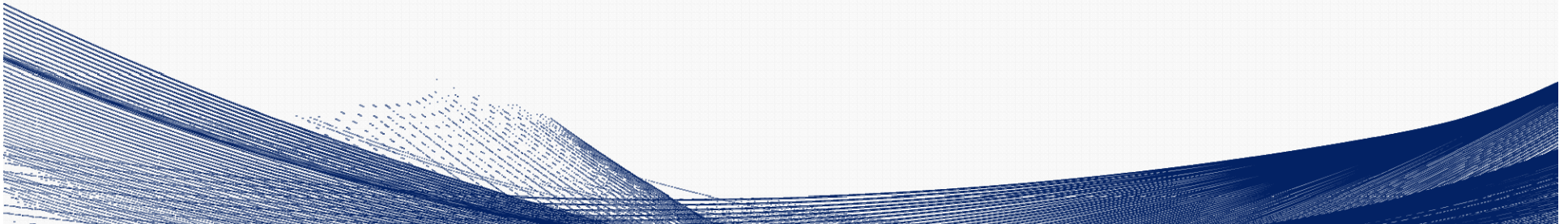
# Best practices for responding and disclosing (cont'd)

- Have you pulled together all relevant documentation?
- Reliance on rumor, innuendo, distant memories, or anecdotal information will only cause problems.
- If you don't know, you don't know.
- What form of waiver of liability did the physician sign?
  - Absolute or qualified? Need to read closely.
  - No waiver, no response.



# Best practices for responding and disclosing (cont'd)

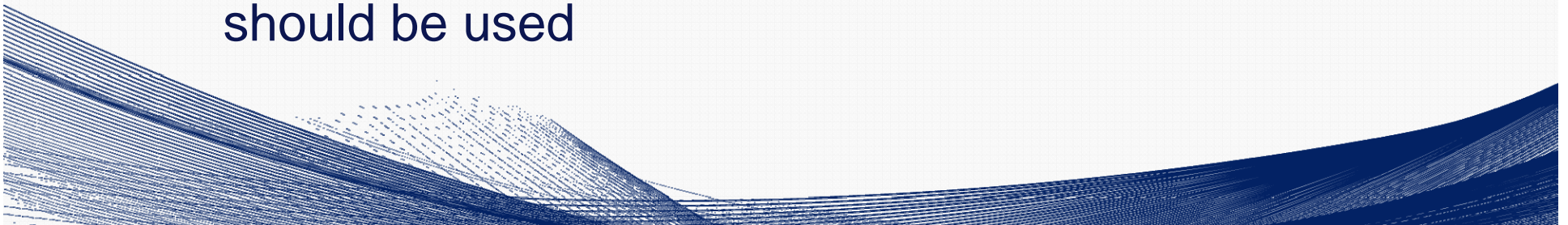
- Is an accurate, objection response likely to lead to an adverse appointment/reappointment decision by inquiring third party?
  - Is a factor, but should not be the deciding factor on how to respond
- Is the physician on staff?
  - Need to be consistent and fair in how you treat this physician
- What do your medical staff bylaws provide regarding protection and immunities relating to disclosures?
  - Presents an opportunity to amend bylaws





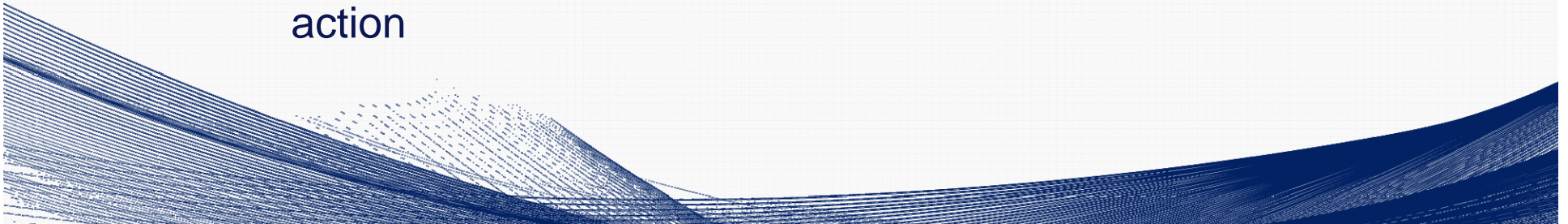
# Best practices for responding and disclosing (cont'd)

- What is the immunity standard for your state and inquiring states?
- Do you have a separate waiver form that physician is required to sign?
- What are your insurance coverages?
  - Always a good idea to reaffirm to medical staff the coverage and state protections afforded to physician participating in the peer review process
- Check board policies and procedures
- Need to decide whether qualified or absolute waiver should be used



# Best practices for responding and disclosing (cont'd)

- Responses and disclosures:
  - Need to determine if state statutes, caselaw, or regs dictate or affect nature of scope of response
    - i.e., Louisiana hospitals bound by Kadlec decision
  - Form responses:
    - Responses which simply provide dates during which physician was on the medical staff and is in good standing should only be used for physicians who have not had any quality of care, professional conduct, or similar issues which have resulted in any kind of investigations or reviews that had led to the imposition of any form of corrective or remedial action



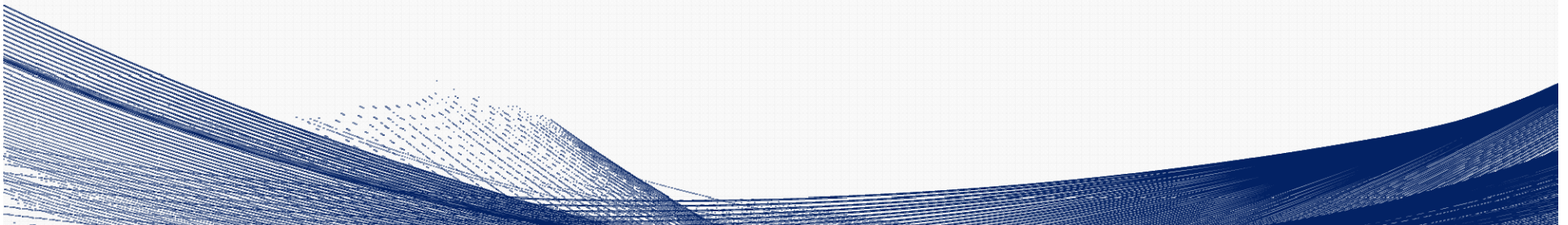
# Best practices for responding and disclosing (cont'd)

- ❑ Examples where use of form is appropriate:
  - The perfect physician—no problem, no complaints in file, no investigations, no remedial actions
  - Physician has had some cases reviewed and some medical record suspensions, but no remedial action imposed
  - Physician is difficult to deal with and may even have been counseled, but no remedial action ever taken against him
- ❑ Examples where use of form is inappropriate:
  - Form letter should not be used if any remedial action has been imposed within the previous two years for quality of care or professional conduct which did or may have had an adverse effect on patients. Actions would include monitoring, proctoring, mandatory consultations, privilege restrictions on reductions, resignations in lieu of correction action, and any time hospital has been required to report the physician to federal or state agency or authority.

Under these circumstances, answer the questionnaire.

# Best practices for responding and disclosing (cont'd)

- Responding to questionnaires:
  - Respond to all questions
  - Be truthful, accurate, objective, and base response on clear documentation
  - If a question asks for an explanation because of a response provided, be brief and to the point
    - Response, at a minimum, should provide enough information to give the answer proper context. You need not go overboard, but you also want to avoid follow-up questions from the hospital.

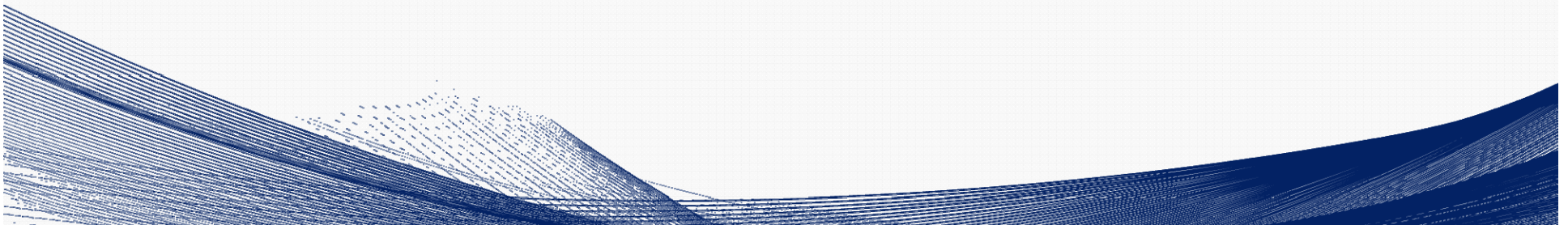


# Best practices for responding and disclosing (cont'd)

- If questionnaires completed by more than one person (i.e., department chair and division head), attempt to coordinate and strive for consistency, if possible
- Make sure that medical staff coordinator or other administrative personnel reviews response before it is sent out
- Responding to ratings questions:
  - If you don't know because of little or low activity levels, simply say so and do not provide rating responses
  - Try to come up with an agreed-to approach on the profile of a physician who should get highest, middle, and lowest ratings, and strive for consistency
  - Any rating of average or less will be viewed as evidence of a potential problem physician and may require an explanation
  - Always make sure you have facts and documentation to support any response

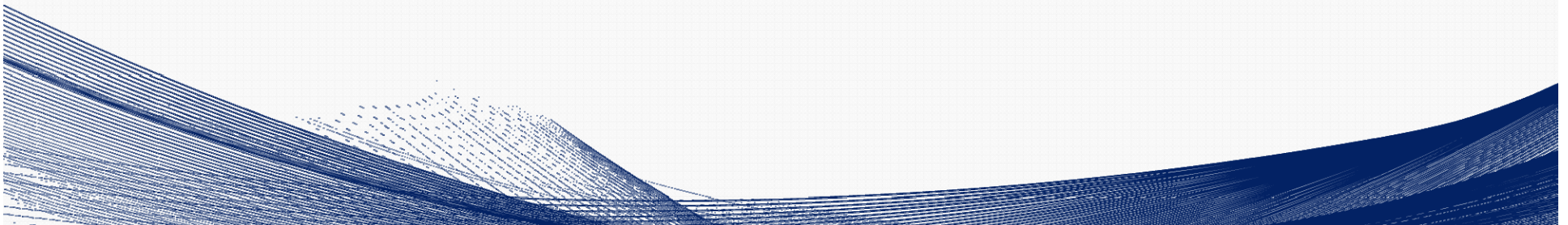
# Best practices for responding and disclosing (cont'd)

