DUE PROCESS *or* PROFESSIONAL ASSASSINATION?

A Texas case brings to light how the system can be contaminated by economic competition.

By John Zicconi

Texas physician Roland Chalifoux believes he has become the victim of a disturbing trend in medicine: one that values money over care quality and rewards political uniformity over solo innovation. The young neurosurgeon believes his financial competitors used a sham peer-review process in an attempt to destroy him because he was making more money and gaining greater community prestige than any of the "good old boys."

Chalifoux, 42, has sued both a Dallas hospital and three of his peers who he says trumped up charges against him and had his privileges revoked because they were tired of him dominating spine surgeries in their highly competitive market.

As a result of what his lawyer called an attempt of "professional assassination," Chalifoux now has both the State of Texas investigating his medical competency and a black mark in the controversial National Practitioner Data Bank. He was forced to leave the Dallas-Fort Worth Medical Center in 1999 and move his practice to two other nearby hospitals where he says the administration watches him closely but so far has not attempted to remove his privileges.

"Most of this comes down to jealousy and a matter of a turf battle," Chalifoux says. "It was a matter of who was going to be controlling spine care at that hospital."

Medical industry observers say Chalifoux's case is a classic example of an ugly, yet growing trend in the healthcare industry. As both HMOs and insurance companies crack down on the cost of medical care, physicians in highly-competitive markets are finding themselves competing for an ever-shrinking slice of the reimbursement pie. Established physicians who are either part of a powerful Medical Practice Organization or entrenched in a hospital's political structure are finding it lucrative to target solo practitioners or colleagues who question the local pecking order and eliminate them.

Critics charge that through sham peer review, hospital hierarchies are successful-

