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Brushing Off Lawsuits: Dental Peer Review Examined

Lisa C. Markarian*

I. INTRODUCTION

Lawyer, n.: One skilled in the circumvention of the law

*Dentist, n.: A Prestidigitator who, putting metal in one's mouth,
pulls coins out of one's pocket*

Ambrose Bierce¹

No matter how you define it, going to the dentist or into court usually means one thing – stress. The unfamiliar surroundings, the feeling of helplessness and the anticipation of unpleasant events all make for a stressful situation, whether it occurs in a courtroom or in a dentist's office. A dentist may naturally feel as uncomfortable being behind the defendant's table as an attorney would feel sitting in a dental chair.² Given the choice between appearing in court, and appearing before a small group of fellow dentists, a dentist would most likely choose the latter. Add to that the time lost from work and liability for "pain and suffering" on top of damages from legal settlements, it is easy to see why dental associations tout peer review as a preferred alternative to litigation and a major benefit of membership in their groups.

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1. AMBROSE BIERCE, THE DEVIL'S DICTIONARY (1911), available at <http://www.alcyone.com/max/lit/devils>.

2. American Dental Association, ADA Community Brief, *Striving for Perfection and Predictability*, (Nov. 2004), available at http://www.ada.org/prof/resources/pubs/epubs/brief/brief_0411.pdf (discussing the common physical and emotional reactions exhibited by dentists in response to dental malpractice suits).

Dentistry is recognized “as one of the learned professions.”³ Consequently, this status requires organized dentistry to be responsible for “governing or policing the conduct and performance” of its members.⁴ As the number of dental malpractice claims continues to rise, organized dentistry has had to devise alternative dispute resolution models that would effectively reduce the number of cases filed and litigated in civil court.⁵

For all contractual and legal intents and purposes, a dentist is a provider of services, while the patient who consents to treatment is a consumer.⁶ A dentist’s fees reflect, in part, the cost of malpractice insurance protection.⁷ Dentists can also calculate into their fees any refunds they may pay back to patients who suffer adverse results.⁸ An injured patient on the other hand has limited means of protection against damages resulting from the wrongful acts of dentists.⁹ The options open to patients include: (1) filing a complaint in civil court, (2) reporting the incident to a government agency such as the

3. Donald T. Nakahata, *Component Peer Review and Patient Relations Combined*, 5 J. CALIF. DENT. ASSOC. 74, 78 (1977).

4. *Id.*; see American Dental Association, *How the Dental Peer Review System Works and What You Expect From It*, 11 (2005), http://www.ada.org/prof/prac/tools/peer_review_overview.pdf [hereinafter *How the Dental Peer Review System Works*]. The three points in a dentist’s career where quality of dental care is influenced are: in dental school, entry into dental practice and after receipt of a dental license. Peter C. Damiano et al., *Assessing Quality in Dentistry: Dental Boards, Peer Review Vary on Disciplinary Actions*, 124 J. AM. DENT. ASS’N. 113, 115 (May 1993). The ADA Commission on Dental Accreditation has set stringent accreditation standards which United States and Canadian dental schools must meet. *Id.* Accreditation ensures that the students of a dental school receive a curriculum with an adequate amount of training to practice dentistry. *Id.* Second, before a state may grant a license to practice dentistry, the following requirements must be satisfied: “graduation from an accredited dental school, successful completion of the National Board Examination and the state or regional clinical board exam.” *Id.* Third, a number of groups impact the quality of care a licensed dentist must provide. *Id.* The federal government and the Inspector General regulate the dental care provided to Medicaid recipients and collect and disseminate information regarding disciplinary actions taken against dentists to the National Practitioner Data Bank. *Id.* The Centers for Disease Control and Prevention determines infection control procedures and recommends guidelines to the Food and Drug Administration. *Id.* Each state has a Board of Dental Examiners that renews dental licenses and disciplines practitioners. Damiano, at 115. Dental insurance providers indirectly influence dental care quality by setting standards for the services they cover. *Id.* “Organized dentistry influences practitioner quality by operating the peer review process, encouraging continuing education, establishing principals of ethical behavior and developing implicit and explicit standards of care.” *Id.*

5. See Donald Ellek, *Resolving Conflicts through Peer Review*, DENTAL EXPRESSIONS CNA HEALTHPRO NEWSLETTER (Summer 1998) available at <http://www.ada.org/members/law/SHOWARTICLE.ASP?ARTICLEID=355>; See also Carl B. Meyer, *Science and Law: The Quest for the Neutral Expert Witness: A View From the Trenches*, 12 J. NAT. RESOURCES & ENVTL. L. 35, 52 (1996-1997).

6. WILLIAM O. MORRIS, *DENTAL LITIGATION* 2 (Michie Co., 1977).

7. *Id.*

8. *Id.*

9. *Id.*

state dental board,¹⁰ or (3) if the dentist is a member, reporting the matter to a local dental association.¹¹

A patient who submits a complaint against a member dentist of a local component of the American Dental Association (“ADA”) will initiate a dispute resolution process referred to as peer review.¹² Hospitals and other medical institutions utilize a similar system to resolve disputes and to maintain high standards of care for their patients.¹³ Peer review consists of evaluations or diagnostic reviews by a panel of dentists directed at treatment

10. The State Dental Board [hereinafter Board] then determines whether to “censure, fine or recommend criminal investigation” of the dentist to appropriate agencies. SIDNEY H. WILLIG, LEGAL CONSIDERATIONS IN DENTISTRY 25-28 (Robert E. Kreiger Publishing Co. 1978). The Board is established and operated pursuant to the State Dental Practice Act, to regulate the quality of dental care. *Id.* at 25-26. Dental licensure began in Alabama in 1841 and nearly every state had a mandatory licensure statute by 1900. *Id.* at 25. While Dental Practice Acts were historically offshoots of Medical Practice Acts, they developed “special character and utility that reflected the professional growth and esteem of dentistry.” *Id.* Mandatory licensure was geared to assure the public that a person using the title doctor of dentistry “has exhibited sufficient proficiency and has qualified by virtue of education, experience and character to merit the appellation.” *Id.* at 25-26. “The Dental Practice Act then names, qualifies and licenses a particular class of persons who may use the title professionally accorded and who may offer and provide professional dental services to the public.” *Id.* Accordingly, the regulations set by the Board are made pursuant to the State Dental Practice Act in compliance with the state’s Administrative Procedures Act (administrative agency law). WILLIG, at 11-12.

11. John Zimmerman, *Peer Review in Review (Or, How to Avoid Tangling with the Board of Dental Examiners)*, J. CAL. DENT. ASS’N. 18 (Jan. 1995). Pursuant to the State Dental Practice Act, the Board is charged with the responsibility for setting forth regulations by which a dentist must adhere in order to retain their state licenses. WILLIG, *supra* note 10, at 11-12. The Board has the authority to discipline infractions of the State Dental Practice Act. *Id.* At the Board’s discretion, a dentist in violation of the State Dental Practice Act can be censured, fined or referred for criminal prosecution. *Id.* In many states, the dental peer review program is “administratively separate from the state board of dentistry or other regulatory agencies. However, the peer review program works cooperatively with the state agencies, referring some cases to the state agency, accepting referrals from the state agency, or examining the same case for different reasons.” *How the Dental Peer Review System Works*, *supra* note 4, at 5.

12. California Dental Association, CDA Peer Review Manual, 2-1 (1989 revised in 2004), available at <http://www.cda.org/public/policy/review/> [hereinafter CDA Peer Review Manual]. This manual is a procedural guide for the CDA peer review system.

13. See William D. Bremer, Annotation, *Scope and Extent of Protection from Disclosure of Medical Peer Review Proceedings Relating to Claim in Medical Malpractice Action*, 69 A.L.R. 5th 559 (2005). The peer review process was created in 1913 when the American College of Surgeons was established, the purpose of which was to improve the quality of medical care. See also Katherine T. Stukes, *The Medical Peer Review Privilege After Virmani*, 80 N.C. L. REV. 1860, n.10 (2002).

provided by a fellow dentist charged with practicing below the local community's standard of care.¹⁴

This comment will take a closer look at the peer review process by evaluating the system currently utilized by the California Dental Association ("CDA"). Part II provides a short background of the ADA, its relationship with the CDA and the CDA's formation of their peer review system.¹⁵ Part III discusses the purpose and model of CDA's peer review system, and describes the steps involved in the mediation process.¹⁶ Part IV presents an illustrative example of the peer review process.¹⁷ Part V, explores how the patient and dentist benefit from participating in the peer review system.¹⁸ Finally, Part VI concludes.¹⁹

II. BACKGROUND: THE ADA, THE CDA AND THE PEER REVIEW MODEL

The American Dental Association is the world's largest and oldest dental association and claims a membership of over 149,000 dentists.²⁰ Established in 1859, the ADA today is regarded as the leading oral health authority in the United States.²¹ A tripartite organization, the ADA is composed of: (1) a central governing body at the national level with its headquarters in Chicago, Illinois, (2) fifty-three constituent state associations, and (3) 545 local components distributed within the states.²²

The California Dental Association, one of the fifty-three state constituents, is comprised of thirty two local components.²³ The CDA created its peer review system in 1976 to provide a uniform system for resolving disputes between patients and its member dentists.²⁴ The association subsequently developed the *Peer Review Manual* and the *Quality Evaluation Manual* publications which set forth the mission, the scope and the operational guidelines that govern the system.²⁵ The *CDA Peer Review*

14. CDA Peer Review Manual, *supra* note 12, at 5-1.

15. See *infra* notes 20-55 and accompanying text.

16. See *infra* notes 56-75 and accompanying text.

17. See *infra* notes 76-126 and accompanying text.

18. See *infra* notes 127-86 and accompanying text.

19. See *infra* notes 187-91 and accompanying text.

20. American Dental Association, *Understanding Organized Dentistry*, http://www.ada.org/pr/off/ed/students/resources_organized.pdf (last visited Jan. 24, 2006).