- Other questions and issues:
  - Must you disclose response to physician?
    - No, although if requesting an absolute waiver, physician may not sign until you disclose the proposed response
  - If physician refuses to sign an absolute waiver, can you refuse to provide a response?
    - Yes, although you should inform physician that response will not be provided to requesting hospital, which likely will delay processing or result in involuntary withdrawal of application or even denial



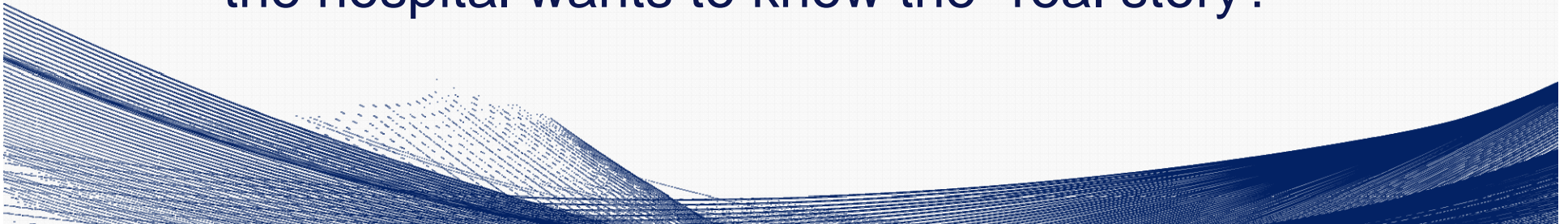
# Best practices for responding and disclosing (cont'd)

- You could also advise physician that if contacted, you will tell hospital that you are withholding response pending signature on absolute waiver
- Should I provide a copy of any portion of peer review record?
  - Never! Never! Never! Once document is released, you should assume that everyone and their uncle will see it, including one or more plaintiff's attorneys.



# Best practices for responding and disclosing (cont'd)

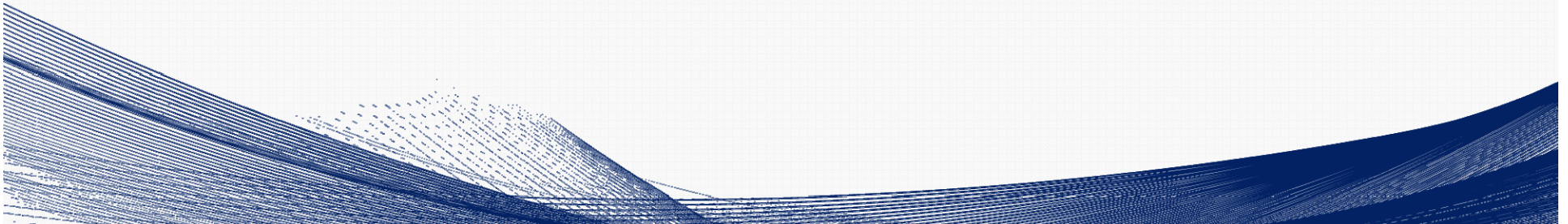
- Am I obligated to respond to subsequent requests for additional information?
  - If first response was specific enough so as to provide a context or background to questionnaire answers, there is no need or requirement to provide additional information unless otherwise mandated by law
  - Use your judgment
- Should I ever provide verbal responses: What if the hospital wants to know the “real story?”





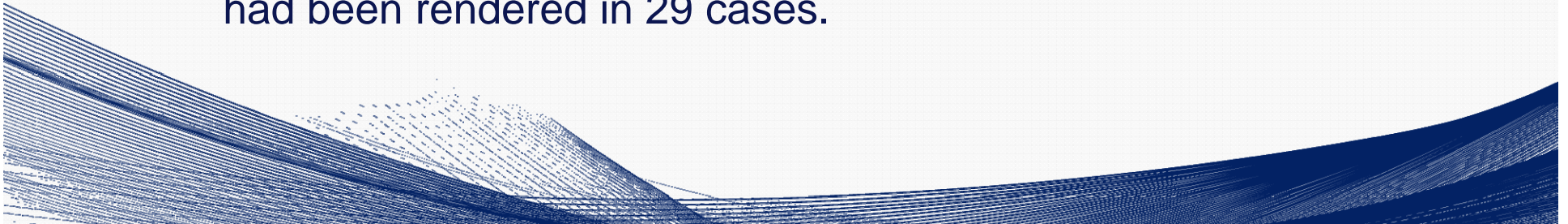
# Poliner I—an overview of the case

- Key facts:
  - Dr. Lawrence Poliner is a board-certified cardiologist who sought membership and clinical privileges at Presbyterian Hospital of Dallas in 1997.
  - Several questions arose regarding three incidents in the cath lab, one resulting in a patient's death, that led to a review by two medical staff committees and later by the department of internal medicine.
  - During the pendency of this review, a fourth case was identified in which it was alleged that an angioplasty was performed on the wrong artery, leaving the blocked artery untouched. Director of lab reviewed this error as potentially life-threatening.



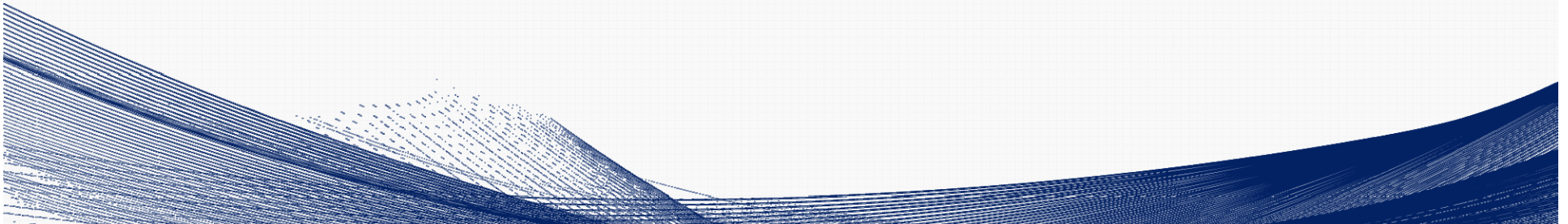
# Poliner I—an overview of the case (cont'd)

- Shortly thereafter, department chair met with Poliner after meeting with hospital management, including the CEO and VPMA, and requested that he voluntarily agree not to exercise any cath lab procedures until an ad hoc committee could be appointed to review these cases.
- Poliner claimed that he was not told about the fourth case, did not have an opportunity to defend himself against the accusations, was not told which cases were to be reviewed, that he could not consult with legal counsel before signing the “abeyance letter,” and unless he signed within three hours of receiving the letter, he would be summarily suspended.
- Committee reviewed 44 cases and found that substandard care had been rendered in 29 cases.



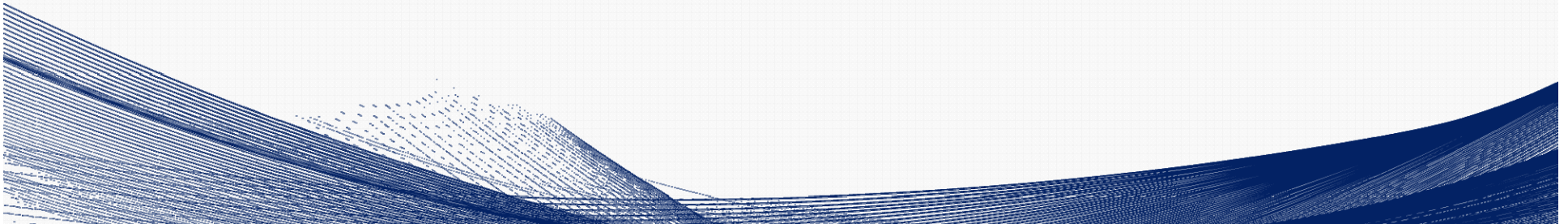
# Poliner I—an overview of the case (cont'd)

- Cases and findings referred back to the department, which sought an outside review. The review was not conducted prior to scheduled department meeting.
- Poliner sent a letter one day before the scheduled meeting seeking a one- or two-day extension in order to prepare. Request was denied.
- Poliner was given one hour to discuss the cases. Department committees unanimously recommended suspension based on:
  - ❑ Poor clinical judgment
  - ❑ Inadequate skills, including angiocardiology and echocardiography
  - ❑ Unsatisfactory medical record documentation
  - ❑ Substandard patient care

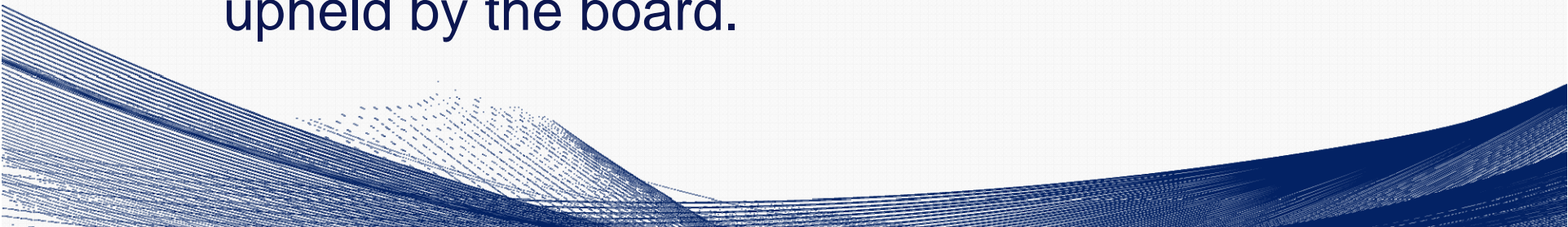


# Poliner I—an overview of the case (cont'd)

- Upon receipt of report, department chair summarily suspended Poliner's cath lab and echocardiography privileges. Admitting, consultation, non-cath lab privileges, and echos were unaffected.
- Hearing was held almost three months later based on Poliner's request.
- Hearing committee recommended unanimously that Poliner's privileges be restored, with conditions, and determined that the summary suspension, when imposed, was appropriate.

