

# The Hospital Medical Staff Peer Review Process: The Good, The Bad, and The Ugly

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## SUBTITLE:

“Practical Matters the Physician  
Must Know When Confronted by  
a Medical Staff Peer Review/  
Clinical Privileges/Fair Hearing  
Proceeding”



Originally presented by  
George F. Indest III at an annual  
meeting of the American College  
of Surgeons

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**“In the next fifteen minutes we  
have to create enough confusion  
to get out of here alive.”**

***-Smith [Clint Eastwood]  
in “Where Eagles Dare”***



**“If you want to play the game,  
you’d better know the rules....”**

***-Inspector Harry Callahan  
[Clint Eastwood]  
in “The Dead Pool”***



# TERMINOLOGY

“Peer Review Hearing” a/k/a

- Privileges Hearing
- Fair Hearing
- Medical Review Hearing
- Credentials Hearing
- Medical Staff Hearing
- Disciplinary Hearing
- Credentials Committee Hearing
- Ad Hoc Committee Hearing



# The "Private Practice Physician" We are Discussing

1. Not a Hospital employee.
2. Does not have a direct contract with the Hospital.
3. Not a member of a group with an exclusive contract.
4. Does have clinical privileges at the Hospital.

# Two components of a physician's medical staff relationship in a Hospital (often used interchangeably & incorrectly):

## 1. "Clinical Privileges"

- Based on proven clinical skills and competence to perform certain defined procedures in the hospital

## 2. Medical Staff Membership

- "Good citizenship" issues

# Assuming the Private Practitioner's Perspective:

The Good = The Physician

The Bad = The Hospital Staff  
and Medical Staff  
Leadership

The Ugly = The process, and  
especially the  
litigation process

# Indest's Maxims for Peer Review

1. The process is different in every hospital.

**“What are you talking about, ‘routine?’ There’s no routine.”**

***Robert [Clint Eastwood] in  
“The Bridges of Madison County”***



# Indest's Maxims for Peer Review

1. The process is different in every hospital
  - Medical Staff Bylaws are different
  - Hearing procedures are different
  - Attorneys may not be allowed to participate

# Indest's Maxims for Peer Review

1. The process is different in every hospital
  - Hearings may not be allowed for certain types of adverse actions
  - Burden may placed on the physician

# Indest's Maxims for Peer Review

1. The process is different in every hospital
  - Physician may have to pay for certain parts of it like the court reporter
  - Investigation and appeals processes may be different



# Indest's Maxims for Peer Review

2. The Hospital's resources are unlimited.
  - Speaks for itself

Additionally:

- Use of certain experienced companies and organizations with hospital "leanings"
- Use of certain law firms which specialize in doing nothing but hospital representation

# Indest's Maxims for Peer Review

2. The Hospital's resources are unlimited.
  - Hospital's personnel and Hospital's attorneys do all of the work and provide all of the support for the Medical Staff and the peer review committee.

# Indest's Maxims for Peer Review

2. The Hospital's resources are unlimited.
  - The Hospital/Medical Staff has unlimited access to Hospital employees and documents

# Indest's Maxims for Peer Review

3. You need legal representation from the time of the first rumor you hear that a complaint has been filed or that a matter is being investigated.

# Indest's Maxims for Peer Review

3. You need legal representation from the time of the first rumor.

## Incorrect Attitudes:

"I'm going to wait and see what happens."

"I'm going to wait and see if charges are filed."

**”...You’ve got to ask yourself one question: ‘Do I feel lucky?’ Well, do ya, punk?”**

***-Inspector Harry Callahan  
[Clint Eastwood]  
in “Dirty Harry”***

# Indest's Maxims for Peer Review

3. You need legal representation from the time of the first rumor.

Incorrect Attitudes:

"My friend is president of the Medical Staff and he told me he would make this all go away."

# Indest's Maxims for Peer Review

3. You need legal representation from the time of the first rumor.

## Incorrect Attitudes:

"There are plenty of other physicians on that committee who have had far worse outcomes than mine. They can't say anything bad about me."