21. *Id.*

22. *Id.*

23. California Dental Association, *Become a Member*, <http://www.cda.org>.

24. CDA Peer Review Manual, *supra* note 12, at 1-1.

25. CDA Peer Review Manual, *supra* note 12, at 1-1; see also California Dental Association, *Guidelines for the Assessment of Clinical Quality and Professional Performance 1* (2004), available at http://www.cda.org/cda_member/policy/quality/quality.html [hereinafter *Quality Evaluation*]

Manual incorporates the requirements of state and federal law, as well as the standards of the Joint Commission on the Accreditation of Healthcare Organizations.²⁶ The Council on Peer Review, the administrative body of the peer review system, is located in Sacramento and performs all of the functions required to implement the system uniformly throughout the state.²⁷

1. History of the Dental Peer Review System

Tooth decay was a perennial national problem that meant a mouthful of silver for patients, and for dentists, a pocketful of gold

Claudia Wallis²⁸

In the early days of organized dentistry, and when society was less litigious, self-policing was provided by component dental societies because they were able to address adverse situations expeditiously.²⁹ The components formed and managed “local patient relations, counseling, or

Manual]. The Quality Evaluation Manual is a series of guidelines that evaluate the quality of dental care, based on standards set forth by the CDA. *Id.*

26. See Joint Commission on Accreditation of Healthcare Organizations available at <http://www.qmsonline.com/jcaho.htm> [hereinafter JCAHO]. JCAHO is a private entity that provides accreditation to health care facilities. Susan O. Scheutzow & Sylvia Lynn Gillis, *Confidentiality and Privilege of Peer Review Information: More Imagined than Real*, 7 J.L. & HEALTH 169, n.11 (1993). JCAHO accreditation is vital for these facilities because only accredited JCAHO organizations are eligible for federal certification in Medicare and for state licensing purposes. *Id.* A majority of health care organizations and medical institutions in the United States must conform to JCAHO standards to receive accreditation. *Id.*

27. CDA Peer Review Manual, *supra* note 12, at 2-25. The CDA Peer Review Manual has jurisdiction over the State of California and all of the component dental societies within California. *Id.* at 1-1. The Council on Peer Review serves the following functions: (1) Act as a liaison between component and regional peer review committees; (2) Monitor peer review committees to ensure investigations are conducted according to correct procedures. In doing so, each component peer review committee is protected by qualified immunity pursuant to the California Civil Code § 43.7 (West Supp. 2004); (3) Function as an appeal committee for the CDA peer review cases; (4) “Develop and codify statistical data regarding the peer review system”; (5) “Provide monthly reports and case listings to components”; (6) “Maintain liaisons with the specialty organizations”; (7) “Conduct peer review conference(s) and training workshops to promote a better understanding of the CDA peer review process”; (8) “Provide training materials for orientation of new committee members”; (9) Review and approve procedural peer review guidelines. CDA Peer Review Manual, *supra* note 12, at 1-5 – 1-6.

28. Claudia Wallis, *Today’s Dentistry: A New Drill; Physicians of the Mouth do More Than Just Fill Teeth*, TIME MAGAZINE, Sept. 9, 1985, at 73.

29. Nakahata, *supra* note 3, at 75.

grievance committees.”³⁰ These committees utilized persuasive techniques and their approach was purely evaluative and ameliorative.³¹ These proceedings “never assumed a formal codified procedure – they didn’t become akin to miniature courts of law.”³² However, as society and the dental community grew more complex, a more uniform hierarchal structure was needed to ensure a fair process of self-regulation among the different local societies.³³ An institutionalized response became even more necessary once third parties, such as insurance providers, insinuated themselves into the dentist-patient relationship.³⁴ The solution to this problem was the creation of the statewide peer review system we have today.³⁵

2. *Development of CDA’s Peer Review System*

Quality is at the core of any profession’s responsibility to the public.³⁶ In the health professions, not only is there a fiduciary duty to do no harm, but there is also an inherent need to establish and maintain standards of quality.³⁷ In 1975, the CDA took steps to set such standards when it created criteria to determine the standards for dental care, and resolved the profession’s method of self-evaluation and self-regulation.³⁸ “This

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Nakahata, *supra* note 3, at 75.

35. *Id.* Peer review was designed, to a large extent, “similar to existing patient-relations committees, whose basic operational modes were adopted.” *Id.*

36. CDA Peer Review Manual, *supra* note 12, at 1-2.

37. MORRIS, *supra* note 6, at 19.

38. *How the Dental Peer Review System Works*, *supra* note 4, at 22. From September of 1973 to April of 1974, three task force committees investigated the legal aspects of various dental care programs, existing peer review mechanisms and quality-assessment systems. Quality Evaluation Manual, *supra* note 25, at i. These committees led an intense investigation, receiving personal testimony from interested individuals and studying written statements received from both organizations and dentists. *Id.* at ii. The peer review system ultimately developed by the task force was the product of professional opinions and suggestions of general practitioners, specialty groups, component societies and other parties. *Id.* This was the foundation for development of the peer review system. *Id.* The task force developed peer review standards along with outlines of service priorities, “program audits, and programs for consumer education.” Quality Evaluation Manual, *supra* note 25, at i. “Public hearings were held at which the entire membership of the association was given the opportunity to provide data useful to the deliberations of the task force.” *Id.* at ii. On May 31, 1975, after the intensive two-year task force effort, the House of Delegates approved the “Guidelines for the Assessment of Clinical Quality and Professional Performance and the Standards for Program Design to Assure the Quality of Care.” *Id.* at ii. On June 1, 1975, the newly appointed “Ad Hoc Committee on Quality Assurance” implemented the House of Delegates resolution and produced the first edition of “Guidelines for the Assessment of Clinical Quality and Professional

resolution mandated the formation of a uniform statewide CDA system for resolving disputes regarding dental care.”³⁹ Peer review, which has now been utilized by the CDA for more than thirty years, operates in accordance with the regulations set forth in the *CDA Peer Review Manual*.⁴⁰ Dentists, by virtue of their membership in CDA, have agreed to be bound by peer review determinations.⁴¹

The *CDA Peer Review Manual* directs each member to “provide appropriate and timely service,”⁴² with a level of quality on par with community standards, and suitable in light of the clinical circumstances presented to the dentist.⁴³ Both the member-dentist and the patient bringing the complaint are required to comply with the committee’s decisions.⁴⁴ The patient must acknowledge in writing that participation in the program is in lieu of litigation.⁴⁵ Peer review will not be initiated without this assurance.⁴⁶ Additionally, prior to the receipt of any monetary award, the patient must sign a “Release of All Claims” form that waives the patient’s right to pursue any additional claims growing out of the complaints resolved by peer review.⁴⁷

It is important to point out the three basic principles that characterize the committee’s procedures. “First and foremost, the committee is *not* an arbitration board and it can’t conduct a formal hearing.”⁴⁸ The proceedings

Performance.” *Id.* In 1976, the CDA peer review system was established with the passage by the CDA House of Delegates of HR 15-1976-H. *CDA Peer Review Manual*, *supra* note 12, at 1-1.

39. *CDA Peer Review Manual*, *supra* note 12, at 1-1.

40. *Id.*

41. *Id.* The CDA’s *Code of Ethics* “requires a member to *comply with the reasonable requests of a duly constituted committee, council or other body of the component society or of this association . . . and to abide by the decision of such body.*” *Id.* at 1-1 – 1-2 (emphasis in the original).

42. *Id.*

43. Nakahata, *supra* note 3, at 77; *CDA Peer Review Manual*, *supra* note 12, at 1-1.

44. *CDA Peer Review Manual*, *supra* note 12, at 1-3.

45. *Id.* at 7-3.

