95-0316, *Memorial Hospital-The Woodlands v. Hon. F. Scott McCown*
95-0340, *Brownwood Regional Medical Center, et al. v. Hon. F. Scott McCown*
95-0474, *Irving Healthcare System v. Hon. David Brooks*
95-0596, *Kincaid, et al. v. Hon. David Brooks*

October 11, 1995

MCQUARRIE: May it please the Court. Good morning. The importance of this matter to all the citizens to the State of Texas cannot be overstated. This Court's decision will significantly impact the quality of healthcare that all the citizens of the State of Texas will receive in the future. This case is about whether his medical peer review and in particular, his credentialing, when a physician applies for staff privileges at a hospital medical peer review, within the meaning of §5.06(g) and (j) or article 4495(b) commonly known as the Medical Practice Act, as well as whether such actions, are within the general permitting privilege contained in the health and safety code provision 161.032. What is medical peer review? It consists of the continuous evaluation by physicians of physicians ability safely to deliver quality patient care. Participants in the process include physicians who are members of medical peer review committees, physician witnesses, former colleagues of the applicant and usually take place behind closed doors. None of the participants is paid for his or her time or expertise. Under current law, medical peer review is voluntary, that is, participation in medical peer review is voluntary. Most participants believe under existing law that the proceedings and records of medical peer review are confidential. In this setting, hospitals are usually able to find physicians willing to donate their time and expertise for the medical peer review process. Without complete confidentiality, however, the entire medical peer review process is in jeopardy, and with it, the medical profession's ability to police their own and to assure quality patient care is jeopardized. Without complete confidentiality, today's willing participants in medical peer review tomorrow may be unwilling to participate.

GONZALEZ: A doctor who is libeled has no avenue to determine who has course in _____? What are the avenues for a doctor like in this case, is libeled to have some sort of process to determine who has been saying some bad things about him?

MCQUARRIE: Mr. Justice, that would be easily done through normal discovery processes if a doctor is libeled, he can conduct whatever discovery he needs to through depositions, requests for production, interrogatories to whoever he believes he has been libeled by. In this case, Dr. Leipzig of course is not taking a position, and CBS is taking a position, but for a doctor who is libeled, he can do whatever discovery he needs with respect to the basis upon which the libel statements were made.

ENOCH: Mr. McQuarrie, at least one of the parties commented that Brownwood

has been sued along with Dr. Leipzig for malpractice. Is there any claim of negligent hiring in any of those suits? I think they mention four of them. Is negligent hiring an issue in any of those?

MCQUARRIE: I do not recall whether it is. I do know that with respect to relator in Memorial Hospital - The Woodlands, there is no such thing. In fact there is no such medical malpractice lawsuit at all.

ENOCH: If negligent hiring is an issue, would your position be that the hospital need not produce any credentialing information even though the issue of whether or not they were negligent in hiring, would your position be we don't have to decide either?

MCQUARRIE: That's a crucial question and my position would be, that's correct, the hospital need not produce any credentialing documents including the initial staff member's application and supporting documentation. If a party believes, reasonably, that there has been negligent credentialing and has some reasonable basis for that belief, that party is free to pursue all the traditional avenues of discovery.

HECHT: How? Who could he find out from?

MCQUARRIE: He can first depose the doctor in question. In this case, Dr. Leipzig, and ask Dr. Leipzig "Where have you practiced before? Who have your surgical, in this case, been? What colleagues have been in the operating room with you?

HECHT: And then just try to go find out from each one of them?

MCQUARRIE: And then take the depositions of those colleagues.

HECHT: How is that practical for somebody who had been in practice for any length of time? If you didn't even know who to depose?

MCQUARRIE: One would start with Dr. Leipzig. Dr. Leipzig obviously knows who his surgery service chiefs have been where he's practiced earlier.

HECHT: And you just track those folks down? Doesn't that strike you as a pretty difficult way to get about getting the information?

MCQUARRIE: Not really. That's what plaintiffs must do in every other case. They must go to witnesses who have primary knowledge about the event.

HECHT: No, normally they would go to the hospital and say "who told you

anything about me in this process." Get a list of names and names you know where to start as opposed to just everybody you've worked with for a number of years.

MCQUARRIE: They can get that list in a simple interrogatory to the defendant, Dr. Leipzig. They could send an interrogatory to Dr. Leipzig and say give us the names, addresses and phone numbers of the surgery service chiefs under whom you have practiced during your surgery career.