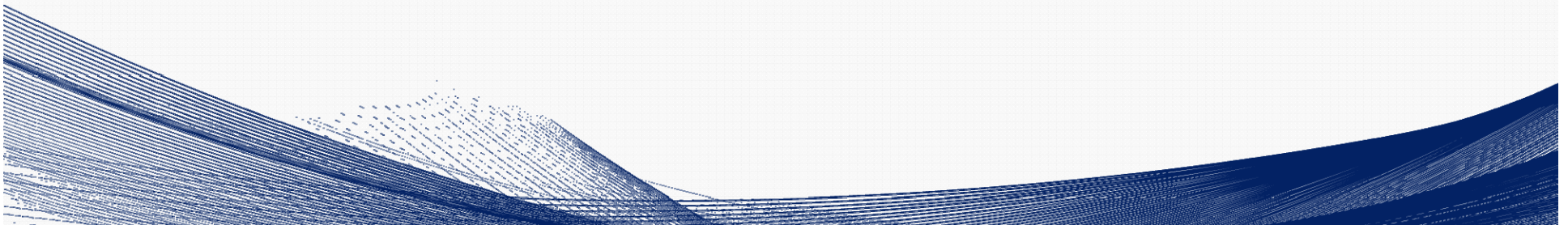


# Poliner I—an overview of the case (cont'd)

- Poliner sought to appeal the earlier decision which imposed the summary suspension because he wanted his record cleared.
  - Poliner was informed that the sole basis for any appeal is whether he had been provided procedural due process.
  - Appeals committee held that Poliner received due process and that it did not have the authority to overturn the suspension. This decision was upheld by the board.
- 

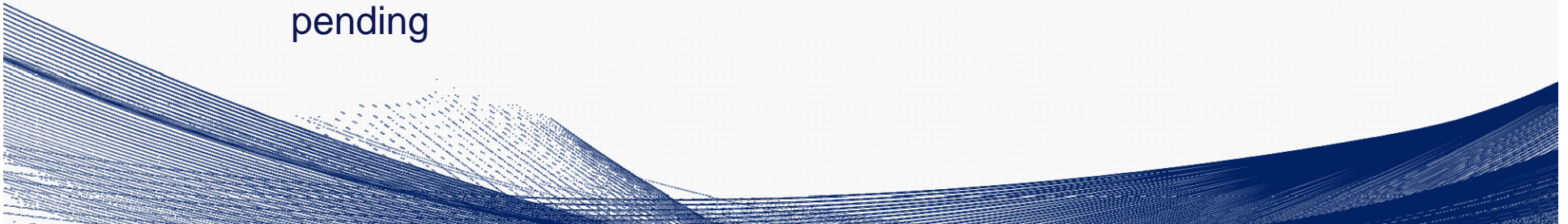
# Poliner—court decision

- Poliner filed a multicount complaint in federal court against the hospital and several physicians based on:
  - Antitrust, both state and federal
  - Breach of contract by failure to follow due process procedures under the bylaws
  - Business disparagement, slander and libel
  - Tortious interference with business and with prospective advantage
  - Texas Deceptive Trade Practices Act
  - Intentional infliction of emotional distress and mental anguish



# Poliner—court decision (cont'd)

- A declaration that defendants were not entitled to immunity under HCQIA or the Texas Medical Practice Act
- Court made the following findings:
  - Hospital bylaws, which required procedural due process rights in medical staff bylaws, created a contract right
  - HCQIA immunity protections did not apply because the court found there were genuine issues of material fact which questioned whether abeyance (summary suspension) was imposed based on the reasonable belief that it was taken in the furtherance of quality care and after a reasonable effort to obtain the facts
    - Was imposed while cases were under investigation which were still pending



## Poliner—court decision (cont'd)

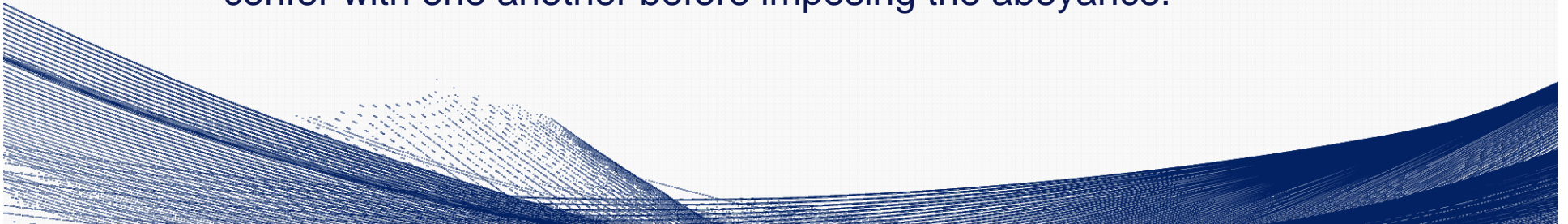
- Poliner was not given information about the cases nor an opportunity to give his side of the story. As per medical bylaws standard, not clear whether there was an imminent threat to patients.
- Poliner also was threatened with suspension if he did not agree to the abeyance letter.
- There was evidence that the hospital and certain physicians violated bylaws and HCQIA when forcing him to sign the abeyance letter and that some of them harbored animosity.



# Poliner reversed

## □ Key findings:

- 5th Circuit Court of Appeals reversed the District Court based on its finding that defendants were immune from money damages under the Health Care Quality Improvement Act.
- Court spent considerable time detailing all of the quality-of-care issues and problems which were identified by the various medical staff committees and outside reviewers.
  - Record in peer review matters needs to emphasize the quality-of-care issues so as to feed into the court's general reluctance to interfere in peer review disputes
- Court also emphasized and described the quality review procedures, the various committees that participated in the process, and efforts by the hospital and medical staff to adhere to these procedures and to confer with one another before imposing the abeyance.

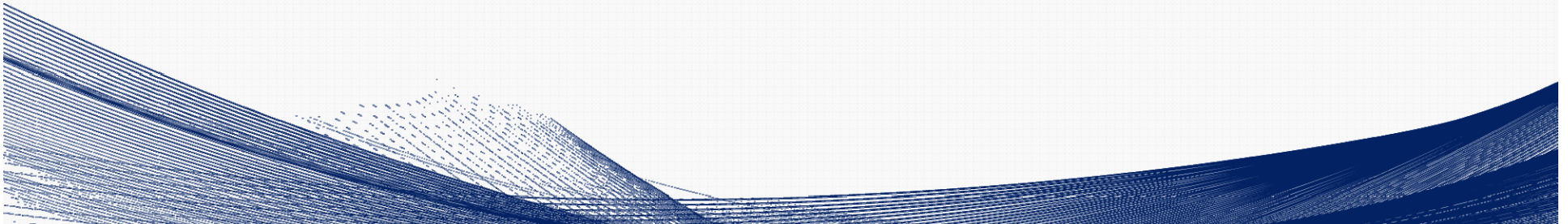


# Poliner reversed (cont'd)

- HCQIA presumes that any peer review proceeding is a professional review action which meets the standards for immunity “unless the presumption is rebutted by a preponderance of the evidence.”
- Courts look to whether the:
  - ❑ Action was taken in furtherance of quality healthcare
  - ❑ After a reasonable effort to obtain the facts
  - ❑ After adequate notice and hearing procedures that are fair
  - ❑ In the reasonable belief that the action was warranted by the facts known after a reasonable effort to obtain the facts
- In evaluating compliance with HCQIA, the courts apply an objective standard of performance rather than a subjective good-faith standard.

## Poliner reversed (cont'd)

- The question for the appellate court was whether the abeyance was a peer review action that satisfied the HCQIA standards and not whether imposition of the abeyance was in compliance with the bylaws.
  - Stated differently, failure to follow bylaws does not necessarily mean that you lose HCQIA immunity protection
- If the reviewers, with the information available to them at the time, would reasonably have concluded that the abeyance would restrict incompetent behavior or would protect patients, the HCQIA immunities apply.

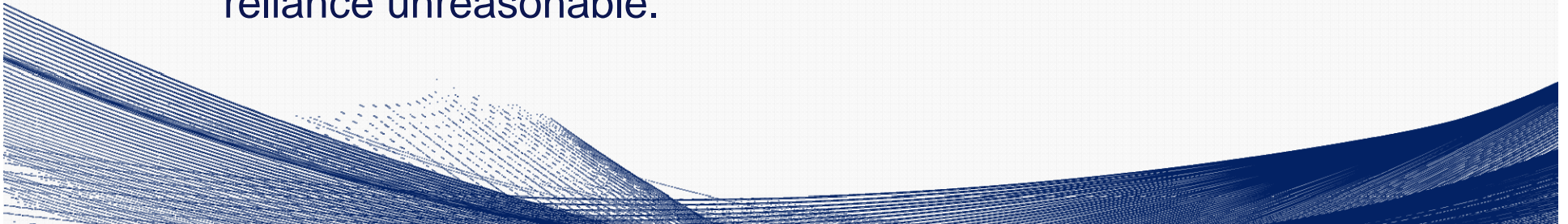


# Poliner reversed (cont'd)

- HCQIA does not require that the action taken actually improved the quality of healthcare or that the conclusions reached by the reviewers were in fact correct.
  - Being wrong does not automatically mean that the immunity protection does not apply
  - The good or bad faith of the reviewer is irrelevant; need to look to the totality of the circumstances
- When abeyance was imposed by the department chair, there were already serious questions about Poliner's quality in a number of cases, including his admitted diagnostic error (i.e., Poliner missed the fact that one of his patient's left anterior descending artery was completely blocked even though he opened the patient's right coronary artery). Patient also suffered postprocedure respiratory complications which almost resulted in patient's death.
- Ad hoc committee:

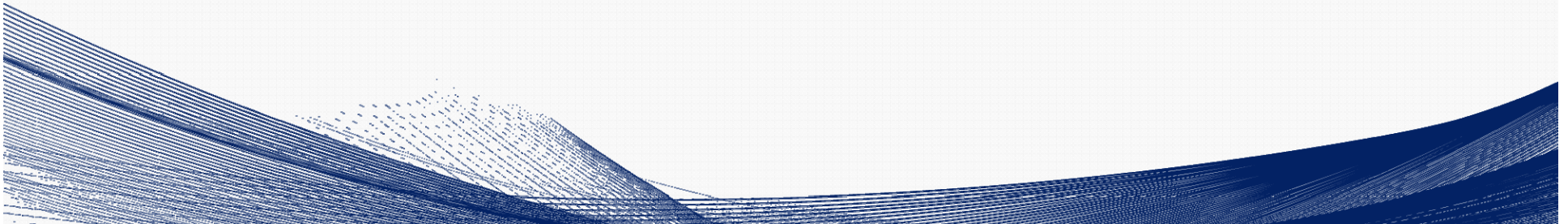
# Poliner reversed (cont'd)

- Ad hoc committee decision to extend abeyance was made after learning that six cardiologists determined that he gave substandard care in more than half of the 44 cases reviewed.
- The court determined that each decision, imposition of abeyance, and the extension was imposed under the objective reasonable belief that the actions would further quality healthcare.
  - The fact that a hearing committee later decided that the criticisms were not completely accurate and recommended removal of the suspension did not mean that the immunity did not apply
- Nothing in the record suggested that the information was “facially flawed” or “so obviously deficient” as to make defendant’s reliance unreasonable.



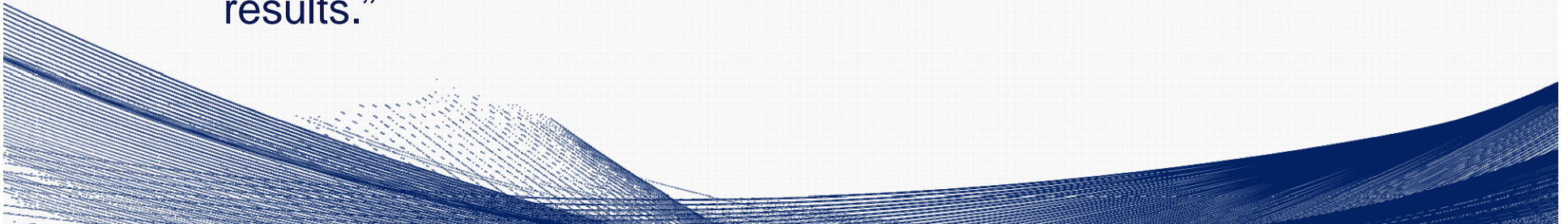
# Poliner reversed (cont'd)

- Poliner was entitled to a reasonable effort and not a perfect effort.
- Failure to follow bylaws does not conclusively defeat entitlement to HCQIA immunity.
- Court holding does not mean that hospitals which comply with HCQIA requirements are free to violate their bylaws and state law.
  - Physicians can seek injunctive and declaratory relief
- “The immunity from money damages may work harsh outcomes in certain circumstances, but that results from Congress’ decision that the systemwide benefit of robust peer review in rooting out incompetent physicians, protecting patients, and preventing malpractice outweighs those occasional harsh results.”



# Poliner reversed (cont'd)

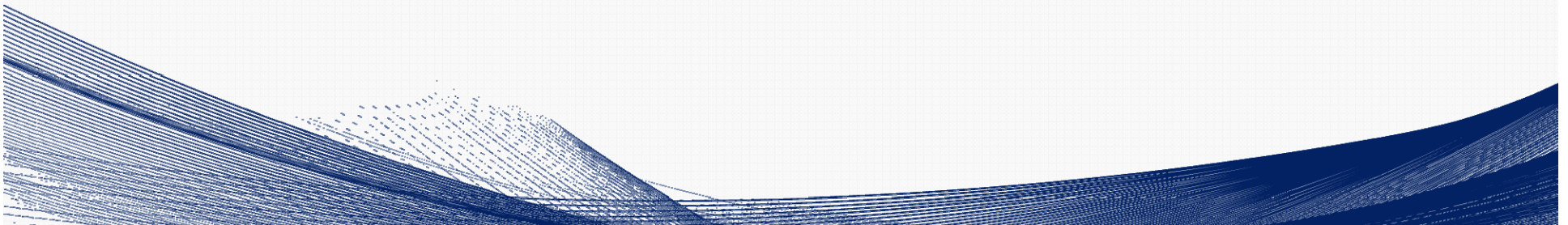
- Court rejected Poliner’s argument that the ability to impose an immediate summary suspension is limited to where failure to take action may, without a prior hearing, result in “an imminent danger to the health of any individual”—requires that the physician be impaired or grossly incompetent.
- Also, court noted that the suspension was very limited and focused only on certain of his privileges.
- “The immunity from money damages may work harsh outcomes in certain circumstances, but that results from Congress’ decision that the systemwide benefit of robust peer review in rooting out incompetent physicians, protecting patients, and preventing malpractice outweighs those occasional harsh results.”



# Effect of Poliner on corrective action decisions

## □ Key lessons learned:

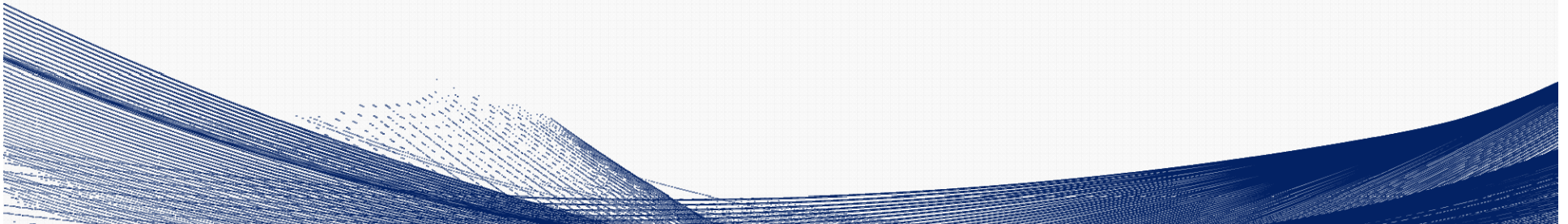
- Abeyance letter was treated as a summary suspension. This form of corrective action rarely should be used and only where there is a documented, immediate, and real threat to patient care.
- Need to consider whether other remedial actions would suffice in protecting patients.
- Decision-makers need to understand the summary suspension standard under the medical staff bylaws and must make sure that standard clearly has been met before a suspension has been imposed.





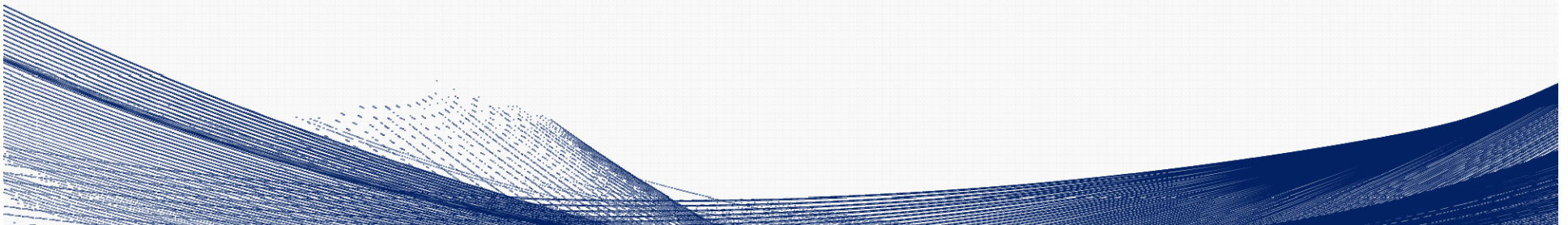
# Effect of Poliner on corrective action decisions (cont'd)

- As a general rule, you should always have at least two persons concur that a summary suspension is the only remedial action available to address the actual or perceived threat to patient care.
- Make sure that direct competitors or anyone with an actual or perceived bias is not involved in direct decision-making.
  - Not always possible; may need to involve outside parties
  - Sometimes physician wants a physician in same specialty area to be involved at hearing stage—get a waiver



# Effect of Poliner on corrective action decisions (cont'd)

- You must always follow your medical staff and corporate bylaws.
- Always try and make sure that there is appropriate and adequate documentation before taking action.
- Hearing and appellate review bodies should be able to look at the basis of the decision as a whole to determine if action was appropriate and should not be limited to a question of whether procedures were followed or procedural due process given.

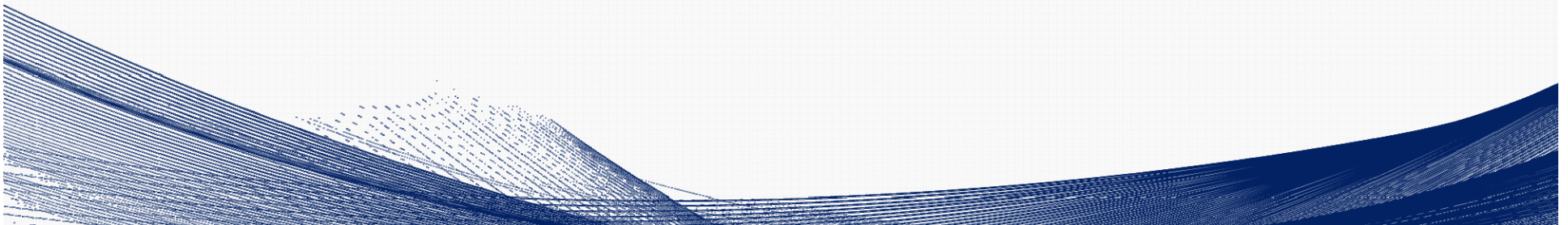


# Effect of Poliner on corrective action decisions (cont'd)

- Unless otherwise required by state or federal law, bylaws should not reference a right to “procedural or substantive due process.”
  - ❑ Not required
  - ❑ Can create a higher standard
  - ❑ Courts confuse what is and is not due process
- Forcing a physician to make an immediate decision under threat of a greater sanction, with no opportunity to consult with a peer or legal counsel and without being advised of the background or right to rebut the charges, is ill advised.