46. *Id.* at 7-4. All patients who choose to undergo the peer review process must initially sign the Patient Agreement Form. *Id.* This form is the agreement which binds the decision of the peer review committee. *Id.* at 7-11. It provides full disclosure to the patient of the privilege guarantees throughout the process of peer review along with information regarding the statute of limitation of the patients claim. *See id.* at 7-11.

47. *Id.* at 7-4.

48. Nakahata, *supra* note 3, at 78; *see How the Dental Peer Review System Works*, *supra* note 4, at 5, 10. Section 3 of the *Code of Ethics* makes a CDA member’s compliance with peer review committee mandatory. *CDA Peer Review Manual*, *supra* note 12, at 1-8. In doing so, the CDA must provide peer review participants with due process rights in such proceedings. *See Salkin v.*

are kept informal, and attorneys do not represent the parties involved.⁴⁹ “Care is taken not to pre-judge the issues or unfairly bias the results.”⁵⁰ Second, the parties involved must be informed of all the options available to them and made to understand “the fact that they are allowed wide latitude to prove their claims.”⁵¹ Third, the disciplinary powers vested in the Judicial Council, the legal arm of the CDA, provide the peer review system with broad discretionary authority as a self-regulatory mechanism.⁵²

As privacy and confidentiality laws evolve, so do the terms laid out in the *CDA Peer Review Manual* and *Quality Evaluation Manual*.⁵³ Consequently, these manuals undergo continual revision to reflect “current and future progress in the practice of dentistry.”⁵⁴

Cal. Dental Ass’n, 176 Cal. App. 3d 1118, 1122 (1986); cf. *Hackethal v. Cal. Medical Ass’n*, 138 Cal. App. 3d 435, 187 (1982) (discussing the requirements of adequate procedures for such disciplinary hearings). *Salkin v. California Dental Association* aided the CDA in clarifying its procedures to ensure that dentists and patients were provided a fair and effective process to adjudicate their complaints outside of the traditional courtroom process. See *Salkin*, 176 Cal. App. 3d at 1121-22. In *Salkin*, a dentist who had been publicly censured by the CDA for malpractice brought action against the CDA and ADA alleging denial of a fair hearing. *Id.* at 1119-20. In deciding the *Salkin* case, the California Court of Appeal applied the fair procedure doctrine to both the CDA’s and ADA’s public censure of the plaintiff for malpractice. *Id.* at 1121-22. The court found that the censure was imminently threatening to the plaintiff’s dental practice and “transcend[ed] the organization itself because it convey[ed] to the community that the disciplined member was found lacking by his peers.” *Id.* at 1125. The court held due process requirements apply to cases where the punishment is not expulsion, but rather suspension and the disciplinary censure. *Id.* at 1121-22. The court, following the guidance of the Florida Supreme Court found that if a private organization is “tinged with public stature or purpose,” the organization “may not expel or discipline a member adversely affecting substantial property, contract or other economic rights, except as a result of fair proceedings which may be provided for in organization by-laws, carried forward in an atmosphere of good faith and fair play.” *Id.* at 1125 (citing *McCune v. Wilson*, 237 So. 2d 169, 173 (Fla. 1970)).

49. Nakahata, *supra* note 3, at 78; see CDA Peer Review Manual, *supra* note 12, at 6-1; see also *How the Dental Peer Review System Works*, *supra* note 4, at 10-11.

50. Nakahata, *supra* note 3, at 78; see *How the Dental Peer Review System Works*, *supra* note 4, at 5.

51. Nakahata, *supra* note 3, at 78; CDA Peer Review Manual, *supra* note 12, at 1-2.

52. Cal. Dental Ass’n v. FTC, 224 F.3d 942, 946 (2000); CDA Peer Review Manual, *supra* note 12, at 6-1. Component societies are responsible for enforcing the CDA’s bylaws and the *Code of Ethics*. California Dental Ass’n, 224 F.3d at 944. However, if a matter cannot be resolved or the component is unsure of the application of the Code, the case is referred to a hearing before the Judicial Council. *Id.* The Judicial Council located in Sacramento, is the body responsible for hearing violations of both bylaws and the *Code of Ethics*. CDA Peer Review Manual, *supra* note 12, at 1-4. After reviewing the case, CDA’s Judicial Council releases advisory opinions, which although not binding on member dentists, may be considered as persuasive by the trial body and any disciplinary proceedings pursuant to CDA bylaws. California Dental Ass’n, 224 F.3d at 944. If a violation is found and no settlement was reached, CDA could impose penalties ranging from censure to expulsion. *Id.*

53. Quality Evaluation Manual, *supra* note 25, at ii.

54. *Id.*

III. PEER REVIEW FUNDAMENTALS

1. *Types of Peer Review Cases*

The peer review program is implemented through the commitment of many dentist-volunteers who perform patient examinations, interview dentists under review, and draft resolution letters describing their findings.⁵⁵ Generally, disputes qualified for peer review fall under the categories (1) quality,⁵⁶ (2) appropriateness,⁵⁷ (3) utilization⁵⁸ and (4) irregular billing/usualness.⁵⁹ If the dentist and the patient are unable to resolve these types of disputes privately, it is then beneficial for both parties to engage in peer review as an alternative to litigation.

2. *Limits of Peer Review*

Peer review is not appropriate for all claims. For example, it is not intended to be a forum for claims already in litigation, violations of the state

55. American Dental Association, *Peer Review: A Positive Approach to Resolving Disputes*, ADA Community Brief, (Nov. 2004), http://www.ada.org/prof/resources/pubs/epubs/brief/brief_0411.pdf (last visited Jan. 24, 2006).

56. CDA Peer Review Manual, *supra* note 12, at 1-7 – 1-14. Peer review cases concerning the quality of care involve the “functional and/or aesthetic character of dental treatment.” *Id.* at 1-12. For example, in a quality of care case, a peer review committee may need to determine whether a patient’s problem arising from a failed root canal is within the particular limits presented by the case or caused by an error in the treatment. *See id.* at 1-13 – 1-14.

57. *Id.* at 1-13. Cases concerning appropriateness of care focus on “whether the treatment is (or was) proper or fitting” for the patient’s condition. *Id.* For instance, did the patient really need the crown, or was a filling sufficient? Why did the dentist put a crown on a hopelessly loose tooth? An appropriateness review is a “subjective evaluation[] to determine whether treatment is (or was) necessary.” *Id.* Appropriateness reviews include analyzing the accuracy of diagnoses of patients’ problems. *Id.*

58. CDA Peer Review Manual, *supra* note 12, at 1-13. A utilization review is similar to an appropriateness review in that it is concerned with whether the dentist performed appropriate treatment; however the initiating party can be the member dentist, patient or carrier. *Id.* Utilization reviews, initiated either by the dentist, carrier or patient, are intended to resolve disputes over insurance company payments for treatments performed. *Id.*

59. *Id.* at 1-14. Cases submitted for an irregular billing review evaluate the legality of the payments requested. *Id.* Irregular billing cases also include those cases submitted for a review of “usualness.” *Id.* “Usualness cases involve whether the fee a dentist charged is the fee generally accepted as payment in full for a given procedure.” CDA Peer Review Manual, *supra* note 12, at 1-14. For instance, a usualness case may concern whether a dentist charged an insured patient a higher fee than a non-insured patient. *Id.*

dental practice act, or claims brought by one dentist against another.⁶⁰ Antitrust laws prevent a dental society as a group from controlling or setting fees.⁶¹ However, peer review committees can investigate potential consumer fraud by determining whether the reviewed dentist misrepresented his or her fees to the patient.⁶² The complainant is nearly always the patient, except in cases where the member dentist asks the dental society to intercede in a dispute with his or her patient's insurance company over the denial of a claim.⁶³ Termed utilization review, the peer review committee evaluates the appropriateness of care and makes recommendations that are generally honored by most third-party carriers.⁶⁴

3. *Dentist's Duty to Inform, Not to Inflame*

"The practice of dentistry is a profession that relies upon technical expertise, and therefore, errors are inevitable and a satisfactory result cannot always be guaranteed."⁶⁵ At times, a dentist may unduly inflame the patient about "questionable treatment" done by a colleague; if inflamed enough, the patient is more likely to seek relief for damages rather than return to the original dentist to remedy the problem.⁶⁶ To limit these situations, dental societies counsel member dentists regarding their professional responsibility and obligation to contact the other dentist and notify him or her of exactly what problem was encountered with the patient and what treatment recommendations were made.⁶⁷ If, after due diligence, a reasonable suspicion of sub-standard treatment still exists, the dentist should refer the patient to peer review.⁶⁸ The *CDA Code of Ethics* ("Code") addresses this

60. Ellek, *supra* note 5; see CDA Peer Review Manual, *supra* note 12, at 2-11. The Board of Dental Examiners has the authority to enter into settlements of disputes and to incorporate these settlements into formal board orders. Janice M. Graham et al., 36 CAL. JUR. 3d Healing Arts and Institutions § 233 (West Supp. 2004). "Such settlements are consistent with the public policy favoring compromises of disputes." *Id.*

61. American Dental Association, Law & Ethics Frequently Asked Questions, http://www.ada.org/members/law/faq/bizprac_antitrust.asp (last visited Jan. 24 2006).