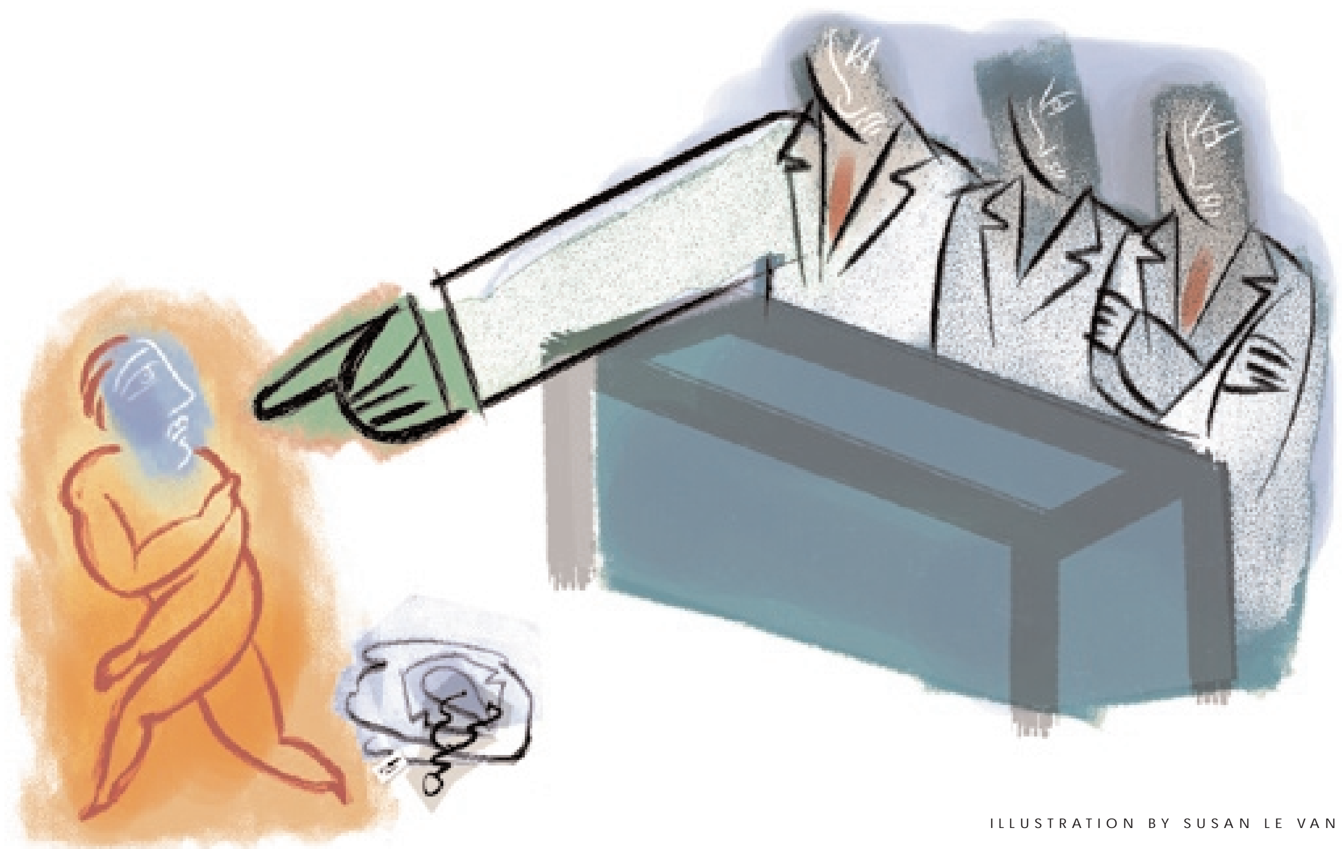

ILLUSTRATION BY SUSAN LE VAN

A law passed during the Reagan administration that was designed to protect the peer review process from over-zealous lawyers has turned into a mechanism by which vengeful or greedy practitioners can attack their competitors with legal impunity, critics say.

ly taking down numerous hardworking physicians annually. Although statistics do not exist, they believe as much as 75 percent of all peer review is called for nonmedical reasons. Critics claim that physicians who attempt this kind of professional assassination often do so with calculated precision. Worse, due to Congress' rush during the 1980s to find a way to expose and punish bad doctors, the practice has become protected by federal law.

Death of the fraternity

"It is very cold, it is very calculated, and it is very uncaring," says Jeffrey Grass, an attorney who represents not only Dr. Chalifoux but about two dozen other physicians who claim to be victims of sham peer review. "It is not typically how we think about physicians. But the old fraternity is gone.

"The brotherhood and the Hippocratic oath that we are all in this for the patients' good and we are going to respect each other as this fraternity of dignified professionals has kind of gone by the wayside. It is my personal experience that doctors are one of the most ruthless bunch you will ever find. Physicians are so dispassionate it is amazing. They have no compunction about ruining someone's career," Grass says.

Chalifoux had his privileges at Dallas-Fort Worth Medical Center revoked in the fall of 1999. He soon filed suit in federal court seeking a jury trial for antitrust violations.

According to Chalifoux, the hospital mislabeled a spine surgery he performed, calling it a four-level vertebrae fusion instead of three. Hospital rules banned four-level procedures. The mistake took place at a time when Chalifoux was applying to become a member of the physician staff. Instead of granting him permanent privileges that fall, two of his competitors called for an investigation. They went through his back charts, found about a dozen other "questionable" decisions and called for a peer-review hearing.

According to court documents, the in-house peer review panel eventually ex-

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onerated Chalifoux and recommended that the hospital executive committee restore his privileges. But the executive committee, which included Chalifoux's two accusers—orthopedic surgeons Jeffrey Carter and James Pollifrone—exercised its right to reject the panel's recommendation and refused to let Chalifoux return to the hospital.

Chalifoux believes the process was rigged. Both Carter and Pollifrone were part of the hospital's power structure and were in a position to act not only as his accuser, but also his judge, jury, and executioner, he says.

"The whole thing was a joke," Chalifoux says. "That is why I am suing them."

During the peer-review hearing, Chalifoux had four neurosurgeons who were not on staff at the hospital review his charts and testify he did nothing wrong. Both Carter and Pollifrone testified otherwise, but they never sought independent consultation. Their review was conducted internally with the aid of the hospital chief of staff, Robert Snow.

"They should have outside people review things," Chalifoux says. "Before you make any decisions on a physician's future, you send the stuff to outside doctors who don't have any political ties to the hospital and let them review it. What I have a problem with is here we had the executive committee, who has already said they don't want me there, overruling the fair hearing people who tell me they want me there. So the fair hearing has no power at all."

Carter, Pollifrone, and Snow all declined comment. Dallas-Fort Worth Medical Center closed in November. Repeated calls to its administration went unanswered.

Attack with impunity

Physicians have been undergoing various types of peer review for decades. Believing the non-medical world is incapable of accurately assessing a physician's work, doctors have successfully lobbied Congress for the latitude to police themselves. But a law passed during the Reagan administration that was designed to protect the peer review process from over-zealous lawyers has turned into a mechanism by which vengeful or greedy practitioners can attack their competitors with legal impunity, peer-review critics say.