# Indest's Maxims for Peer Review

3. You need legal representation from the time of the first rumor.

## Incorrect Attitudes:

"I was one of the first physicians at that hospital. They're not going to do anything to me." (or any variation of the foregoing)

# Indest's Maxims for Peer Review

## Incorrect Attitudes:

"I have a good personal injury attorney (or tax attorney, or criminal defense attorney, or corporate attorney, or business litigation attorney) I know. She can competently represent me in this medical staff matter."

# Indest's Maxims for Peer Review

Incorrect Attitudes:

"I can represent myself. After all, these are just my peers who will be judging me."  
(or any variation of the foregoing)

**“You’re a legend in your  
own mind.”**

*-Inspector Harry Callahan  
[Clint Eastwood]  
in “Sudden Impact”*

# Indest's Maxims for Peer Review

4. You must be represented by an experienced, knowledgeable healthcare attorney. The hospital will be. Never attempt to represent yourself.

**“A man alone is easy prey.”**

***-Preacher [Clint Eastwood]  
in “Pale Rider”***



# Indest's Maxims for Peer Review

5. The "nonconformist," "trouble maker," or "disruptive physician" will be forced into a hearing situation. The guy everyone likes won't be. Make sure you are the latter person.

# Indest's Maxims for Peer Review

6. If hospital administration (including nursing staff) is out to get you, you will be gotten.
  - If the hospital administration identifies you as a "bad physician," "trouble maker" or "disruptive physician" you are dead.



# Indest's Maxims for Peer Review

6. If hospital administration (including nursing staff) is out to get you, you will be gotten.
  - Your prior cases may be reviewed and scrutinized retrospectively for problems that were “overlooked.”
  - Every poor result or outcome will be scrutinized.

# Indest's Maxims for Peer Review

6. If hospital administration (including nursing staff) is out to get you, you will be gotten.
  - You will be written up for everything that happens.
  - You will be written up for incidents that others are never written up for.

# Indest's Maxims for Peer Review

6. If hospital administration (including nursing staff) is out to get you, you will be gotten.
  - You will be written up for violations of hospital policies that others are not written up for.
  - Incidents where you were just “joking around” will be written up as “sexual harassment.”

# Indest's Maxims for Peer Review

6. If hospital administration (including nursing staff) is out to get you, you will be gotten.
  - Any patient complaints over insignificant matters that would previously have been handled in a routine way, will now be treated as significant events.

**"Sometimes trouble just follows a man."**

***-Josey Wales [Clint Eastwood]  
in "The Outlaw Josey Wales"***



# Indest's Maxims for Peer Review

7. You will probably be offered an opportunity to resign prior to the commencement of the investigation...

**"I guess I better leave  
before you go and lose  
your temper."**

***-Manco [Clint Eastwood] in  
"For a Few Dollars More"***



# Indest's Maxims for Peer Review

8. But you will foolishly turn down the opportunity to resign. (Note: There are some serious qualifications to this maxim.")



**“Well, right now I don’t  
feel too agreeable.”**


***-Stranger [Clint Eastwood]  
in “High Plains Drifter”***

# Indest's Maxims for Peer Review

9. There are many options and alternatives available early in the process, but only an experienced health care attorney will be likely to know them.

**"A man's got to know his  
limitations."**

***-Inspector Harry Callahan [Clint  
Eastwood] in  
"Magnum Force"***



# Indest's Maxims for Peer Review

9. Options & alternatives may include:
  - Agreement not to admit, treat, or perform certain procedures
  - Taking a leave of absence (LOA)
  - Assessment by independent organization (Professional Resources Center, etc.)

# Indest's Maxims for Peer Review


9. Options & alternatives may include:
  - Agreement to undertake additional training.
  - Resignation (prior to any proceedings being commenced.)