SPECTOR: Is it your position that the hospital would not even furnish the names of anyone who have contacted the hospital?

MCQUARRIE: If such contacts were pursuant to requests by the hospital as part of the credentialing process, yes, ma'am.

CORNYN: Why would the legislature, in a follow-up to the question Judge Gonzalez asked you about how a doctor whose name had been tainted on a peer review committee, why would the legislature create a cause of action to recognize a cause of action for malicious communications make, if they are absolutely protected.

MCQUARRIE: The answer is they are not absolutely protected. If a member of a credentialing committee on the golf course, for example, has a conversation with several of his surgery buddies and maligns another doctor, that clearly is outside the scope of confidential medical peer review committee work.

CORNYN: But you still can't get to the records themselves absent a written waiver, I take it from your argument.

MCQUARRIE: That's correct.

CORNYN: And how, you know, in these days with HMOs and managed care and doctors more dependent than ever upon these entities to hire them and to grant them access to a pool of patients, isn't there more and more danger from the physician's perspective that there will be things communicated in peer review committees that will indeed damage them and prevent them from employment without any recourse available to them?

MCQUARRIE: I think not. There is clearly going to be more and more peer review with the advent of managed care and all these managed care entities surfacing and the legislature foresaw that and stated in the statute clearly a need recognizing that need to protect that peer review from discovery if that peer review is conducted in accordance with the dictates of the statute §5.06 of article 4495(b) those types of things will rarely, if ever, happen. I would add also that the legislature has the prerogative, I would argue, to do so. If the legislature deems fit in the public interest of the citizens of this

state who are consumers of healthcare to ensure that the medical profession can do everything that it can to enhance the quality of care even if it must meet by doing a peer review thoroughly and with open and thorough and free discussion and full disclosure by a physician's former colleagues. Even if to do so must restrict the ability of a few parties, restrict, not eliminate, just restrict, to pursue claims they may have, that I submit to you, is within the legislature's prerogative. I think that must be borne in mind when evaluating these give and take tensions that are built in to this process.

ENOCH: Mr. McQuarrie, in responding to Justice Hecht, you talked about, you go after all these other people that were in Dr. Leipzig's history. The privilege is broader than just documents and records. The privilege extends to all communications to that committee does it not?

MCQUARRIE: The 4495(b) privilege does, yes.

ENOCH: So why wouldn't the conveying party, the doctor, who sent the communication, why do you assume that what he sent them, he would be subject to having to turn over.

MCQUARRIE: I do not make that assumption.

ENOCH: And your assumption was that all that the doctor would be prevented from doing is just simply find out from his hospital the names, but he could give you where he used to work, you could go and find out everything from there.

MCQUARRIE: I understand your question and I apologize. The brief party would not be able to get the letter written by that doctor reference. He would, however, be allowed to go because that record is a document of the committee. It was prepared at the _____ committee. But he would be allowed to go to that doctor and ask that doctor did you ever observe Dr. Leipzig perform surgery in the operating room? Answer: yes. Did you ever observe any improper surgical technique? Yes or no? Did he have an inordinately high infection rate post surgically?

CORNYN: They could never ask him if he ever made a complaint to the committee though?

MCQUARRIE: That's correct.

CORNYN: They couldn't get a copy of the document whereby the complaint committee, the physician or head of surgery denied it, and had in fact made the communication? There would be no way to impeach that sworn testimony?

MCQUARRIE: That's correct, I think in isolation, but one must consider I think

if there is a doctor who has bad a record as is contemplated in this case, there are going to be more than one person who has made observations that would substantiate that record and from the documents submitted in camera with this cause, _____ hospital cause I think that's very inevitable.

CORNYN: To sum up, your position is that there is no balancing that takes place, there is just an iron curtain that bars access to that information.

MCQUARRIE: That's correct. And that the legislature has the prerogative to do that and did so specifically in §5.06 of article 4495.

HECHT: Does that mean that there is no way to gauge whether the credentialing process was conducted fairly and the way it should be? Because there is no way to probe what happened?

MCQUARRIE: Actually, that's not, I don't believe that would be my position, your honor. All hospitals have what is generally called a "fair hearing plan" where administrative due process is granted to the physician who is denied privileges or whose privileges have been revoked or whatever the disciplinary action may be. And in that fair hearing plan which was usually set out in great detail, there are various avenues for that position to be confronted by the evidence against him and to respond, with counsel.