In 1986, the federal government passed the Health Care Quality Improvement Act in response to pressure from the medical industry to give both hospitals and peer-review panels legal immunity from lawsuits. The same law created the National Practitioner Data Bank, a federal list of problem physicians who have not only lost privileges but who have lost malpractice cases or had problems with issues like drug addiction.

The data bank, which came on line in 1990, contains the names of about 161,000 physicians but has nearly 258,000 total entries because many physicians are listed more than once. More than 9,500 doctors are listed as a result of peer review. A total of 1,080 were reported during 2000.

Hospital administrators check the data bank before granting privileges. Physicians who have been reported to the bank often have their privilege requests denied because hospital officials don't want to assume the liability of allowing a problem doctor to join their staff. This causes great problems for physicians who have been the victim of fraudulent peer review, says Dr. Verner Waite, a leading critic of peer review.

"If you get reported to the data bank, you are dead," says Waite, a retired general surgeon from California who in 1984 won a $260,000 court settlement after he was wrongly accused during peer review. "You might as well turn in your license. It is a powerful weapon that is used mercilessly all over the United States."

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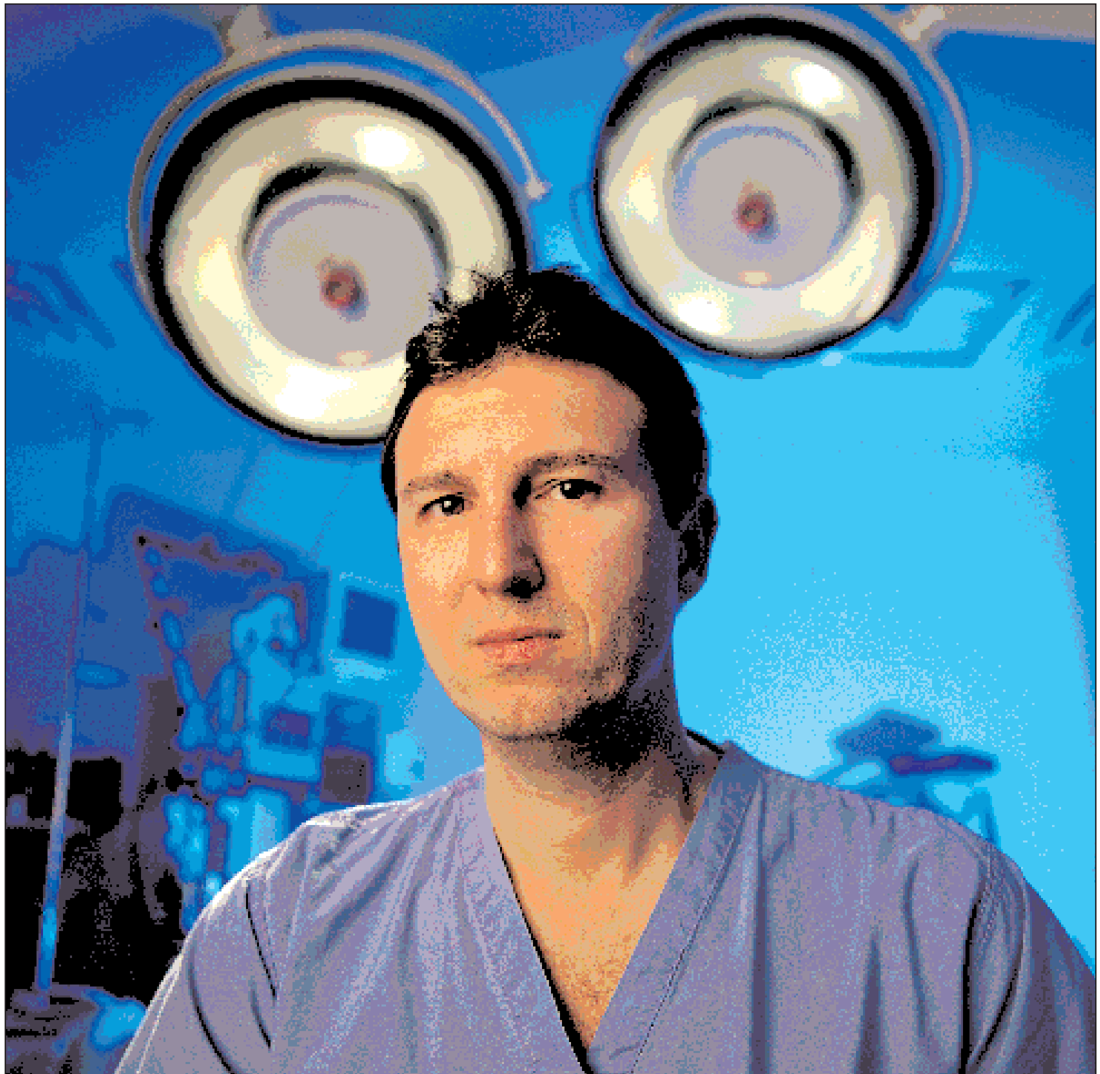
Roland Chalifoux, a Dallas neurosurgeon, has sued two of his competitors for improper peer review.