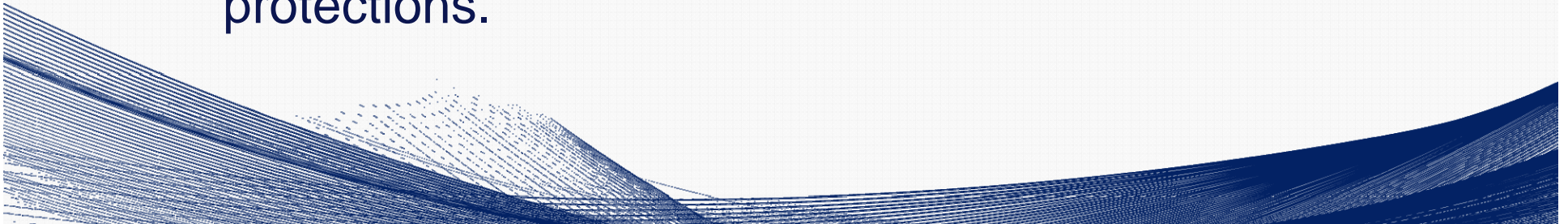
# Effect of Poliner on corrective action decisions (cont'd)

- As a general rule, you should bend over backwards to accommodate physician on procedural issues such as extensions of time, access to records, access to counsel, and related procedural issues.
- Remember to incorporate HCQIA standards into bylaws:
  - ❑ Was action taken in the reasonable belief that it furthered quality care?
  - ❑ Was there a reasonable effort to investigate the facts before disciplinary action was imposed?



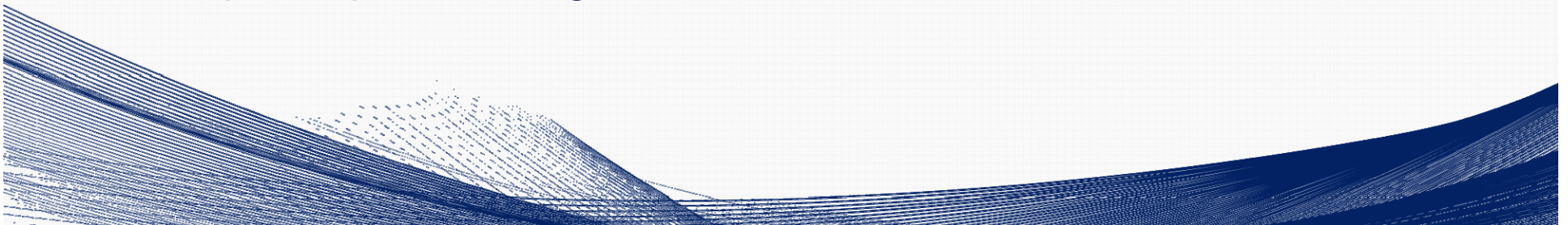
# Effect of Poliner on corrective action decisions (cont'd)

- You must know the language and standards of state immunity and confidentiality standards so as to guide your procedures and decision
- Remember the state confidentiality and immunity statutes generally do not apply in federal courts to federal versus state claims (i.e., federal antitrust versus a state defamation lawsuit)
- Hospitals and medical staff also must be cognizant of their respective state confidentiality and immunity statutes to make sure that their procedures and actions track these statutes so as to maximize state protections.

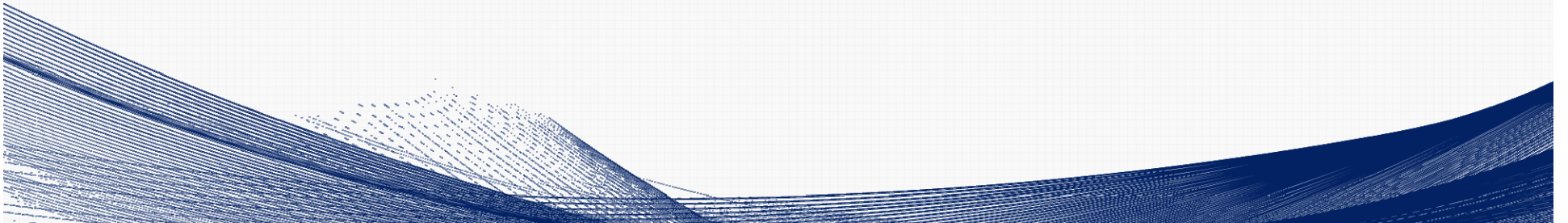


# Effect of Poliner on corrective action decisions (cont'd)

- Know what actions do and do not trigger a Data Bank report and use this knowledge effectively.
- Be fair and reasonable while keeping in mind the requirement to protect patient care.
- Carefully review hospital's insurance coverage as applied to peer review process in order to maximize insurance protections to all peer review participants.
- If necessary, may need to consider formal indemnification of peer review participants, despite state immunity and insurance protection, if medical staff balks at peer review participation in light of Poliner decision.



# Other observations and comments

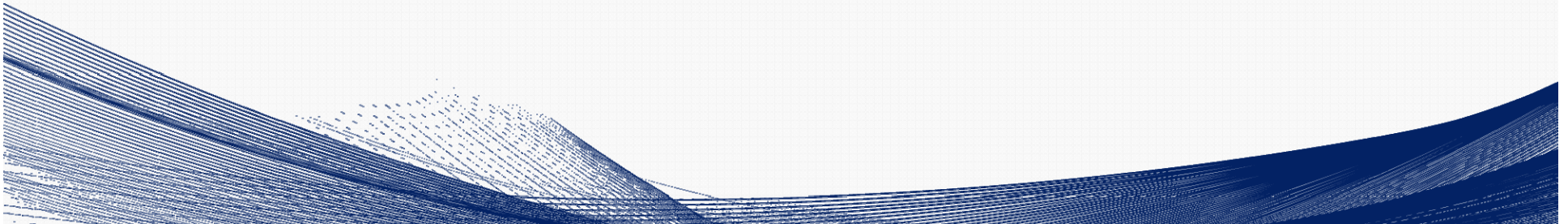


# Frigo v. Silver Cross Hospital

## Negligent credentialing

### □ Frigo v. Silver Cross Hospital

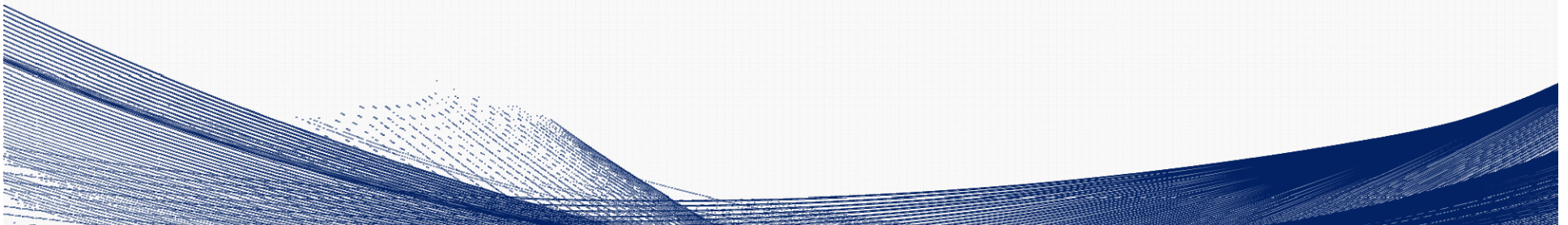
- Frigo involved a lawsuit against a podiatrist and Silver Cross.
- Patient alleged that podiatrist's negligence in performing a bunionectomy on an ulcerated foot resulted in osteomyelitis and the subsequent amputation of the foot in 1998.
- The podiatrist was granted Level II surgical privileges to perform these procedures, even though he did not have the required additional postgraduate surgical training required in the bylaws as evidenced by completion of an approved surgical residency program or board eligibility or certification by the American Board of Podiatric Surgery at the time of his initial appointment in 1992.





# Frigo v. Silver Cross Hospital Negligent credentialing (cont'd)

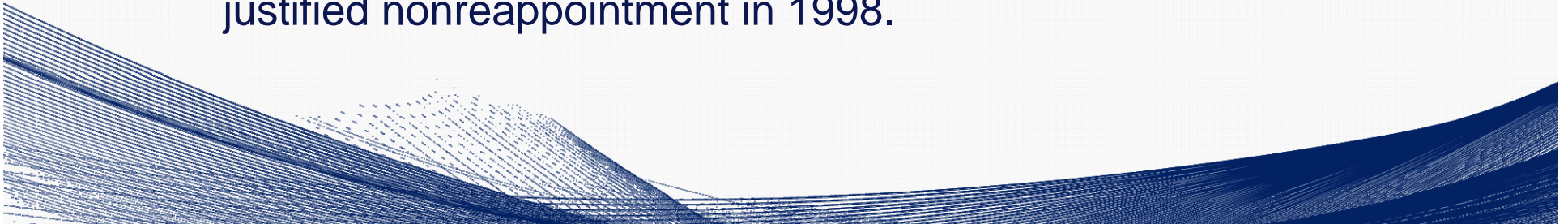
- At the time of his reappointment, the standard was changed to require a completed 12-month podiatric surgical residency training program, successful completion of the written eligibility exam, and documentation of having completed 30 Level II operative procedures.
- Podiatrist never met these standards and was never grandfathered. In 1998, when the alleged negligence occurred, he had only performed six Level II procedures and none of them at Silver Cross.
- Frigo argued that because the podiatrist did not meet the required standard, he should have never been given the privileges to perform the surgery.