# Indest's Maxims for Peer Review

10. A "fair hearing" is not fair.

**"I'm afraid you've misjudged  
me."**

***-Inspector Harry Callahan [Clint  
Eastwood]  
in "Magnum Force"***



# Indest's Maxims for Peer Review

10. A "fair hearing" is not fair.
  - The resources are stacked in favor of the hospital/medical staff/administration.
  - Peer review proceedings are very expensive (for all parties).
  - The burden can be and may be placed on you to prove you are currently clinically skilled and competent.



# Indest's Maxims for Peer Review

10. A "fair hearing" is not fair.

- There may be external motivations, other than quality (Especially in cases of tenured professors senior physicians and minorities).
- Economics & economic motivation

# Indest's Maxims for Peer Review

10. A "fair hearing" is not fair.
  - Economics & economic motivation:
    - Proceedings initiated by your competitors
    - Complaints made by your competitors
    - You allegedly bring in too many cases (e.g., your cases monopolize the operating room or prime O.R. time)

# Indest's Maxims for Peer Review

10. A "fair hearing" is not fair.
  - Economics & economic motivation:
    - You bring in the wrong type cases (e.g., too many Medicaid or indigent)
    - One medical group is allowed to control an entire department (in absence of an exclusive contract).

# Indest's Maxims for Peer Review

10. A "fair hearing" is not fair.

– Economics & economic motivation:

- You are an "overutilizer" (you use too many resources, overtime for hospital staff, etc.)
- You "cherry pick" the best cases (e.g., all of the non-indigent/non-Medicaid cases)
- You refuse to participate in managed care plans with the hospital & other physicians

# Indest's Maxims for Peer Review

10. A "fair hearing" is not fair.

- If suspended pending investigation/hearing and the suspension goes 30 days or more, then a report to the NPDB is required.

- Report to NPDB = Report to State Medical Board/Licensing Authority

# Indest's Maxims for Peer Review

10. A "fair hearing" is not fair.

- You may find the same individual(s) on:
  - a. The Investigation Committee
  - b. The Peer Review/Hearing Committee
  - c. The Appeals Committee
  - d. The Board of Directors/Trustees  
(Responsible for final recommendations)

# Indest's Maxims for Peer Review

10. A "fair hearing" is not fair.

Gag orders and law suits

- You may be gagged and not allowed to talk to witnesses or potential witnesses in order to prepare your case.

# Indest's Maxims for Peer Review

11. It does not matter what the peer review or fair hearing committee recommends.
  - The Board of Directors/Trustees can and will overrule the conclusions and recommendations of any peer review hearing (with the input of hospital admin & hospital attorney)



# Indest's Maxims for Peer Review

11. It does not matter. . . .
  - The Board of Directors can and will. . . .
    - Peer review committee must make solid, unequivocal findings supported by evidence.
    - Peer review comm. must make strong, precise, well-reasoned conclusions and recommendations.

# Indest's Maxims for Peer Review

11. It does not matter. . . .
  - The Board of Directors can and will. . . .
    - Be sure you ask the peer review committee to do this.
    - You (or your attorney) should present to them a proposed or recommended report.

# Indest's Maxims for Peer Review

12. Those who judge you are not your peers:
  - They may all be different specialties from yours.
  - None may be surgeons or have direct knowledge of your specialty.
    - (Attempt to have the hearing committee appointed by your medical specialty association.)

# Indest's Maxims for Peer Review

13. The only rights you have are those in your Medical Staff Bylaws (unless you are at a "public or government hospital" or in California)

# Indest's Maxims for Peer Review

14. The consequences to you of an adverse outcome will be lifelong and career altering.

## Consequences:

- NPDB Reports
  - National
  - On file for fifty (50) years
  - Very difficult to get corrected or voided.
  - Reported to your state medical board at same time.

# Indest's Maxims for Peer Review

14. The consequences to you of an adverse outcome will be lifelong and career altering.
  - State licensure action (in every state in which you have a license) will probably result
  - Medical specialty associations and certification bodies will commence proceedings if they learn of it (and they will).