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Congress' action was motivated by a high-profile case in Oregon where a general surgeon won a $2 million antitrust lawsuit against his former partners. Like Chalifoux, Dr. Timothy Patrick claimed that these other physicians were competitors who used peer review to drive him out of business for purely economic reasons.

When Congress passed the Health Care Quality Improvement Act it provided immunity for physicians who serve on peer-review panels as long as hospitals provide due process and members of the panel act in good faith. Prior to 1986, physicians often challenged peer-review decisions in court. Although doctors can still do that, critics contend that immunity protection, which allows the hospital to keep all documents and discussions secret, severely curtails what a physician can introduce in court, which has made winning court cases that challenge peer review next to impossible.

The Health Care Quality Improvement Act not only deprives physicians of their due process rights to the courts, but also equal protection under the law, according to critics. By providing hospital peer reviewers with immunity, the law singles out physicians for protection from common-law remedies. No other profession is granted such protection, they said.

"The Health Care Quality Improvement Act is one of the worst things that ever happened to the medical profession," says Robert Meals, a Seattle attorney who specializes in representing doctors during peer review. "It has basically immunized the hospitals from any sort of antitrust liability, and most liability period.

"What it was supposed to do is give doctors who sit on peer review panels some freedom to not be sued if they are doing their job in good faith. But it has not worked out that way. It has basically become an act which has emboldened the hospitals to stack the deck against the doctor and then basically say 'you can't do anything about it.' "

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Because there are no national standards that govern peer review, each hospital is a separate fiefdom with its own unique set of bylaws, Meals says. And because federal law calls for the "exhaustion of administrative remedies" within the hospital before a physician can sue in court, most judges believe they are being asked to step into an arena where they do not belong, he says.

"By the time the case ever gets to court, it has already been largely litigated through the administrative setting," Meals says. "Judges are not doctors. All they have to hear is a couple of doctors who seem to have good credentials say this guy was bad. In my experience, even if there is a very meritorious problem with the way the case was handled in the hospital setting, the courts usually won't do anything about it."

Since the Health Care Quality Improvement Act was passed, less than a half dozen physicians who have sued claiming their peer review was fraudulent have won, Meals says.

"Since the courts are not really there for the doctors, the whole game is at the hospital, which is a setting where the playing field is not only not level, it is virtually vertical," Meals says. "It's awful. There are not only no legal principles of protection, I would say common criminals have far greater legal rights when they have been accused of something than a doctor does in the peer-review setting. It is a tremendous problem."

Process has merit

American Medical Association Trustee Dr. Donald Palmisano makes no apologies for his organization's support of both peer review and immunity. He does not deny that the system can be abused, and he is quick to mention that the AMA does not support hospitals that let economic competitors make decisions during review. But what doctors need to understand is that the peer-review process was granted legal impunity for their protection as well as the protection of those on the hearing panel.

"The process should be protected," Palmisano says. "There may be things said that the people on the panel conclude have no merit. Why should that be available to the press and end up in the newspaper to hurt a physician's reputation? That is why we have always said that this needs to be protected. We ought to have this protected because it will improve patient safety because we can investigate without any shame and blame, and get to the root cause of problems."

As for economic competitors being involved during peer review, Palmisano says they should be allowed to present evidence at the hearing. But they should not be involved in the decision making.

"Medicine recognizes and accepts that peer review is necessary," he says. "But it has to be done ethically and it has to be done with principles of due process. A physician should not be deprived of his privileges solely on the basis of medical testimony by economic competitors. In any proceeding that results in the termination of privileges, there should be testimony from one or more physicians who are not economic competitors or who do not stand to gain economically by an adverse action."