# Frigo v. Silver Cross Hospital

## Negligent credentialing (cont'd)

- She further maintained that the granting of privileges to an unqualified practitioner who was never grandfathered was a violation of the hospital's duty to make sure that only qualified physicians are to be given surgical privileges. The hospital's breach of this duty caused her amputation because of podiatrist's negligence.
- Jury reached a verdict of \$7,775,668.02 against Silver Cross.
- Podiatrist had previously settled for \$900,000.00.
- Hospital had argued that its criteria did not establish nor was there an industrywide standard governing the issuance of surgical privileges to podiatrists.
- Hospital also maintained that there were no adverse outcomes or complaints that otherwise would have justified nonreappointment in 1998.



# Frigo v. Silver Cross Hospital

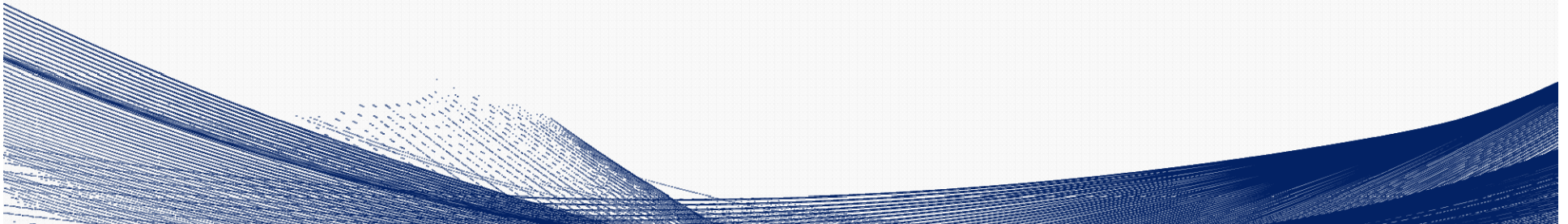
## Negligent credentialing (cont'd)

- Court disagreed and held that the jury acted properly because the hospital's bylaws and the 1992 and 1993 credentialing requirements created an internal standard of care against which the hospital's decision to grant privileges could be measured.
- Court noted that Dr. Kirchner had not been grandfathered and that there was sufficient evidence to support a finding that the hospital had breached its own standard, and hence, its duty to the patient.
- This finding, coupled with the jury's determination that Dr. Kirchner's negligence in treatment and follow-up care of Frigo caused the amputation, supported the jury's finding that her injury would not have been caused had the hospital not issued privileges to Dr. Kirchner in violation of its standards.



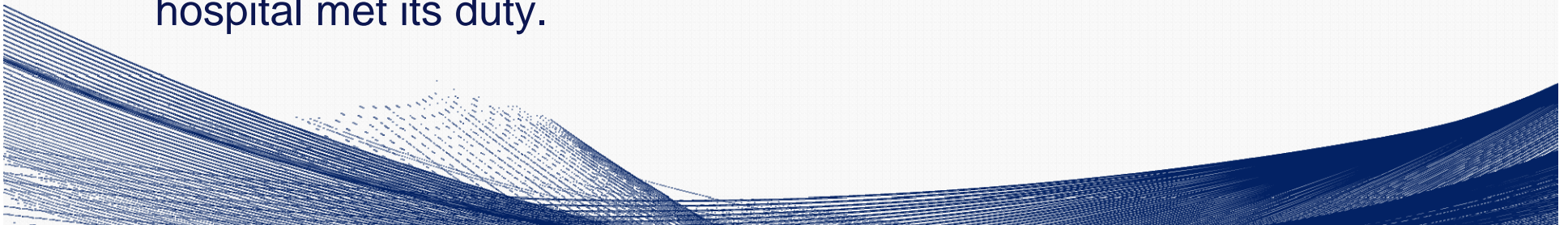
# Defending against a corporate negligence claim

- ❑ Existence of duty and breach of duty and causation is usually established through expert testimony.
- ❑ Expert must establish that duty was not met (i.e., that hospital adopted and followed all standards as reflected in its bylaws and procedures, and/or no breach occurred, and/or if there was a breach, it did not cause patient's injuries).
- ❑ Courts and juries may be less likely to hold in favor of the plaintiff even if, for example, a physician's lack of qualifications or history of malpractice actions raises the issue of whether privileges should have been granted, as long as some action was taken (i.e., physician was being monitored or proctored or was under a mandatory consultation).
- ❑ A judge and jury will be more likely to find in favor of the plaintiff if the hospital did absolutely nothing with respect to the physician's privileges.



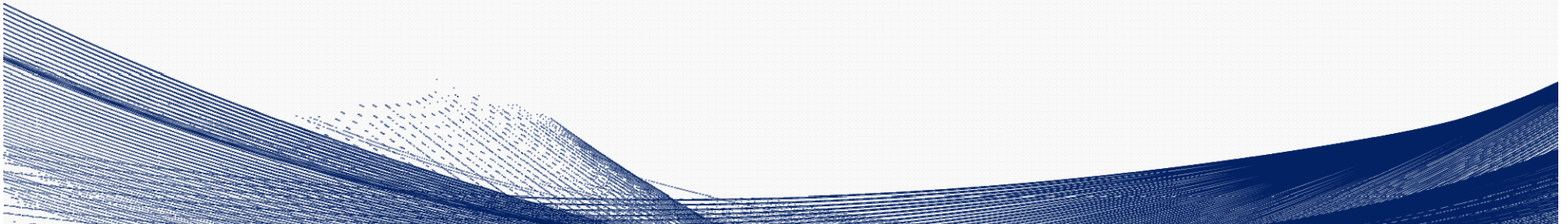
# Defending against a corporate negligence claim (cont'd)

- ❑ It will be important for hospital to establish that there is not necessarily a black-and-white standard on what qualifications are absolutely required before issuing clinical privileges, although such a position, at least for certain privileges, may have been established (i.e., PTCAs).
- ❑ Also, the hospital should argue that even if a physician was identified as having issues or problems, a reduction or termination of privileges is not always the appropriate response. Instead, the preferred path is for the hospital to work with the physician to get him or her back on track by implementing other remedial measures such as monitoring, proctoring, additional training, etc.
- ❑ Attempt to introduce physician's peer review record to establish that hospital met its duty.



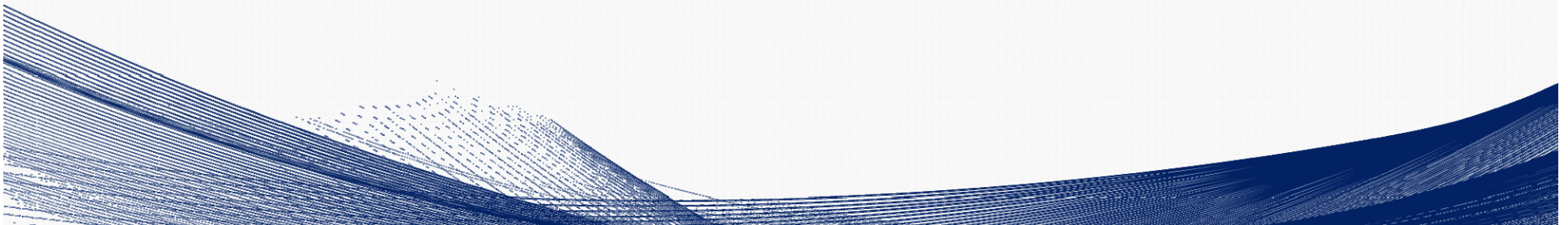
# Defending against a corporate negligence claim (cont'd)

- You must evaluate whether your peer review statute does or does not allow introduction of peer review record into evidence for this purpose.
- Denying a plaintiff access to this information usually makes it more difficult to prove up a negligent credentialing claim.
- Most statutes do not permit the discovery or admissibility of this information because to do so would have a chilling effect on necessary open and frank peer review discussion. There is no statutory exception that allows a hospital to pick and choose when I can or cannot introduce information into evidence.



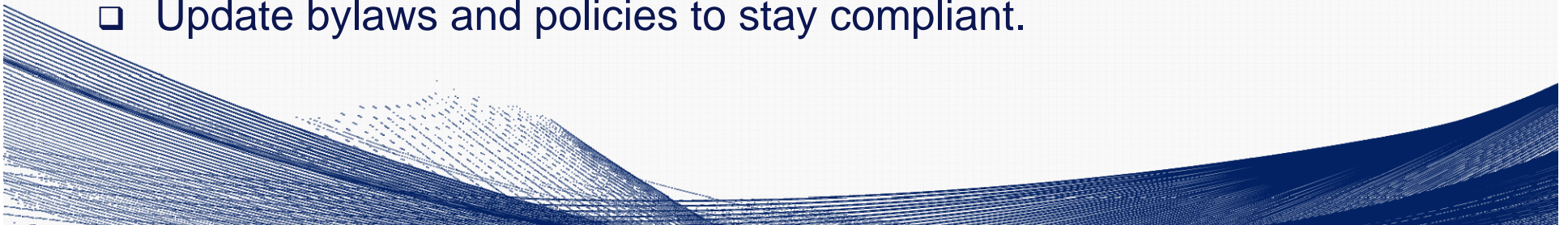
# Defending against a corporate negligence claim (cont'd)

- In Frigo, hospital's attempt to establish that duty was met by showing through the peer review record that podiatrist had no patient complaints or bad outcomes was denied because prohibition on admissibility into evidence was absolute.
- Court stated, however, that this information was somewhat irrelevant because the hospital clearly did not follow its own standards.