62. CDA Peer Review Manual, *supra* note 12, at 1-13 – 1-14.

63. Interview with Roseanne Zimdahl, Peer Review Coordinator, San Fernando Valley Dental Society, in Los Angeles, Cal. (Mar. 8, 2005).

64. *Id.*; see CDA Peer Review Manual, *supra* note 12, at 1-13 – 1-14.

65. Chiodo et al., *Litigation, Legislation and Ethics, Ethics Case Analysis: Another Doctor's Mistreatment*, AM. J. ORTHOD. DENTOFACIAL ORTHOP. 221 (1999).

66. *See id.* at 221.

67. *Id.*; Interview with Roseanne Zimdahl, *supra* note 63.

68. Chiodo, *supra* note 65, at 221.

situation when it advises, “a dentist’s duty to the public imposes a responsibility to report instances of gross or continual faulty treatment.”⁶⁹

4. Peer Review Procedures

Private associations such as the ADA are required to employ procedures that protect individuals from arbitrary exclusion or expulsion.⁷⁰ These procedures are not as strict as the common law requirement of fair procedure, which compels a formal proceeding in court.⁷¹ The minimum requirement of fair procedure for peer review determinations is merely the adequate notice of charges and a reasonable opportunity to respond.⁷² According to ADA bylaws, each member state is permitted to adopt its own standards of quality for peer review purposes that may be as stringent as or more stringent than those adopted by the ADA.⁷³ The CDA has established more stringent standards than those set forth by the ADA.⁷⁴

69. *Id.* at 221. The CDA recommends that a dentist alert their patient’s previous dentist if they believe that the quality of their treatment was questionable. *Id.* A dentist on the receiving end of such a call should in turn inquire into the patient’s condition, and if the patient was willing, offer to see the patient to resolve the problem. *Id.* However, when a dentist becomes aware of a pattern of seriously substandard treatment, it is his or her responsibility both to the public and the dental profession to report the information to their component peer review committee. *Id.*

70. See William P. Gunnar, *The Scope of a Physician’s Medical Practice: Is the Public Adequately Protected by State Medical Licensure, Peer Review, and the National Practitioner Data Bank?*, 14 ANNALS HEALTH L. 329 (2005); see also Philip L. Merkel, *Physicians Policing Physicians: The Development of Medical Staff Peer Review Law at California Hospitals*, 38 U.S.F. L. REV. 301, 317 (2004); Brian E. Appel, *National Practitioner Data Bank: Fact Sheets*, SC39 ALI-ABA 123, 132 (Nov. 1997); CDA Peer Review Manual, *supra* note 12, at 6-2.

71. Merkel, *supra* note 70, at 317.

72. *Id.* at 310.

73. *How the Dental Peer Review System Works*, *supra* note 4, at 1; see Damiano, *supra* note 4, at 113.

74. *Cal. Dental Ass’n. v. Am. Dental Ass’n.*, 23 Cal. 3d 346, 356 (1979). A mandamus proceeding brought by the CDA against the ADA was based on the ADA’s reversal of a decision made by the CDA to expel a dentist for ethical misconduct. *Id.* at 346. The trial court vacated the ADA’s decision and ordered a hearing on the dentist’s appeal because the ADA failed to decide the appeal in light of the CDA’s higher ethical principles, which the ADA is authorized to adopt pursuant to its own bylaws. *Id.* Furthermore, the trial court was not required to evaluate the merits of the dentist’s expulsion since the CDA’s interests in ensuring that the ADA comply with its own bylaws only require that the national association’s judicial council consider the state association’s code of ethics in deciding the dentist’s appeal. *Id.*

IV. A HYPOTHETICAL SITUATION: MS. WHINER VERSES DR. BLUNDER

This section presents an illustrative example of how CDA bylaws, in conjunction with due process requirements, deal with the parties involved in the peer review process.⁷⁵

This is a case of a young dentist, Dr. Blunder, who made a series of questionable judgments while performing a complex root canal procedure on his patient, resulting in severe pain and eventual loss of the tooth. The patient, Ms. Whiner, now seeks compensation for the adverse result. Ms. Whiner faces a number of options, including: hiring an attorney who will file a complaint in court to seek damages, reporting the dentist to the California Dental Board which could possibly impact the dentist's licensure status, and/or she can file a complaint with the local component of the CDA to initiate peer review.⁷⁶ Having heard from another dentist about the benefits of peer review, Ms. Whiner decides to submit a complaint to the administrative office of Dr. Blunder's local dental society.⁷⁷ Pursuant to California Civil Code section 340.5, to be considered, peer review complaints must be made three years from the time the treatment in question was completed, or one year from the time that the patient discovered the problem, whichever occurs first.⁷⁸

In response to Ms. Whiner's telephone inquiry, the dental society's central office sends her an information form, called a "Request for Review" form, and a "Dentist Request for Review" form is sent to Dr. Blunder, along with requests for copies of records, x-rays, photos, models, and any other pertinent evidence to be submitted by all involved parties.⁷⁹ After these

75. See 11 AM. JUR. 3D § 1 *Proof of Facts* (2005) (offering a "[b]asic overview of the structure and function of the human dentition so that the reader can obtain the knowledge needed to serve a client involved in a dental injury case.")

76. See Zimmerman, *supra* note 11, at 18.

77. *How the Dental Peer Review System Works*, *supra* note 4, at 13. In the past, before a patient took a claim to peer review, the CDA along with other component societies around the country would encourage mediating the claim between the dentist and the patient prior to a formal review process. Interview with Roseanne Zimdahl, *supra* note 63. While this method proved to be a more cost-effective and efficient means of resolving disputes, recently it has been discouraged by the CDA out of concerns that the lack of uniformity in this informal process would pose unnecessary legal risks. *Id.*

78. CDA Peer Review Manual, *supra* note 12, at 2-10. Since peer review is an alternative to civil litigation, if a party initiates litigation after the peer review process has begun, even during the appeal process, peer review will cease to continue. *Id.* at 2-39. Furthermore, the peer review committee will refuse to accept any case if either party has initiated litigation. *Id.* Any case that has been litigated to judgment is not eligible for peer review. *Id.* However, mere involvement of an attorney does not automatically invalidate a complaint from being accepted into peer review. *Id.* at 2-39; see also *How the Dental Peer Review System Works*, *supra* note 4, at 10.

79. CDA Peer Review Manual, *supra* note 12, at 2-7 – 2-8; see also *How the Dental Peer Review System Works*, *supra* note 4, at 11. Involved parties include any dentists the patient may

materials are received, appointments are made for a clinical examination of the patient and for an interview with the dentist.⁸⁰ At least three peer review committee member dentists examine the patient.⁸¹ In case the peer review involves one of the recognized dental specialties, the administrative office assembles a panel of at least three dentists engaged in that specialty to undertake the clinical evaluation and dentist interview.⁸² It is important to note that although general dentists evaluate general dentists, and specialists evaluate specialists, the criteria used and standards applied in the process are all the same.⁸³ In other words, general dentists who perform the same treatment as specialists are held to the same standards as specialists. In this case, Dr. Blunder is a general dentist; so three general dentists from the local component's peer review committee perform the patient examination and the dentist interview.

During the patient examination, committee members take turns examining the dental treatment in question. If the patient's complaint includes several issues, the committee members must address all of them.⁸⁴ At this time, the patient may introduce other complaints in addition to those specified in her original written complaint, which the committee must also address.⁸⁵ During the examination, committee members utilize a manual developed by the CDA entitled *Guidelines for the Assessment of Clinical Quality and Professional Performance* that details evaluation criteria and performance levels of most dental procedures.⁸⁶ The examiners must determine the quality of treatment, choosing among two levels of "satisfactory" and two levels of "not acceptable" findings outlined in the

have seen on consultation for the patient's complaint. Interview with Roseanne Zimdahl, *supra* note 63.

80. *How the Dental Peer Review System Works*, *supra* note 4, at 11 (2005); CDA Peer Review Manual, *supra* note 12, at 2-1.

81. CDA Peer Review Manual, *supra* note 12, at 2-1. The examiners have been provided code names with which to make reference to the quality of the dental work. See Quality Evaluation Manual, *supra* note 25, at 4. By using these terms, the patient is not made aware of any of the determinations by the examiners. See *id.* This confidential method of examination is beneficial to the dentist because it insulates the patient from inconsistent determinations by the committee. *Id.* If one examiner finds a certain parameter unacceptable and the two other examiners find the parameter acceptable, the majority wins. *Id.* at 6. However, the patient is never aware of any disagreement among committee members. Interview with Roseanne Zimdahl, *supra* note 63.