The Joint Commission on Accreditation of Health Organizations was established about the same time as the Health Care Quality Improvement Act. Although technically not a regulatory or government agency, the Joint Commission, which contains peer review standards, assesses nearly every hospital in the United States, accrediting more than 95 percent of the nation's beds. Hospitals are not required to seek Joint Commission accreditation, but institutions that fail come under great public scrutiny.

Since its founding, the Joint Commission has only identified the existence of a peer-review process before accrediting a hospital. At no time did surveyors assess the review's effectiveness. But after receiving much criticism in recent years, the Joint Commission in 2001 changed its standards. As of January, surveyors now conduct a "meaningful evaluation" of both a hospital's peer review and credentialing procedures by determining whether the process is not only designed well, but that it functions effectively.

"The concern was that the process might not be set up to the best or most objective advantage by at least some institutions," says Dr. Robert Lee, a Chicago pathologist who is project development director at the Joint Commission. "In some places, the process was found to be either wanting or deficient, or really not accomplishing the mission. There was a concern that just a call for an organizational structure meant that one place might do a very good job and another may not."

But even under its new standards, the Joint Commission does not tell a hospital how it must conduct peer review. Nor does it prohibit controversial mechanisms like allowing economic competitors to sit in powerful seats of judgment. Instead, it simply puts hospitals on notice that its peer-review process will be analyzed to a greater degree than it was before.

"The attempt was not to define the details of what has to be done at each hospital, but to better identify what should be done while developing a pro-

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Help for Peer Review Victims

When Dr. Joe Pastorek lost his tenured professorship at the Louisiana State University School of Medicine after what he considered to be a sham peer review, he contacted the Semmelweis Society. The society, which was established in 1986, allowed him to network with other doctors who also believed they had been wronged.

Pastorek's case caught the eye of New Orleans cardiologist Dr. Bahram Zamanian, who in the summer of 2000 was awarded a $6 million court settlement after a jury ruled he was the victim of fraudulent peer review. Zamanian, who recently had a judge throw out his court victory and call for a new trial, is helping Pastorek get back on his medical feet.

Fired in 1997, Pastorek, an ob/gyn, was reported to the National Practitioner Data Bank. His termination from LSU, where he had been a professor since 1981, also resulted in the loss of his malpractice insurance. The combination of this black mark in the data bank and his lack of insurance prompted the hospitals where he practiced to drop him from their staffs, Pastorek says.

Pastorek claims he was fired from LSU after he refused to testify against a colleague who was targeted for wrongful peer review. When he did not play ball, university officials went after him, Pastorek says.

According to Pastorek, who is suing LSU, he was professionally assassinated by both the medical school's ob/gyn department chair Thomas Elkins and LSU chancellor Mervin Trial. Elkins is now dead. Calls to Trail's office were not returned.

"I have been doing clinic work in a weight reduction clinic," says Pastorek, who gets paid by the hour. "I'm fighting people (in court) and trying to crawl out of the hole at the same time."

Several months ago, Zamanian, who recently reviewed Pastorek's case, put in a good word for him with the administration of Kenner Regional Medical Center, a 300-bed hospital just outside of New Orleans. Pastorek's request for privileges is being reviewed by Kenner's medical executive committee and should be ruled on soon. If he is granted privileges, Pastorek says the Semmelweis Society will deserve much of the credit.

"It's a way of networking," Pastorek says of the society. "If you get in a position like I am, you can find people who can help out."

The Semmelweis Society was founded by a California general surgeon who won a $260,000 court case against several of his competitors after they defamed him through a fraudulent peer-review process. Dr. Verner Waite used a portion of his financial award to start the society, which over the years has had about 4,000 members. (On the Web at **www.semmelweissociety.net**.)

"After winning our case, I started to hear from many doctors," Waite says. "We had people who were on the board of governors of their hospital and members of the American College of Surgeons tell us fraudulent peer review is a major problem and we ought to do something about it."

For the cost of room and board, Waite, who is now retired, travels the country speaking about peer review and testifying in court hearings as an expert witness.

Although statistics do not exist, Waite says he thinks more than 75 percent of all peer review is done for economic or political reasons.

"The most common reason somebody gets peer reviewed is because he is a successful economic competitor," Waite says. The process was created "to get rid of bad doctors. But it is almost never used for that. A bad doctor does not get peer reviewed if he, or his friends, are part of the establishment."