OWEN: Is that a statutory requirement?

MCQUARRIE: To my knowledge it is not.

CHIEF: Any other questions? Thank you counsel.

SCHELL: May it please the Court. First, to follow up on the last issue, I believe that is statutorily mandated that the physician who is the subject of peer review be provided with fair disclosure. That is provided by subsection (i) of 4495 §506 and does provide a mechanism for a physician who is denied staff privileges to obtain certain legislatively oriented...

OWEN: _____ a copy of the final decision and a statement of the basis but they are not entitled to the underlying documentation when in reaching the decision.

SCHELL: A written copy of the recommendation of the medical peer review committee along with a copy of the final decision and a statement of the basis of the decision but not the actual underlying medical peer review committee documents.

OWEN: _____ material in the _____.

SCHELL: It may or may not. It is not going to get disclosure or discovery of the actual underlying documents but it certainly is going to give the physician adequate information to act on the denial of his privileges, that is the decision, the basis and the recommendation of the committee.

CORNYN: Not the identity of the complainant necessarily?

SCHELL: Not necessarily. Once you start opening that door, cracking that door, it's wide open and there is no privilege as I'll be glad to address, may it please the Court. Judge Brooks, in the trial court, reluctantly ordered that Irving Healthcare System produce peer review committee documents to the very physician who was the subject of the peer review. Such was a misapplication of the statutory privilege of confidentiality as a matter of law. Such obviously totally emasculates the confidentiality of medical peer review.

SPECTOR: Are you making a distinction between two different committees? Is there a credentialing committee and then a peer review for in-house?

SCHELL: At Irving Healthcare System, and the affidavits on file would address this question, there is one committee. It has a dual function of both granting staff privileges to applicants, to physician medical surgical privileges, and also acting as a continuing peer review committee to assure that quality, cost-effective, non-injurious medical services are being provided to patients at the hospital on a continuing basis from beginning to end. Let me make it clear that it is our position that a patient who is injured or killed by an incompetent physician is just as dead if it's the first patient that that physician works on in the facility or if it's the last. Judge Brooks' decision has worse than a chilling effect on the privilege in question. Peer review is effectively lost if the decision of the trial court is allowed to stand under the facts of this case. I will address article 4495(b) and counsel for Dr. Dickie, who was the chairman of the medical peer review committee at Irving Healthcare System, and is a co-defendant in the underlying case will address the Texas Health and Safety Code as well as the *Ramirez* and *Barnes* decisions which are cited in the briefing which we think are inapplicable to this case.

ENOCH: Mr. Schell, is there not another privilege? In the decision to hire someone is there not another privilege that exists for someone who has been a co-employee or former employer to express opinions about a former employee's competence to the new employer? Is there not a general privilege that doesn't apply just to medicine but isn't there a privilege that exists in the hiring context for one former employer or colleague to make a recommendation or criticism of a former employee to a prospective employer?

SCHELL: Justice Enoch, I would believe that a qualified privilege would exist in all

employment situations to provide truthful information about applicants for a job be it a healthcare job or some other industry but what this case is and why we have 4495(b) is hospitals, is healthcare facilities, is physicians who literally are in charge and trusted with the health and safety of the people of Texas on a 24-hour a day for 365 day a year basis and that is why we have this statute. This statute is unique. It only applies to healthcare facilities. It doesn't apply in any other employment situations.

ENOCH: Is there the same critical need for this privilege in the hiring context that there was or is for the privilege in the routine review of a colleagues's own activities?

SCHELL: Be that colleague a physician or surgeon applying for staff privileges at a hospital, yes, we believe the information that the committee must act upon is just as important at that phase as it is on a continuing basis in reviewing the competence of the physician or surgeon.

OWEN: I want to ask you about subsections 11(l) and (m) that deal with _____. There are certain protections that we can do for people on the committee and who report to the committee. Under your theory of how the statute works, how would you ever demonstrate malice under either of these sections if you don't have access to the records?

SCHELL: Well, there are three exceptions statutory, and only three exceptions to the absolute privilege of confidentiality. Those are provided in subsection (g) any competitive action and 1983 civil rights actions and none of which are involved in this case malice the party pleading malice can prove it in every way known to the law from any factual, any evidentiary source known to the law except one, and that is the peer review committee documents and oral communications. This is a very, very narrow privilege but where it does apply it's _____ and must be applied broadly or the people of the State of Texas are literally at the mercy of incompetent physicians because you don't have peer review if it's not applied exactly as it's written by the legislature.