# Indest's Maxims for Peer Review

14. The consequences to you of an adverse outcome will be lifelong and career altering.
  - You will unlikely ever get clinical privileges at another hospital.
  - You may lose medical malpractice insurance coverage.
  - You may be dropped from the panels of many HMOs, managed care plans, and health insurers.
  - Contracts with employers and insurers may require you to report this (so you can be terminated)

# Indest's Maxims for Peer Review

14. The consequences to you of an adverse outcome will be lifelong and career altering.
  - The Office of the Inspector General (OIG) will be notified when the NPDB report is made and may initiate action to revoke your Medicare participation, excluding you from Medicare.
  - If excluded from Medicare you will be terminated as a Medicaid provider, also.
  - You will have to report this action on your quarterly CAQH reports.



# Indest's Maxims for Peer Review

15. Once a peer review proceeding is commenced, it's not just going to go away, and none of your friends on the Executive Committee or Board of Trustees is going to make it go away.

# Indest's Maxims for Peer Review

15. (Continued) You should not resign your clinical privileges or medical staff membership once an investigation or peer review proceeding is commenced as this will be treated the same as if they were revoked by a hearing panel. Nor can you fail to renew them when they expire. You must see it through.

**“We’re [They’re] not just gonna let you walk outta here.”**

***-Inspector Harry Callahan  
[Clint Eastwood]  
in “Sudden Impact”***

# Indest's Maxims for Peer Review

16. Once a peer review proceeding is commenced against you, you will be in the most important fight of your career and possibly your life.

# Indest's Maxims for Peer Review

17. You have no power, no control, and no leverage.

– You must try to get some.

**"When you have to shoot...  
shoot.... Don't talk."**

***-Tuco [Eli Wallach] in  
"The Good, the Bad, and the Ugly"***



# Indest's Maxims for Peer Review

17. You have no . . . leverage. Get some:
  - Assemble an experienced legal team.
  - Begin preparing early and prepare seriously.
  - Get experts. Credible, established experts. You will need them. You must have them.

# Indest's Maxims for Peer Review

17. You have no . . . leverage. Get some:
  - Filing a law suit may not be as likely to succeed as in past times. But consider filing:
    - Against individuals who have committed tortious acts (e.g., defamation) outside of the peer review process.



# Indest's Maxims for Peer Review

17. You have no . . . leverage. Get some:
  - Consider filing a law suit :
  - For enforcement of the Medical Staff Bylaws if the Hospital Medical Staff is not following them.
  - If you are the subject of discrimination in these proceedings because of race, color national origin, sex, age, or disability (or the perception of any of the foregoing)

# Indest's Maxims for Peer Review

17. You have no . . . leverage. Get some:
  - Know and exercise your rights at every opportunity. Document this in writing (not e-mails).
  - Have your counsel recommend reasonable alternatives to the Medical Staff.

**“Nothing’s wrong with shooting as long as the right people get shot.”**

***-Inspector Harry Callahan  
[Clint Eastwood]  
in “Magnum Force”***

# Indest's Maxims for Peer Review

17. You have no . . . Leverage. Get some:
  - Consider “political” or “public relations” avenues. But you must be careful to preserve peer review confidentiality.
    - Timing of funding for critical projects, buildings, or programs.
    - Lobbying to sympathetic physicians on medical staff.

# Indest's Maxims for Peer Review

17. You have no . . . Leverage. Get some:
  - Consider “political” or “public relations” avenues. But you must be careful to preserve peer review confidentiality.
  - Timing of the certification/recertification or surveying of critical hospital programs and projects.
  - Consider filing complaints with appropriate certifying organizations.

# Indest's Maxims for Peer Review

17. You have no . . . leverage. Get some:
  - Consider “political” or “public relations” avenues
    - Get your county, state or national medical society or specialty association involved.
    - Think of other reasonable actions you can take. Brainstorm with your legal counsel and supporting physicians.