82. CDA Peer Review Manual, *supra* note 12, at 3-3.

83. *Id.* at 3-3 – 3-5.

84. See *id.* at 3-3.

85. *Id.* at 3-4.

86. *Id.* at 3-3; see CDA Quality Evaluation Manual, *supra* note 25, at 1.

manual: the treatment can be excellent, acceptable, should be corrected, or must be corrected.⁸⁷ Since the examination is a collaborative effort and findings are compared and rectified between the examiners at a later time, the examiners are barred from divulging any of their findings or opinions to the patient during the examination.⁸⁸ In this case, some of the evidence is nonexistent, as Ms. Whiner's tooth had been removed before the committee's examination. There are instances where no resolution is given for lack of evidence, or altered evidence or the committee may close the case because of "non-compliance" by the dentist.⁸⁹ In this case however, Ms. Whiner's oral surgeon submitted an x-ray of the tooth just prior to extracting it, showing clearly that the tooth had been perforated and damaged beyond repair. Dr. Blunder's pre-operative x-ray reveals that the tooth had only a moderate-sized filling, the judicious removal of which could not have resulted in the damage observed in the oral surgeon's x-ray.

At the dentist interview, pursuant to the rules of peer review, Dr. Blunder is not allowed to be represented by counsel or to produce any witnesses.⁹⁰ Essentially, the purpose of the dentist interview is to allow the dentist an opportunity to tell his or her "side of the story," to introduce any additional pertinent evidence, to ask the committee about review procedures only, and to respond to any queries made by the peer review committee.⁹¹ Committee members cannot divulge their findings during this interview.⁹² While the CDA encourages participation by the dentist, the interview is voluntary, and the dentist can decline in writing.⁹³ Dr. Blunder admits during the interview that while his records are silent on the issue, he may have perforated the tooth while attempting to find one of the root canals. After the conclusion of the interview, the committee members assemble, discuss their findings and reach a determination for each and every complaint brought by the patient.⁹⁴

It is determined that the root canal therapy attempted by Dr. Blunder was unacceptable and also caused additional harm. Adverse decisions against the dentist would closely follow the criteria outlined in the *Guidelines for the Assessment of Clinical Quality and Professional Performance*.⁹⁵ If the treatment were unacceptable but re-treatable, then Dr.

87. See CDA Quality Evaluation Manual, *supra* note 25, at 4.

88. See CDA Peer Review Manual, *supra* note 12, at 3-6 – 3-8.

89. *Id.* at 2-13 – 1-15.

90. *Id.* at 3-7.

91. *Id.* at 3-6 – 3-7.

92. CDA Peer Review Manual, *supra* note 12, at 3-7.

93. *Id.* at 7-33.

94. *Id.* at 3-6 – 3-7.

95. *Id.* at 3-8.

Blunder would be responsible only for refunding his fee for the failed root canal.⁹⁶ Since the treatment resulted in further damage, removal of the tooth, Dr. Blunder does not refund his fee, but is responsible for making the patient whole again by paying to correct the damage he caused.⁹⁷ One of the three committee members assigned to the case is responsible for writing the resolution recommendations and also for detailing the findings of the clinical examination in a document called the Resolution Addendum.⁹⁸ The Resolution Addendum also lists all of the pertinent evidence submitted that would impact the final determinations.⁹⁹ This Resolution Addendum will be sent, along with the “Patient’s Request for Review” and any other written information from the involved parties to the CDA Council on Peer Review (“Council”) in Sacramento.¹⁰⁰ X-rays, models, photographs and other “hard” pieces of evidence are retained by the peer review team members and remitted back to their owners after the case is closed and the appeal period has expired.¹⁰¹

The purpose of the Council is to guide and monitor the peer review system.¹⁰² At this point in the process, the Council insures that the committee has followed proper procedures by verifying that the committee’s findings address all of the patient’s concerns and that the evidence presented supports all of the recommendations.¹⁰³ The Council may remand the case back to the committee for clarification or modifications.¹⁰⁴ Having satisfied all of the requirements for a complete and accurate resolution, the CDA sends out the final resolution in letters to the patient and the dentist.¹⁰⁵ The resolution letter includes a listing of the patient’s complaints, the peer review determinations and any refund or corrective treatment

96. *See id.* at 3-11 – 3-12. In determining whether to award a patient a refund of expenses or to perform a corrective on the patient, the peer review committee takes the actual treatment into consideration. *Id.*; *Peer Review Annual Workshop*, Council on Peer Review, Aug. 15, 2004. If the treatment being reviewed is unacceptable, then a refund is in order. *See* CDA Peer Review Manual, *supra* note 12, at 3-11 – 3-12. However, if treatment being reviewed has caused additional harm, then corrective treatment is in order. *Id.*

97. *See* CDA Peer Review Manual, *supra* note 12, at 3-12.

98. *See id.* at 3-11.

99. *Id.*

100. *See id.* at 3-16 – 3-17.

101. *See id.* at 3-16.

102. CDA Peer Review Manual, *supra* note 12, at 1-6.

103. *See id.* at 3-13.

104. *See id.* at 6-1.

105. *See id.* at 2-26.

recommendations.¹⁰⁶ CDA rules bar the peer review committee from making specific treatment recommendations.¹⁰⁷

Making Ms. Whiner whole again would involve replacing her missing tooth, and the treatment may include placement of a fixed or removable bridge, or the placement of an implant-supported crown. The CDA instructs her to submit an estimate for any corrective treatment from a dentist of her choice within thirty days of receipt of the resolution letter.¹⁰⁸ The dentist and the patient both have the opportunity to appeal the decision of the peer review committee to the Council. The appeal must be submitted in writing within thirty days of the date of the resolution letter, and must address only procedural issues and not the findings of the examining committee.¹⁰⁹ The dentist receives the same resolution letter as the patient, but also receives a copy of the Resolution Addendum summarizing the patient's examination and other evidence considered by the committee.¹¹⁰

The resolution letter, while intended to inform both the dentist and the patient of CDA's determination, is written in lay terms for the patient's benefit.¹¹¹ If the CDA finds in the dentist's favor, the reasons for that finding is explained in the resolution letter as clearly as possible to allay the patient's concerns over fairness; if found in the patient's favor, no explanation is put forth in the resolution letter, but the finding is explained and justified to the dentist in the Resolution Addendum.¹¹² The committee reviews any estimates for corrective treatment submitted by the patient, and can either approve the estimate, approve a portion of the estimate or reject the estimate.¹¹³ At its discretion, the committee can request additional estimates from other dentists of the patient's choosing.¹¹⁴ Upon approval of an estimate by the committee, the committee will request that the dentist under review send a check for the estimated damages to the dental society's administrative office.¹¹⁵

106. *See id.* at 2-25 – 2-26.

107. *See id.* at 3-3 – 3-5.

108. CDA Peer Review Manual, *supra* note 12, at 3-13.

109. *Id.* at 4-1; *see* California Dental Association, *Peer Review Program*, <http://www.cda.org/public/policy/peerrev.html>.

110. *See* CDA Peer Review Manual, *supra* note 12, at 3-5, 2-27.

111. Interview with Roseanne Zimdahl, *supra* note 63.

112. *See* CDA Peer Review Manual, *supra* note 12, at 3-5, 3-15.

113. *See id.* at 7-80.

114. *See id.* at 7-85.

115. *Id.* at 2-27. Prior to November 2005, the patient would have had one hundred and twenty days from the expiration of the appeal period to have the corrective dental work completed. Interview with Roseanne Zimdahl, *supra* note 63. Upon receipt of the letter of completion for the corrective treatment from the patient's subsequent treating dentist, the dentist is instructed to send a

An example where the peer review committee must render decisions about the correctness of diagnoses rather than the quality of treatment would be in case of a utilization dispute between a dentist and the patient's insurance company or other third party guarantor.¹¹⁶ The committee examines the dental work and reviews any evidence that would substantiate the dentist's claim for reimbursement.¹¹⁷ The committee recommends a resolution, if possible, and submits it to the CDA for approval.¹¹⁸ Upon CDA approval, a resolution letter is sent to the patient and the dentist.¹¹⁹ If the committee finds for the dentist, it will indicate that the diagnosis was within the standard of care and the treatment was necessary as substantiated by the evidence.¹²⁰

The dentist may appeal the committee's decision.¹²¹ "If any party to a review can factually demonstrate that a procedural error may have occurred, or that the decision was not based on available facts," they may file an appeal with the Council.¹²² Overall, the average number of days for the peer review process is one hundred and twenty days, "a sharp contrast to litigation, which can drag on for years."¹²³ It is the speed of the process that is one of the most attractive features for patients.¹²⁴

The CDA makes great efforts to have its peer review system produce equitable results in a timely manner.¹²⁵ Whatever the outcome, the dentist is spared the public embarrassment, the attorney's fees, state disciplinary action or being reported to the National Practitioner Data Bank by

check in the amount approved by the committee to the dental society office, where is recorded and forwarded directly to the patient. CDA Peer Review Manual, *supra* note 12, at 7-80 – 7-83.