# Other preventative steps to consider

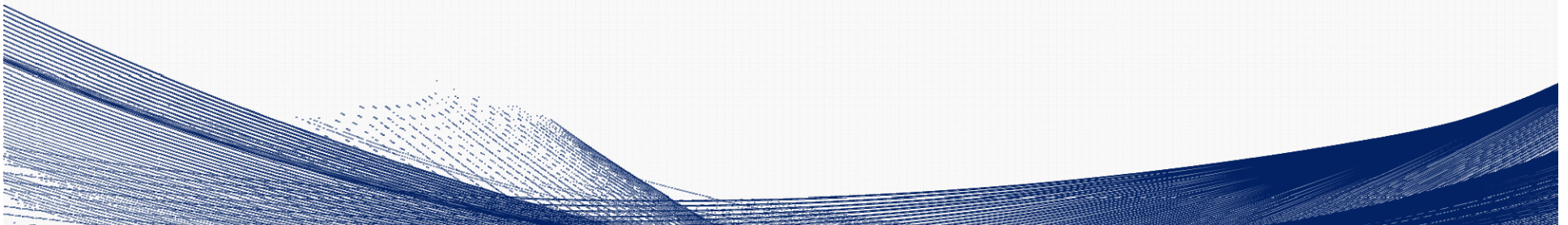
- ❑ Conduct audit to determine whether hospital and medical staff bylaws, rules and regulations, and policies comply with all legal accreditation standards and requirements.
- ❑ If there are compliance gaps, fix them.
- ❑ Determine whether you are actually following your own bylaws, policies, and procedures.
  - Remember: Bylaws, policies and procedures, and guidelines are all discoverable. They also create the hospital's internal standard. If you do not follow your bylaws and standards, you arguably are in breach of your patient care duties.
- ❑ If you are not following your bylaws and policies, either come into compliance or change the policies.
- ❑ Update bylaws and policies to stay compliant.





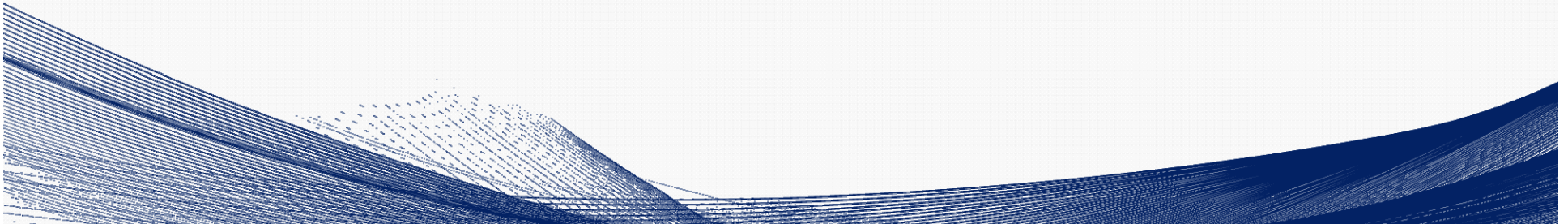
# Other preventative steps to consider(cont'd)

- ❑ Confer with your peers. Standard of care can be viewed as national (i.e., Joint Commission), internal, or areawide so as to include the peer hospitals in your market. If your practices deviate from your peers, this will be held against you as a breach of the standard of care.
- ❑ It is very important to understand from your insurance defense counsel how plaintiff's attempt to prove a corporate negligence violation as well as how these actions are defended.
  - These standards have a direct effect on hospital prophylactic efforts to minimize liability exposure.

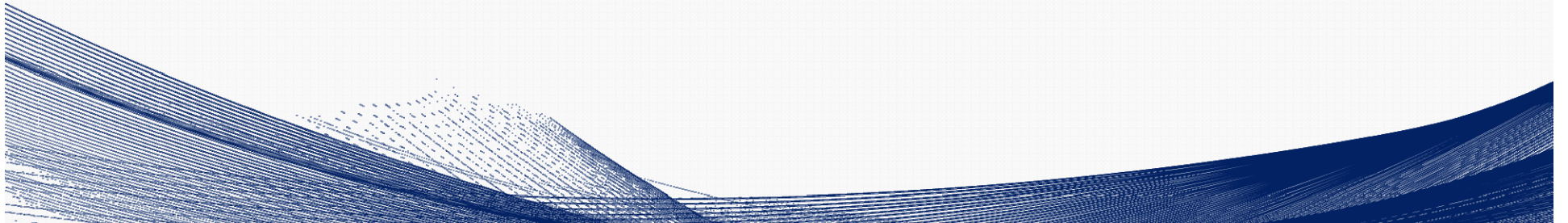


# Other preventative steps to consider(cont'd)

- What testimony must plaintiff's expert assert to establish a claim, and what must defense expert establish to rebut?
- Every state has its own nuances, and you must understand them in order to defend accordingly.
- Does your state peer review statute allow for the introduction of confidential peer review information under any circumstances either to support a plaintiff's claim or to defend against it?
- If the file information would help the hospital, can the privilege be waived in order to defend the case? Realize that plaintiff also would have access. Will this help or hurt you?




# Other observations and comments



# Murphy v. Baptist Hospital

## Economic credentialing

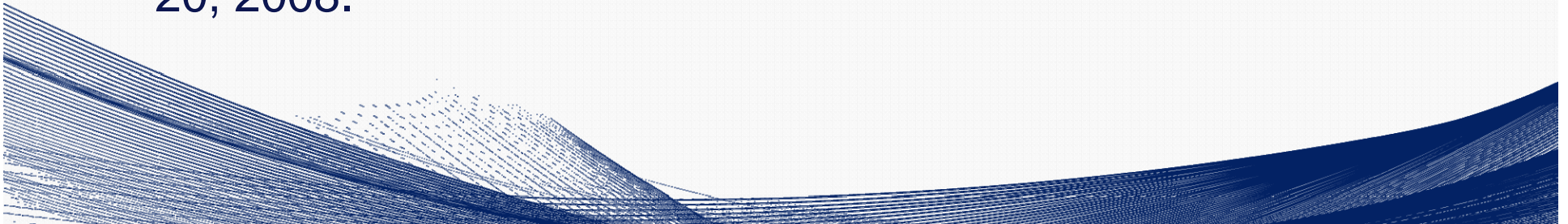
### □ Background of dispute:

- In response to the opening of a competing heart hospital, board of directors adopted an economic credentialing policy (“Policy”).
  - “Any physician who, directly or indirectly, acquires or holds an ownership or financial interest in a hospital anywhere in Arkansas is ineligible for initial or renewed professional staff appointments or clinical privileges at any Baptist hospital.”
  - Policy applied to owners, investors, and immediate family members—very broad definition.
  - No hearing rights were provided if a current physician loses privileges.
  - In order to obtain or maintain privileges, physician or family member had to completely divest themselves of this ownership/financial interest.
- 

# Murphy v. Baptist Hospital

## Economic credentialing (cont'd)

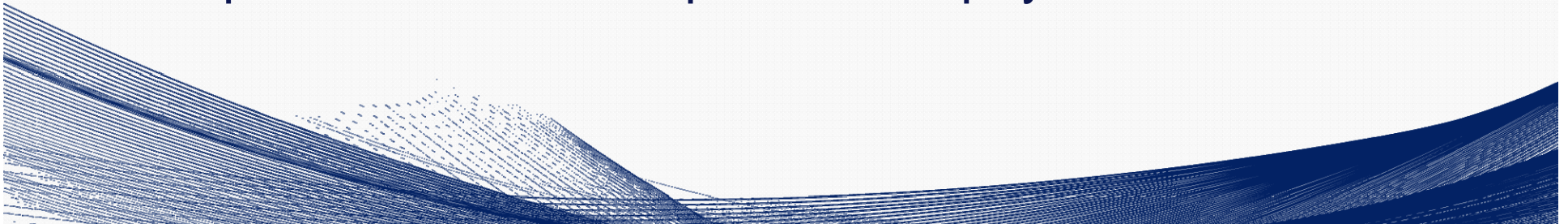
- ❑ Several physicians affected by this Policy sued to enjoin implementation under a number of theories:
  - Tortiously interferes with patient-physician relationship
  - Is contrary to public policy
  - Is an unconscionable business and trade practice in violation of Arkansas Deceptive Trade Practices Act
- ❑ Trial court agreed and enjoined enforcement of the Policy in 2004.
- ❑ Decision was upheld by the Arkansas Supreme Court and was remanded for trial which took place between March 10–20, 2008.



# Murphy v. Baptist Hospital

## Economic credentialing (cont'd)

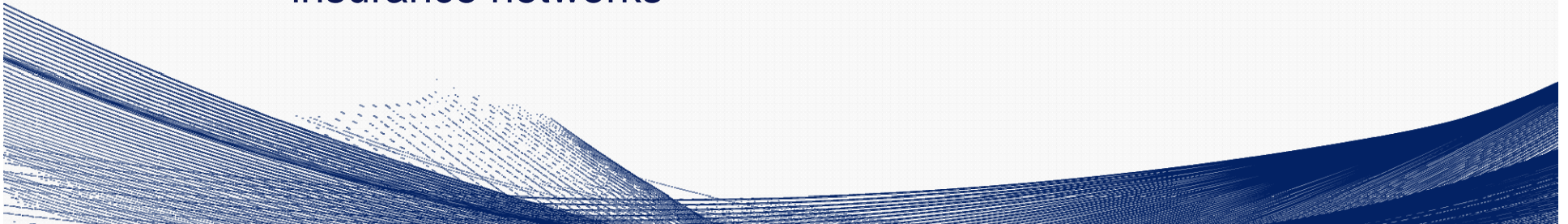
- On February 27, 2009, trial court entered an order for permanent injunction and made the following findings and rulings:
  - Patient-physician relationship carries with it a reasonable business and patient expectations
  - A contract with the patient exists
  - Referrals are the lifeblood of a physician's practice
  - Hospital acknowledged that Policy would disrupt a patient's relationship with their physician of choice



# Murphy v. Baptist Hospital

## Economic credentialing (cont'd)

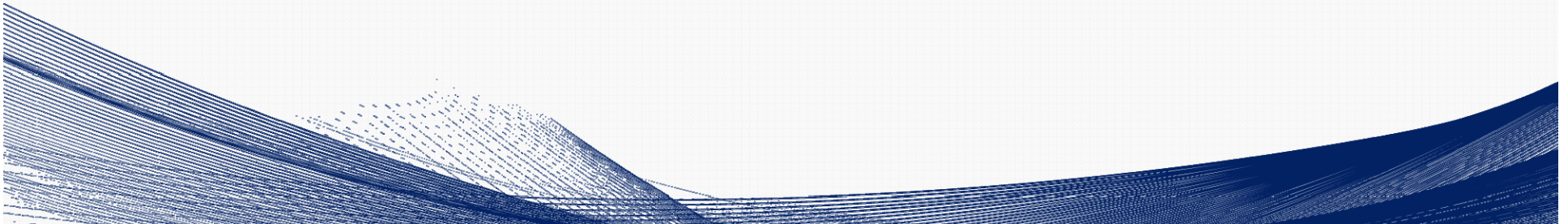
- Court determined that Baptist Health potentially interfered with patient-physician relationship because:
  - ❑ The hospital specifically identified the plaintiff physicians who would be affected
  - ❑ The Policy would make it difficult for any physician associated with a competing heart hospital to admit patients to Baptist Health
  - ❑ Because the hospital was an exclusive, in-network provider with one or more managed care plans, it knew and warned the plaintiffs that retention of their financial interest in any specialty hospital would result in their exclusion from the insurance networks



# Murphy v. Baptist Hospital

## Economic credentialing (cont'd)


- Hospital confirmed with Blue Cross/Blue Shield that plaintiffs would be excluded if they no longer had staff privileges at Baptist
- Although plaintiffs never lost privileges at the hospital, the court determined that imposition of the Policy would in fact cause compensatory damages, would interfere with patient relationships, and would result in loss of referrals
- Policy was contrary to public policy because:
  - Arkansas protects the patient's right to the physician of their choice as reflected in a number of court decisions. The Policy interferes with this relationship.