CORNYN: If a radiologist applies for staff privileges and the radiologists who are already working at a hospital and have staff privileges want to see that applying radiologist's privileges denied because it's going to dilute their income, is that the kind of _____ competitive conduct perhaps malicious act that would be actionable and where the records would be discoverable and that conduct actionable under this...

SCHELL: The records should be discoverable under that scenario as any competitive action. I'm not so sure about the malice because malice does not destroy the discovery of these documents but as anti competitive action radiologists seeking certain acts sort of situation clearly would allow discovery.

HECHT: But if you just divorced my sister and I don't want to work with you anymore that wouldn't, there would be no way to get there?

SCHELL: Not if those comments were made to a medical peer review committee. But of course, such comments would never be acted upon in the real world by a medical peer review committee.

HECHT: Well, that's what these lawsuits are about.

SCHELL: Exactly, and in that situation, the physician would be free to go to every source of facts, every source of information, every source of evidence on planet earth, literally, except one.

CHIEF: Any other questions? Thank you counsel.

COURINGTON: May it please the Court. I am Lea Courington. I am an attorney for Dr. Dickey, the Chairman of the Irving Credentialing Committee who wrote the key letters that are at issue in this case. Your Honor, we would respectfully urge the Court to issue the writ of mandamus that we have requested because the judge decided based on the *McAllen v. Ramirez* case which we submit inappropriately and grafted onto the 4495(b) privilege, a requirement that the documents be treated as confidential and not be subject to discovery or admission into evidence only if it concerned events that actually happened at the hospital at which the committee was sitting we would submit to you that the first line of defense for quality patient care to assure that patients are not killed or injured by incompetent doctors or unethical doctors is that that first level credentialing committee. When that committee is first presented with the first application by that doctor, that is the critical time to decide is this doctor coming on to this staff or not, the only way...

SPECTOR: I'm troubled by the idea that a document that is submitted in secret with confidentiality attached is more reliable than one that the author would realize would be read by a good many people, perhaps the subject that the...

COURINGTON: Your Honor, that libel plaintiffs first line of defense also is in that same committee that is deciding whether he is going to get privileges or not because if that committee is troubled by that application, his concern that this is not an appropriate doctor to be on the staff, the committee, is statutorily required to give the physician a list of the potential charges against him, a list of the recommendations and then he should do what the libeled plaintiff in our case did not do and that is go in, have a hearing...

SPECTOR: No, no, that's not my question. My question is why is a confidential document where the author knows it's going to be confidential more reliable than one

whether its been full disclosure.

COURINGTON: I think with respect the issue may not be precisely the issue of reliability. I think the issue may be that of candor where the doctor...

SPECTOR: That's my point. Why would someone be more truthful when they know no one's ever going to know what they said than when they know that they can't just gratuitously repeat because it's going to be confidential.

COURINGTON: That's a legitimate concern. They should not repeat gratuitous gossip and the committee is well within its rights to bring that person, such as my client, Dr. Dickey, into the hearing if the applying doctor requests it and test his veracity, test his reliability when he says unnecessary surgeries were done, find out the details of that, find out what he bases it on. But the doctor before he sits down to write the letter and before he says unnecessary surgeries were done, medications that were prescribed were not appropriate for all these patients and when he was asked to stop he knows this privilege protects him from being sued, even if he's correct he may still have to go through a lawsuit to prove that he's correct. That's exactly the situation my client is in here today. On the other hand, he knows that he's free to express all that fully, he will be protected by the committee and the potential, the applying doctor's protection is that the person who writes the letter can then come in and sit before a full committee such as yourselves, except its physicians, and he can be quizzed forever about how do you know what you say is true? Have you stood in the operating room with him? Were you there when the medications were prescribed? That is an excellent line of defense. It insures the reliability that you're concerned about but he must know the privilege is there for him to be candid.

CORNYN: How is that hearing to be initiated? It's not by the doctor who has the complaint because he can't identify who it is, who's complained against him. It would only be at the instance of the committee?

COURINGTON: No, if the doctor applies for privileges and the committee denies those or as sometimes says frankly, this application is in trouble and here's what we're concerned about, in every case in which I have been involved, and certainly was the situation here, he was told about the things that troubled the committee.

CORNYN: Not who said it...

COURINGTON: Right. For example, an allegation has been made that you received a reprimand from the State Board.

CORNYN: That's privileged under the statute isn't it?