116. Nakahata, *supra* note 3, at 78; *see also* CDA Peer Review Manual, *supra* note 12, at 5-1.

117. *See* CDA Peer Review Manual, *supra* note 12, at 3-1 – 3-3.

118. *Id.* at 5-3.

119. *Id.* at 5-3. In addition to the resolution letter written in terms the patient can easily understand, the dentist receives a Resolution Addendum which details the results of the committee's clinical exam of the patient. The patient does not receive the Resolution Addendum. *Id.* at 3-4 – 3-5

120. *Id.* at 3-5.

121. *Peer Review Program*, *supra* note 109. Once the peer review committee has obtained an expert opinion indicating that the doctor is guilty of unprofessional conduct or malpractice and after the final appeal, a report to the State Dental Board is required. Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-52 (Supp. IV 1986) [hereinafter HCQIA]; *see* CDA Peer Review Manual, *supra* note 12, at 6-3; *See also* California Dental Practice Act, CAL. CODE REGS. tit. 16, § 1018 (2006).

122. *Peer Review Program*, *supra* note 109.

123. Ellek, *supra* note 5.

124. Interview with Roseanne Zimdahl, *supra* note 63.

125. Ellek, *supra* note 5.

participating in a confidential, non-punitive mechanism to resolve the case. The patient in turn is generally relieved to avoid complex rules, courtroom trappings, exorbitant legal fees and lengthy waits in resolving the dispute.

V. BENEFITS OF PEER REVIEW

The peer review process facilitates communication between the parties in an objective, and protected environment.¹²⁶ The CDA takes great pains to maintain the neutrality of the process, so that peer review is not perceived by patients as just a gang of good ole' boys or by dentists as the Spanish Inquisition.¹²⁷ If any conflict of interest exists, real or perceived, among any of the parties, the peer review case will be transferred to the component's neighboring dental society, or in some circumstances the review member will be recused from the case.¹²⁸ Patients are generally pleased that not just one, but three dentists examine them.¹²⁹ This practice instills a greater feeling of objectivity and a sense that considerable professional expertise is being provided.¹³⁰ The dentists' interviews are kept informal, with the committee reminding dentists that peer review is there to help them and is a member service for which they are paying through their dues.¹³¹

Although the parties may become so firmly entrenched in their own positions that they cannot see another point of view, the peer review process obliges them to see all sides of the issue and acquiesce to the opinions of neutral dentists.¹³² In addition to all of these benefits, the dentist can rest assured that except for cases of repeated or egregious offenses, the complaint will not be reported to the National Practitioner Data Bank ("NPDB").¹³³

126. Ellek, *supra* note 5.

127. See Nakahata, *supra* note 3, at 78; see also Zimmerman, *supra* note 11, at 18.

128. *How the Dental Peer Review System Works*, *supra* note 4, at 5-6. In smaller components, where all of the dentists know each other, it is difficult to have a completely neutral peer review panel. *Id.* Therefore, in these circumstances, the case is very often transferred to another component society. *Id.*

129. CDA Peer Review Manual, *supra* note 12, at 1-8.

130. *How the Dental Peer Review System Works*, *supra* note 4, at 22; Interview with Roseanne Zimdahl, *supra* note 63.

131. *How the Dental Peer Review System Works*, *supra* note 4, at 12.

132. Ellek, *supra* note 5. The peer review system provides a patient with the comfort of knowing that at least 6-10 dental professionals review the case, the evidence and the issues prior to making a determination. Interview with Roseanne Zimdahl, *supra* note 63. This review system is not economically feasible if a patient was to pursue traditional litigation. *Id.*

133. *How the Dental Peer Review System Works*, *supra* note 4, at 21.

1. *The Peer Review Immunity Protects CDA Member Dentists*

Peer review can be made possible only if participants openly engage in dialogue that is free from the fear of legal repercussions.¹³⁴ Peer review committee members would be reluctant to volunteer “in the peer review process if they fear information . . . may later be admitted into a judicial or administrative proceeding.”¹³⁵ Also of concern to dentists is the potential that they could be required to testify against their colleagues if the peer review case later goes to litigation or if the information from the peer review proceedings is revealed to third parties.¹³⁶ Accordingly, state and federal laws confer immunity to peer review committee member dentists, and shield participants from adverse consequences that may result from participation in the peer review process.¹³⁷ While the state laws that govern peer review immunity are not detailed in this comment, a brief overview of the pertinent federal laws growing out of the Health Care Quality Improvement Act (“HCQIA”), are presented to understand the general protection afforded to peer review member dentists.¹³⁸

The HCQIA, passed by Congress in 1986, “formalize[s] federal support for the peer review system” and provides federal immunity analogous to the state protections to physicians and dentists involved in peer review.¹³⁹ One

134. Scott M. Smith, *Construction and Application of Health Care Quality Improvement Act of 1986* (42 U.S.C.A. §§ 11101-11152), 121 A.L.R. FED. 255 (2004). These repercussions would include retaliatory measures from an unhappy dentist due to “an unfavorable review, such as claims for defamation, discrimination, or antitrust.” Stukes, *supra* note 13, at n.14 (citing Patrick v. Burget, 486 U.S. 94, 105 (1988) (upholding an antitrust action against defendant physicians)). In addition, the reviewed dentist may face potential non-legal retribution in the form of lost referrals and the public embarrassment of practicing below community standards. *Id.*; see Zimmerman, *supra* note 11, at 18. To alleviate these concerns, peer review statutes are designed to provide for a certain amount of privacy for the parties and immunity from liability. Stukes, *supra* note 13, at n.14.

135. Scheutzow & Gillis, *supra* note 26, at 171.

136. *Id.*

137. George McDonald, 1 CAL. MED. MALPRAC. L. & PRAC. § 6:11 (West Supp. 2005). The court in *American Dental Association v. Shalala*, 3 F.3d 445, 448 (1993), found the HCQIA, which requires each state Board of Medical Examiners to report information provided to them by health care entities to the NPDB, does not violate Tenth Amendment. Smith, *supra* note 134, at 258.

138. For a general discussion of various state peer review statutes, see Daniel M. Mulholland, III & Phil Zarone, *Waiver of the Peer Review Privilege: A Survey of the Law*, 49 S.D. L. REV. 424, n. 12 (2004).

139. Gunnar, *supra* note 70, at 347 (2005) (alteration in original); Scheutzow & Gillis, *supra* note 26, at 177. Prior to Congress’ enactment of the HCQIA, “peer review in the health care field was governed exclusively by state legislation.” *Id.* The HCQIA was adopted to curtail the “rising medical malpractice insurance rates, the cost of defensive medicine, the ineffectiveness of the state licensing board system to discipline incompetent physicians, and the high likelihood that physicians

of the factors that led to the enactment of HCQIA was the threat of legal liability to those engaged in peer review, regardless of state law protections.¹⁴⁰ The HCQIA affords protection to dentists engaged in peer review from monetary damages under all federal and state actions except those relating to civil rights and due process violations.¹⁴¹ The HCQIA protects peer review members from liability for their resolutions from being perceived as “anticompetitive behavior,” so long as their review is conducted:

- (1) [I]n the reasonable belief that the action was in the furtherance of quality health care,
- (2) [A]fter a reasonable effort to obtain the facts of the matter,
- (3) [A]fter adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
- (4) [I]n the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph.¹⁴²

The HCQIA is premised on the belief that, without this statutory peer review immunity, no dentist would be willing to sit on a peer review committee and engage in frank evaluations of his or her colleagues.¹⁴³ Consequently, the CDA’s protocol for its behavior with member dentists follows the spirit of federal immunity statutes.

with a revoked or suspended medical license in one state would merely move to another state and resume practice.” Gunnar, *supra* note 70, at 347.

140. Josh Blum, *Medical Peer Review*, 38 J. LEGAL EDUC. 525, 528 (1988). The HCQIA represents Congress’ finding that “there is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.” Scheutzow & Gillis, *supra* note 26, at 176. CAL. CIV. CODE, §§ 43.7, 43.8 (West Supp. 2006) (providing qualified state immunity from liability to members of, and persons who communicate to health care peer review committees.)

141. Blum, *supra* note 140, at 528. The HCQIA does not provide immunity “to actions brought by the Federal Trade Commission (FTC), the Department of Justice (DOJ), state authorities pursuing antitrust or civil rights claims, or disciplined physicians with private suits seeking injunctive or declaratory relief.” Gunnar, *supra* note 70, at 348.