# Indest's Maxims for Peer Review

18. You are going to have to spend lots of money to properly defend yourself and you will not get it back if you win.

# Indest's Maxims for Peer Review

18. (Continued) In fact, you are going to have to spend more money to defend yourself than you ever expected.



# Indest's Maxims for Peer Review

18. (Continued) If you have medical malpractice insurance that provides \$25,000 in legal expenses for this type of proceeding, that is not going to be enough. (MAG Mutual, Florida Doctors Insurance Company). But it will certainly help. We are often hired by physicians to take over the defense of such cases after their original counsel has used up all of the funds that the insurance company pays.

# Indest's Maxims for Peer Review

18. (Continued) If you have medical malpractice insurance that provides \$50,000 in legal expenses for this type of proceeding this may be enough for a very simple, one issue case, but not a case with more than one issue or with multiple patient cases. This amount of coverage will certainly be a tremendous help. We are often hired by physicians to take over the defense of such cases after their original counsel has used up all of the funds that the insurance company pays.

# Indest's Maxims for Peer Review

18. (Continued) If you have medical malpractice insurance that provides \$1,000,000 in legal expenses for this type of proceeding (such as is provided by Lloyd's of London) this will be more than enough. We have taken Lloyd's of London Insurance cases before and the company is excellent to work with in such matters.

# Indest's Maxims for Peer Review

18. (Continued) Remember, this is the fight of your career and your life. It may very well be a career-terminating event, Be prepared to pay accordingly for a good, aggressive defense.

**"Sometimes you have to pay  
for your pleasure."**

***-Thunderbolt [Clint Eastwood]  
in "Thunderbolt and Lightfoot"***



# Indest's Maxims for Peer Review

19. If you think you will be successful in suing after the fact in court to have an incorrect result overturned, you are probably wrong. Such cases are almost never overturned by the courts.

# Indest's Maxims for Peer Review

20. However, court litigation may give you the leverage you need to obtain a favorable outcome on the peer review proceeding. See the qualifying comments and explanation above, however. This is often contra-indicated.

# Recommendations

1. You must ensure that your medical staff bylaws contain true "due process" rights for accused physicians. Remember, you may be the one who needs these rights in 5, 10, or 15 years.



**“Well, I’m broken up about  
that man’s rights.”**

***-Inspector Harry Callahan [Clint  
Eastwood]  
in “Dirty Harry”***

# Recommendations

2. You should attempt to have state legislation passed that requires all hospital to afford physicians certain due process rights in peer review proceeding similar to what California has done.

# Recommendations

3. The Medical Staff should never allow hospital administration (or the hospital parent corporation) to force them to adopt medical staff bylaws amendments that lessen due process protections.

# Recommendations

4. The peer review committee (fair hearing committee) should have its own independent legal advisor in all hearings. This must be someone other than from the law firm which routinely represents the hospital.

# Recommendations

5. You and your attorney must treat the peer review process/ fair hearing like you would a civil trial against you for medical malpractice. You must be prepared to disprove every allegation against you with documentary and expert witness evidence.

**”... When things look bad, and it looks like you’re not gonna make it, then you got to get mean. I mean, dog-mad mean. Cause if you... give up, then you neither live nor win. That’s just the way it is.”**

***-Josey Wales [Clint Eastwood]  
in “The Outlaw Josey Wales”***

# Recommendations

6. If you are subject of a peer review proceeding, immediately retain experienced, knowledgeable health care counsel to represent you.

# Recommendations

7. Immediately retain a health care litigation attorney who has experience in this type of litigation. It is unique.



# Recommendations

8. Initially, before any proceeding is even thought of, you and every physician on the Medical Staff should, if your fair hearing procedures/peer review procedures are not in your Medical Staff Bylaws, make sure that both documents state that the Hearing Procedures have the same force and effect as the Medical Staff Bylaws.

**"Opinions are like  
assholes. Everybody has  
one."**

***-Inspector Harry Callahan [Clint  
Eastwood]  
in "The Dead Pool"***



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