# Murphy v. Baptist Hospital

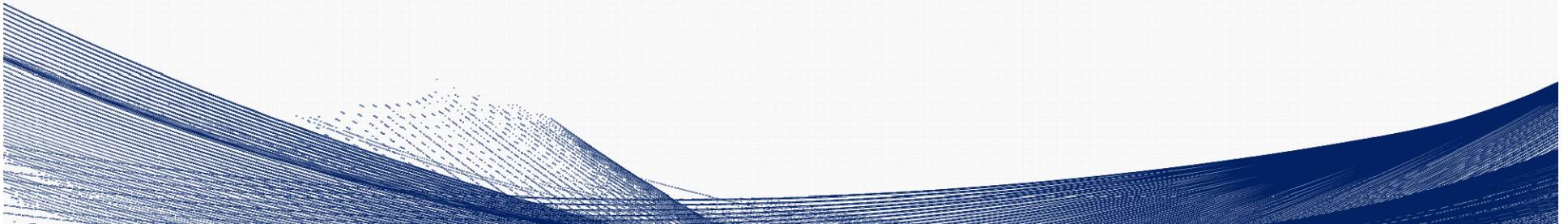
## Economic credentialing (cont'd)

- ❑ Restrictive covenants in employment agreements are not generally enforceable in Arkansas.
  - ❑ The Patient Protection Act of 2005 was passed so as to allow patients to be given the opportunity to see the healthcare provider of their choice and the opportunity of providers to participate in health benefit plans.
  - ❑ The Medicare Act guarantees patients basic freedom of choice.
  - ❑ The AMA Code of Ethics provides that “free choice of physicians is the right of every individual.”
- 

# Murphy v. Baptist Hospital

## Economic credentialing (cont'd)

- ❑ Public policy favors the establishment and acquisitions of specialty hospitals and disfavors economic credentialing.
- ❑ The court cited to expert testimony and federal studies, which concluded that economic credentialing does not benefit the community.
- ❑ Economic credentialing punishes physician investment in specialty hospitals and punishes physicians for engaging in conduct that is “illegal, negatively affects patient care, impedes advancements in medical technology and the construction of a modern healthcare delivery system and interferes with patient-physician relationships. The court also cited to an AMA policy.



# Murphy v. Baptist Hospital

## Economic credentialing (cont'd)

- ❑ The hospital acted contrary to its obligations as a 501(c)(3) not-for-profit, tax-exempt charitable organization because as one of the listed factors of requiring that a hospital operate for the benefit of the community and to demonstrate that it qualifies for exempt status that the hospital is willing to hire any qualified physician. The hospital did not carry out its fiduciary duty to make inquiry as to whether the effect of the policy would be to close the hospital's medical staff and jeopardize its tax-exempt status.
- ❑ Public policy does not support suppression of competition, which was the specific intent of Baptist Hospital by prohibiting physicians from investing in a competing hospital or otherwise lose their medical staff membership and clinical privileges.


# Murphy v. Baptist Hospital

## Economic credentialing (cont'd)

- ❑ The court determined that competition is good because it results in lower prices and better quality and obligates facilities to remain innovative and cost-efficient.
- ❑ Public policy protects the institution of marriage:
  - The court heard testimony that a physician at Baptist was going to lose privileges because her husband, who was not on staff at Baptist, had an ownership in a surgical hospital that would compete with Baptist
  - This physician testified that losing privileges would destroy her hospital practice and that she would be forced to coerce her husband to give up his association or divorce him, and thus the Policy had the effect of contravening the state's interest in protecting the institution of marriage and could affect many physicians given the broad definition of "immediate family member"

# Murphy v. Baptist Hospital

## Economic credentialing (cont'd)

- The court rejected hospital's four separate purposes for supporting the Policy, which were:
    - To prevent physicians from selectively referring profitable patients to their own facilities while dumping less profitable patients at Baptist Health
    - To protect Baptist Health's financial health so that it may carry out its charitable mission
    - To prevent staff members from working at physician-owned facilities
    - Foster hospitable physician-hospital relations
- 

# Murphy v. Baptist Hospital

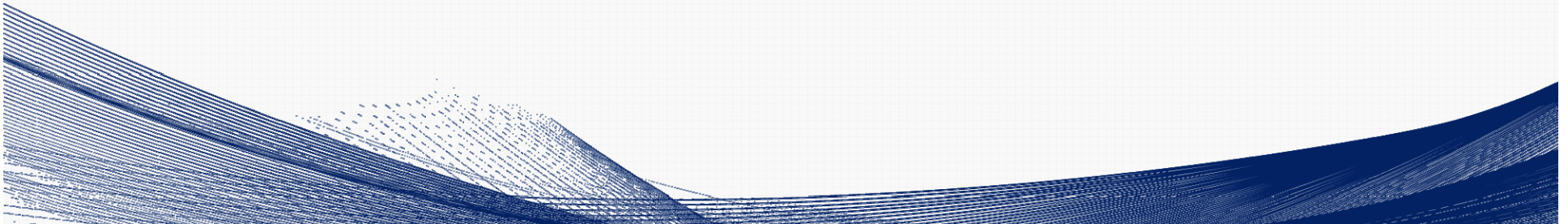
## Economic credentialing (cont'd)

- None of the evidence introduced by Baptist supported any of these proposals.
- Court determined that many supposed purposes were never truly investigated or analyzed and appeared to be an after-the-fact argument in an attempt to justify the Policy.
- The policy was overly broad and not tailored to meet any specific, justifiable purpose.
- The definition of immediate family was broad.
- The restriction applied to every hospital licensed in the entire state of Arkansas and could affect physicians who did not even have a family connection, because it also applied to “any interest, directly or indirectly, in real or personal property used by competing hospital.”

# **Murphy v. Baptist Hospital**

## **Economic credentialing (cont'd)**

- Although the court found that Baptist had a legitimate and strong interest in protecting its economic viability, no such analysis was conducted prior to the implementation of the Policy, and no such rationale was ever presented before the board.
- In addition, the Arkansas Heart Hospital had been in existence for six years prior to any action taken by Baptist Health, and in fact, the Policy was developed by the prospect of another specialty hospital in the market.



# Murphy v. Baptist Hospital

## Economic credentialing (cont'd)

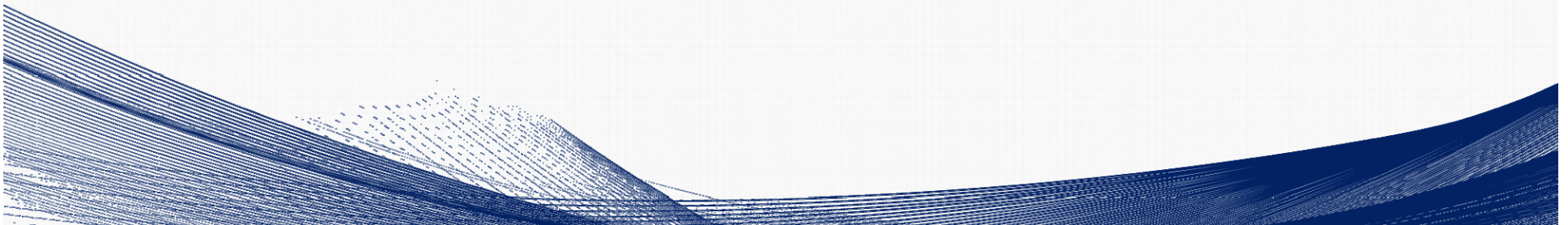
- The court determined that the hospital's decision to adopt the Policy was done so with the intent to stifle competition, even though there is a shortage of cardiac beds in this area. Although the community has a great need for nonprofit hospitals and to make sure that it remained an "economically viable institution," there was no credible evidence to support that the Arkansas Heart Hospital would adversely affect Baptist, which consistently has made money and where other evidence showed that a community hospital increases profitability when specialty hospitals enter the market.



# Murphy v. Baptist Hospital

## Economic credentialing (cont'd)

- Although the court found that “society has a strong interest in ensuring that the most financially lucrative patients are not selected by specialty hospital physicians, leaving uninsured or underinsured patients to be treated at community hospitals, the hospital had failed to prove that any plaintiff had actually engaged in such activity.”
- The court rejected the hospital’s argument that it cannot be compelled to grant staff privileges to the plaintiffs because it had the right to refuse to deal and that one party cannot compel another to contract. The court determined that this right is not absolute and a party “may not refuse to deal where the refusal is illegal, unconscionable, or contrary to public policy.”



# Murphy v. Baptist Hospital

## Economic credentialing (cont'd)

- The court also determined that the Policy was in violation of the Arkansas Deceptive Trade Practices Act because it was adopted in connection with its “business, trade, or commerce,” that the Policy caused actual injury through disruption of relationships with patients and referral sources, and that the Policy “affronts the sense of justice, decency, and reasonableness because it impinges on fundamentally important public policies without adequate countervailing justification.”

# Other observations and comments