142. 42 U.S.C.A. §§ 11101, 11111-11152 (West Supp. 1993). The HCQIA provides that “professional review actions will be presumed to have met these standards unless the presumption is rebutted by a preponderance of the evidence.” Scheutzow & Gillis, *supra* note 26, at n.3.

143. Scheutzow & Gillis, *supra* note 26, at 176. “Overall, the HCQIA provides legal immunity for peer review activities and establishes a national clearinghouse for information on physicians.” Gunnar, *supra* note 70, at 347.

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2. *The Peer Review Resolutions and the National Practitioner Data Bank*

Congress has created two major national information sources for actions taken against physicians and other health care professionals (1) the NPDB and (2) the Healthcare Integrity and Protection Data Bank (“HIPDB”).¹⁴⁴

These databanks contain information about any health care provider who has had pattern of practice peer review or ethics types of violations so that patients, state licensing boards, and health care providers can make more informed disciplinary and credentialing decisions.¹⁴⁵ Both the NPDB and the HIPDB are “authorized to collect and release data concerning health care professional performance.”¹⁴⁶ The databanks are structured so that the information is made “available to the public only in aggregate form, . . . the specific actions taken against an individual, and why the actions were taken” are not revealed.¹⁴⁷

a. *The National Practitioner Data Bank*

In addition to affording immunity, the HCQIA establishes the NPDB, a national clearinghouse “to receive and disseminate information about individual physician misconduct.”¹⁴⁸ The HCQIA mandates a series of reporting requirements for providers, hospitals or other organizations that

144. Linda C. Fentiman, *Patient Advocacy and Termination from Managed Care Organizations. Do State Laws Protecting Health Care Professional Advocacy Make any Difference?*, 82 NEB. L. REV. 508, n.69 (2003); Gunnar, *supra* note 70, at 348; National Practitioner Data Bank-Healthcare Integrity and Protection Data Bank Website, <http://www.npdb-hipdb.com/> (last visited Jan. 26, 2006) [hereinafter NPDB-HIPDB Website]. Regulations established for the purpose of protecting the confidentiality of the patient have created changes in the peer review system. Interview with Roseanne Zimdahl, *supra* note 63. The HIPAA privacy regulations establish federal requirements for the protection of confidentiality of medical and dental information. Beth C. Koob, *The Health Care Quality Improvement Act of 1986*, A.L.I. 333 (1997). Previously, state law primarily drove the confidentiality of medical and dental records. Blum, *supra* note 140, at 528. The federal regulations set standards for the privacy of “Protected Health Information” (PHI), and grant patients’ specific rights. David G. Evans, *HIPAA Privacy of Health Information*, FEDERAL AND STATE GUIDE TO EMPLOYEE MEDICAL LEAVE BENEFITS AND DISABILITY LAWS § 1:47.25 (2002). Now that these privacy regulations are in place, there are limits on what can be discussed prior to mediation. *See id.* The federal regulations set standards for the privacy of “Protected Health Information” (PHI), and grant patients’ specific rights Interview with Roseanne Zimdahl, *supra* note 63.

145. Fentiman, *supra* note 144, at n.69.

146. *Id.*

147. *Id.*

148. Blum, *supra* note 140, at 528 (citing HCQIA, 42 U.S.C. §§ 11101-52 (Supp. IV 1986).); Gunnar, *supra* note 70, at 528.

engage in disciplinary proceedings.¹⁴⁹ One of the most significant benefits peer review holds for dentists is that adverse peer review findings are generally not reportable to the NPDB, whereas adverse outcomes of malpractice suits are reportable.¹⁵⁰ The NPDB is an alert or flagging system.¹⁵¹ The system is a resource for state licensing authorities, medical malpractice payers, health care entities and the general public for the purpose of tracking those in the medical profession who engage in unprofessional behavior.¹⁵² In 1986, Congress concluded that “state medical licensing boards were not adequately weeding out incompetent or unprofessional physicians and that it was too easy for them to move to another jurisdiction and start all over again . . . with the potential of committing additional acts of malpractice upon an unsuspecting community.”¹⁵³

To prevent this jurisdiction jumping, Congress enacted the HCQIA, which limits a physician’s ability to move freely about the country and evade the discovery of the physician’s documented incompetence.¹⁵⁴ The NPDB’s electronic database catalogues payments made by doctors or dentists in malpractice suits or judgments in connection with adverse peer review actions where the member was reported to the state board or to the NPDB.¹⁵⁵ By federal law, the HCQIA requires information on all medical malpractice payments or adverse actions to be reported to the NPDB.¹⁵⁶

149. Blum, *supra* note 140, at 528; HCQIA, 42 U.S.C. §§ 11101-52 (Supp. IV 1986).

150. Koob, *supra* note 144, at 336.

151. National Practitioner Data Bank 2004 Annual Report, NPDB ANN. REP. 10 n.4 (2004), available at http://www.npdb-hipdb.com/pubs/stats/2004_NPDB_Annual_Report.pdf; National Practitioner Databank Guidebook, U.S. Department of Health and Human Services, 9-10 available at http://www.npdb-hipdb.com/pubs/gb/NPDB_Guidebook.pdf.

152. National Practitioner Data Bank 2004 Annual Report, *supra* note 151, at 11.

153. Nolan N. Atkinson, Jr., *How the National Practitioner Data Bank Affects Medical Malpractice Clients*, SC39 ALI-ABA 111, 113-114 (1997).

154. *Id.*; 42 U.S.C. § 11101(2); see generally National Practitioner Data Bank 2004 Annual Report, *supra* note 151, at 11.

155. See Koob, *supra* note 144, at 336; see generally National Practitioner Data Bank 2000 Annual Report, NPDB ANN. REP. 2-6 (2000), available at <http://www.npdb-hipdb.com/annualrpt.html>.

156. See Koob, *supra* note 144, at 336. According to the U.S. Department of Health and Human Services, a “medical malpractice payment” is: “(1) any payment of money; (2) by an entity; (3) for the benefit of a health care practitioner; (4) resulting from a written claim or demand for payment; and (5) based on the provision of, or failure to provide, services.” American Dental Association, *Peer Review Actions and the National Practitioners Data Bank*, http://www.ada.org/prof/prac/tools/peer_review.asp (last visited Jan. 26, 2006); see U.S. Department of Health and Human Services Online, <http://www.hhs.gov>. Each of these elements must be present in order for a reporting obligation to exist. American Dental Association, *Peer Review Actions and the National Practitioners Data Bank*, http://www.ada.org/prof/prac/tools/peer_review.asp (last visited Jan. 26, 2006). “Depending on the facts and circumstances of a case, a fee refund resulting from peer review

Furthermore, pursuant to the HCQIA, NPDB must make this information available to hospitals, state licensure boards, professional societies, and other health care entities under certain circumstances.¹⁵⁷ The NPDB is accessed over 3.5 million times a year by “hospitals, regulatory agencies and professional associations.”¹⁵⁸ One of the most significant benefits peer review holds for dentists is that adverse peer review findings are generally not reportable to the NPDB; however, there are instances when the CDA may refer a dentist to the California Dental Board and the NPDB.¹⁵⁹

b. The Healthcare Integrity and Protection Data Bank

The HIPDB was instituted by Congress as part of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”).¹⁶⁰ HIPDB’s goal is to deter health care abuse by “flagging” a health care provider who engages in irregular or fraudulent billing for services.¹⁶¹ The HIPDB must be notified of the following:

[S]tate and federal licensing and certification decisions; health care-related civil judgments and criminal convictions; injunctions related to the delivery of a health care item or service, exclusions from participation in Medicare, Medicaid, and other state or federal health care programs; and any other adverse action taken by a private entity, including contract terminations made by health plans.¹⁶²

could be a medical malpractice payment, reportable to the NPDB by the dental society or the dentist, whoever makes the payment.” *Id.*

157. About the National Practitioner Data Bank, available at <http://www.npdb-hipdb.com/npdb.html> (last visited Jan. 26, 2006). The HCQIA requires state licensing boards to report adverse licensing actions against health care providers and professional societies to report adverse membership actions. Appel, *supra* note 70, at 125.

158. Fred M. Zeder, *Defending Doctors in Disciplinary Proceedings*, 40 JAN. ARIZ. ATT’Y 22, 23 (2004).

159. CDA Peer Review Manual, *supra* note 12, at 7-32.

160. Fentiman, *supra* note 144, at n.69. The HIPDB, in effect since November 1999, requires the reporting of all “adverse events” and other mandated actions since the date the statute was enacted, August 21, 1996. *Id.* at n.71.

161. *Id.* at n.69 (citing *Healthcare Integrity and Protection Data Bank*, HIPDB ANN. REP. NO. 1 (2000)); see also *Healthcare Integrity and Protection Data Bank*, HIPDB ANN. REP. NO. 1 (2002).