The society was named after Dr. Ignaz Semmelweis, a Hungarian obstetrician who in the 1840's discovered that the simple antiseptic treatment of a doctor washing his hands before delivering a baby would drastically reduce the rate of puerperal fever in women.

Semmelweis' superiors, however, disliked his personality and fought him at every turn. The Viennese medical society rejected and outcast him, not wanting to believe his results. Driven from his job, Semmelweis suffered a breakdown and died in a mental hospital. ■

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gram so those details get addressed," Lee says. "So there was a call for doing something without prescribing specifics."

Semmelweis Society founded to help

Peer-review critics believe this is a step in the right direction. But without specifics that prevent the "good old boys" from controlling the hospital's power structure it will do no good, Waite says. To aid physicians who have been wronged, Waite in 1986 took part of his $260,000 court award and started the Semmelweis Society as a way for doctors who believe they have been shamed to network. Over the years, the society has had about 4,000 members, Waite says.

Until something is done to ensure that neither economic competitors, HMO executives, or leading members of a hospital's political structure can attack a physician without the cover of immunity, nothing will change, Waite says. Even if organizations like the Joint Commission can remove economic competitors from sitting on review panels, the long arm of the establishment can ensure that their cronies do their bidding for them, he says.

"As long as you have absolute immunity you can deliberately lie about your colleague during a medical peer review and you are safe," Waite says. "So any new bright young man who comes to town, if you are the establishment, you can get your colleagues to gang up on the guy.

"The establishment is the judge and jury. They hire the lawyers for the hospital, and they appoint the committees. If you get caught in their web, you will have mile-wide support from your fel-

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low doctors, but I can tell you it is only about an eighth of an inch deep. If they speak out, they are the next victim. It is very dangerous to speak out against the guys in power. And the good old boys who run the various committees of the hospital and who are appointed chief of staff, they know this. And the hospital lawyers are aware of this. They have practically no fear because they are immune," Waite says.

New Orleans cardiologist Bahram Zamanian agrees. In July 2000, Zamanian won a $6 million jury verdict after claiming a hospital wrongly suspended him and that two colleagues defamed him during peer review. But two months after his victory, a judge reversed the jury's decision, saying the peer-review process is subject to immunity under both state and federal laws.

Zamanian, 59, claims Mercy Hospital officials attacked him for two reasons: he kept patients in the hospital too long and questioned some of the hospital's billing practices. His reward for "rocking the boat" was peer review, which lead to both the suspension of his privileges and an entry in the National Practitioner Data Bank. He is appealing the ruling that overturned his $6 million award.

"Generally, every place is the same: If you don't dance to their tune they are going to come and kick your butt," Zamanian says. "I am very skeptical about what hospitals have to say about physicians because if you have good connections within the hospital, you can do whatever you want and nobody is going to tell anybody anything. But if you don't do what they ask, especially if you talk and stand up for what you believe, they come after you."

This political structure can be deadly to those who don't play ball, attorney Meals says.

"All medical staffs are divided into ins and outs politically," Meals says. "For the ins, a lot gets swept under the rug and there is a lot of looking in the other direction. If they do become the subject of a peer-review hearing, the standard of care is relaxed. The standard of care for an out is perfection. If you are not perfect, which nobody is, you lose.

"It is a vicious system, and because the doctors are totally focused on clinical medicine for the most part, except for the political ones, they don't even begin to get an insight into how screwed the system is until they become involved in it," Meals says.

AMA trustee Palmisano says the best way to safeguard against this is for well-intentioned physicians to become involved in their local hospital's power structure. HMOs will dictate policy, and good old boys will assume power only if the medical staff lets them, he says.

"People need to get involved," Palmisano says. "Frequently, we find people don't get involved in anything. Then there is a problem and they want to lament against the system when they have never been involved. They don't bring their case forward unless they have a cause. But they did not come forward when somebody else had a problem because they always say they are too busy. They don't want to serve on a committee because they are too busy.

"We have to safeguard our own liberties," Palmisano says. "If we leave it to the government and the hospitals, they may not be protected the way we want. So we have to become activists, each one of us... It takes a lot of time. And when you are at these meetings and debating these issues, no money is going to pay your staff. But you have to do it. It is part of what you give back to the profession to protect the profession. People just can't complain. They have to do something." ■

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