162. Fentiman, *supra* note 144, at n.69; *Healthcare Integrity and Protection Data Bank Website*, *supra* note 144.

c. *The NPDB and the HIPDB: Consequences for Peer Review*

The peer review committee's determinations are legally non-binding; that is, the force of law does not back them and either party may reject the decision of the peer review committee.¹⁶³ That being said, there are certain material obligations born by both the patient and the dentist in the peer review process.¹⁶⁴ As an example of a patient's obligation, if the committee determines that a dentist's treatment is unacceptable, upon the dentist's prior request, the dental society will withhold the refund until the patient returns the defective treatment to the dentist.¹⁶⁵ This will prevent the patient from pocketing the refund money without having the dental work redone. In case corrective treatment is necessary, the patient is obliged to accept a dollar amount approved by the committee that may be less than the fees submitted for the corrective treatment.¹⁶⁶ The dentist also carries responsibilities and risks consequences. There are three instances when a member dentist may risk referral to the NPDB. First, pursuant to the CDA *Code of Ethics*, a member dentist who defies the requests or decisions of a duly constituted committee, such as the peer review committee, risks an investigation by the Judicial Council, and ultimately risks expulsion from the dental association, along with referral to the state dental board and the NPDB.¹⁶⁷ Second, to address pattern of practice issues, the CDA Peer Review Manual uses a three-strikes rule, which states that if a dentist receives three adverse peer review decisions initiated within a 24-month period, that dentist could be referred to the CDA Judicial Council for a pattern of practice that violates the CDA's *Code of Ethics*.¹⁶⁸ If found in violation of the *Code of Ethics*, the dentist can be reported to the Dental Board of California, the HIPDB and the NPDB.¹⁶⁹ Finally, the Peer Review Manual uses a one-strike rule reserved for cases of "grossly inadequate or inappropriate treatment", where one instance of especially egregious misconduct may result in a referral to the state dental board.¹⁷⁰

163. See *How the Dental Peer Review System Works*, *supra* note 4, at 20.

164. See CDA Peer Review Manual, *supra* note 12, at 1-3.

165. See *id.* at 2-27 – 2-28.

166. See *id.* at 7-85.

167. *Id.* at 1-1 – 1-2; California Dental Association, *Code of Ethics*, available at <http://www.cd.a.org/public/coe.html#3>.

168. CDA Peer Review Manual, *supra* note 12, at 7-86.

169. *How the Dental Peer Review System Works*, *supra* note 4, at 21.

170. CDA Peer Review Manual, *supra* note 12, at 6-3.

3. *The Documents Produced for Peer Review are Protected from Discovery*

Generally, proceedings and records of peer review disputes are not subject to discovery.¹⁷¹ The confidentiality of materials produced by medical peer review committees is specially protected by legislation in forty-four states.¹⁷² *Bredice v. Doctors Hospital, Inc.*, is the first case to recognize a self evaluative privilege in peer review.¹⁷³ In *Bredice*, the plaintiff filed a “medical malpractice suit against a hospital and other defendants.”¹⁷⁴ Discovery motions were made to present the minutes and reports of hospital staff meetings where hospital procedures and practices were discussed.¹⁷⁵ The court denied the plaintiff’s motion for production of the documents.¹⁷⁶ In doing so, the court emphasized the “continuing confidentiality of these materials to encourage frank discussions.”¹⁷⁷

California Evidence Code section 1157 is intended to protect dentists or doctors who participate in peer review or other evaluating committees from having to divulge their findings or having to appear in court for malpractice actions against their peers.¹⁷⁸ A peer review volunteer cannot be compelled

171. In determining whether peer review documents are discoverable, federal courts apply a “weighing of the interests” test. Peter M. Sfikas, *The Sanctity of Peer Review Upheld*, 136 J. AM. DENT. ASSOC. 233 (2005). “They balance the state interest advanced by the state peer review privilege against the interests of the federal claim cited by the individual bringing the lawsuit . . . a balance must be struck between the competing interests of a plaintiff’s need for disclosure and the need for confidentiality.” *Id.*

172. Louis M. Brown et al., *The Legal Audit: Corporate Internal Investigation*, LEGAL AUDIT § 9:66 Protection by Self-Evaluative Privilege, August 2004 Update. Massachusetts, South Carolina, Tennessee and Utah are the only states that have not adopted the document peer review privilege. *Id.*

173. Brown, *supra* note 172 (citing *Bredice v. Doctors Hosp. Inc.*, 50 F.R.D. 249 (D.C. 1970), *aff’d*, 479 F.2d 920 (D.C. Cir. 1973)).

174. Brown, *supra* note 172, at n.147-48 and accompanying text.

175. *Id.*

176. *Id.* at n.149 and accompanying text.

177. *Id.*

178. Bremer, *supra* note 13; *see* CAL. EVID. CODE § 1157.

Neither the proceedings nor the records of organized committees of . . . dental review or dental hygienist review . . . of local . . . dental, dental hygienist . . . societies shall be subject to discovery. Except as hereinafter provided, no person in attendance at a meeting of any of these committee shall be required to testify as to what transpired at that meeting. The prohibition relating to discovery or testimony does not apply to the statements made by any person in attendance at a meeting of any of those committees who is a party to an action or proceeding the subject matter of which was reviewed at that meeting, or to any person requesting hospital staff privileges, or in any action against an insurance carrier

to appear in a court proceeding to testify as to what transpired during a peer review case.¹⁷⁹ Pursuant to California Evidence Code section 1157, neither the proceedings nor the records produced by peer review shall be subject to discovery.¹⁸⁰ For instance, this privilege extends to the results of the peer review examination that is summarized in the Resolution Addendum and sent to the dentist.¹⁸¹ Because the Resolution Addendum is not the work-product of the dentist, it would be at the dentist's discretion whether to include it in the patient's dental records.¹⁸² As all of the contents of the patient's dental chart are discoverable, it would be to the dentist's advantage to make sure that a favorable Resolution Addendum be enclosed.¹⁸³ Assuming there is no evidence of procedural errors by peer review it would be difficult for a patient-plaintiff to litigate a claim successfully when the dentist is armed with a favorable resolution from a professional evaluative body. It becomes especially difficult after having signed statements to be bound by the peer review committee's decisions and absolving the dentist under review of further liability.¹⁸⁴

VI. CONCLUSION

*I told my dentist my teeth are going yellow.
He told me to wear a brown tie.*

Rodney Dangerfield

Despite all of the procedural and licensing safeguards in place, even the most judicious and conservative dentist may encounter the unsettling experience of a dissatisfied and disgruntled patient. A patient may complain about treatment or the outcome of treatment, or doubt a diagnosis when the

alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits.

CAL. EVID. CODE § 1157.

179. *See id.*

180. California Peer Review Statute, <http://www.hortyspringer.com/Data/PeerReview/zCalifornia.html> (last visited Jan. 30, 2006); *see* CDA Peer Review Manual, *supra* note 12, at 2-29 – 7-28.

181. *See also* CDA Peer Review Manual, *supra* note 12, at 3-10.

182. *Id.* at 3-4 – 3-5.

183. James P. Frickleton, *How to Mine the Medical Records*, 40 TRIAL 56 (2004); *see* Shandell et al., THE PREPARATION OF TRIAL AND MEDICAL MALPRACTICE CLAIMS, § 11.02 *What to Discover* (2005).

184. CDA Peer Review Manual, *supra* note 12, at 7-100 – 7-101. At the end of the peer review process, and after the appeal period has expired, the patient signs a "release of all claims" form which waives the patients right to later bring suit against the dentist relating to the treatment reviewed. *Id.* at 7-96.

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dentist has done no wrong; it can happen to the best of dentists. A simple breakdown in communication between dentists and patients or dental staff and patients is a common cause of dissatisfaction. In our consumer-oriented society, it has become natural to expect a certain level of competence from service providers, and to be deserving of “compensation for losses resulting from the acts of others.”¹⁸⁵ The peer review system, overseen by the ADA and administered by each state’s dental association, represents a mechanism for such redress.¹⁸⁶ Peer review committees facilitate quality control for the dental profession; they enforce a standard of quality by setting a means of assessment.¹⁸⁷ In this increasingly litigious climate, the privileges and immunities attendant to member dentists protect those who make the peer review process work.¹⁸⁸ By providing an alternative to litigation, peer review has a dramatic impact on resolving disputes outside of a court setting for both the dentist and the patient.¹⁸⁹

185. MORRIS, *supra* note 6, at 2.

186. See Stukes, *supra* note 13, at 1862. “Peer review, . . . has become the most widely accepted method of identifying and correcting substandard health care.” *Id.* at n.9.

187. James Davidson, *Take a Positive Approach to Peer Review*, AM. ACAD. OF PHYSICIAN ASSISTANCE, <http://www.aapa.org/gandp/peer.html> (Jan. 16, 2005).

188. Mulholland, *supra* note 138.

189. *Id.*