COURINGTON: I think the general nature of it is told to him as a due process...

CORNYN: I thought your position was any complaints made to the committee were privileged whether in writing or verbally and so there is no obligation for the committee to disclose to the applying physician what the nature of the complaints may be. Is that right or wrong?

COURINGTON: It is both right and not quite right your honor. In general, they are given as a due process matter. A general statement of the general nature of the concerns or in the event the committee denies the privilege.

CORNYN: But it's not a legal requirement or are you saying it is a legal requirement?

COURINGTON: I believe under 4590(i) the affected physician, that is the person whose privileges have been denied is given a copy of the recommendation and a copy of the final decision and that usually...

CORNYN: We covered that a little bit earlier though, they are not required to identify the complainant but merely the copy of the final decision and the basis for the decision.

COURINGTON: The basis for the decision is it your honor. I think generally every case I've been involved in the credentialing committee or the executive committee that's gotten to that level has specified for example, you had too many malpractice suits, you were reprimanded by the State Board, you resigned from the county medical society when other charges were pending against you, it's been alleged...

CORNYN: There's no opportunity for the physician then to challenge the veracity of those findings?

COURINGTON: No, I think it is. I think he then began the fair hearings appeal process and comes in and says, for example, yes, I had a certain number of malpractice cases but they were X many years ago.

CORNYN: Is there an opportunity to confront one's accuser?

COURINGTON: Yes, depending on how it's done. Although sometimes to protect again the privilege, and different hospitals, frankly your honor, do it differently.

CORNYN: Is that part of the statute?

COURINGTON: I think many people, many practioners in the area believe that a reading of the Federal Healthcare Quality Improvement Act and this statute read

together mandate due process concerns that the person be entitled to come in and cross examine witnesses who may appear against him but again, all that is privileged.

CORNYN: So they can't cross examine the accuser because it's privileged but yet you want to provide him some kind of response vehicle because of your due process concerns?

COURINGTON: For example, sometimes the credentialing committee chairman, for example, another hospital will take the stand at the executive committee hearing and say it was reported to the committee by a person who may not be identified that unnecessary medications were given and then...

CORNYN: Testimony we wouldn't allow in court?

COURINGTON: That's probably correct, your honor. And then the applicant has an opportunity to say that's not true and here are the reasons. That was not done in this case.

ENOCH: Ms. Courington, I have one question. You represent one of the doctors here?

COURINGTON: Yes, your honor.

ENOCH: Is the only privilege you claimed on your doctor's behalf the privilege that you assert is under this medical practice act 4495(b)?

COURINGTON: Your honor, the privilege against disclosure that we have claimed is both under 4495(b) as well as under 161.031 and 032 as well as under the Federal Healthcare Quality Improvement Act.

ENOCH: Does Dr. Dickey not have some sort of qualified privilege? He was asked by a potential employer to make an opinion about the conduct of a colleague? Has he asserted any sort of qualified privilege to the cause of action?

COURINGTON: Your honor, we have asserted that as a qualified immunity against liability in this case. We have not asserted it as a privilege against producing the material because these statutes are so specific.

ENOCH: But in the context of credentialing it is your belief that your doctors are protected by that qualified immunity?

COURINGTON: Yes your honor, that's correct, because what my doctor provided was an evaluation of events that had occurred with the plaintiff in this case while he

was on staff at this hospital and in succeeding years he provided an evaluation of deliberative review and then sent it to a medical peer review committee at another hospital. We think these privileges cover that.

HECHT: But it's an immunity from liability, not a privilege from disclosure.

COURINGTON: There are both. Under 4495(b) there is an immunity from liability. There is also a privilege from disclosure and the statute also provides that they may not be admitted into evidence.

CHIEF: Any other questions? Thank you counsel.

COURINGTON: Thank you.

CHIEF: The Court is ready to hear arguments from respondent.

CULP: May it please the Court. I represent Dr. Kasnetz in these proceedings. There are two main points that I want to make. First, you can't reasonably interpret a statute recognizing a claim for malicious conduct but then conclude that the same statute prevents discovery of information related to the malicious conduct. In other words, it would be wrong to conclude that the statute allows a claim but simultaneously denies evidence to prove the claim.

BAKER: Would you argue then that your petition says this happened as a result of a malicious act, that the privilege disappeared with merely nothing more than an allegation in the petition, that you filed your request for production of documents the same day you filed your petition?

CULP: No, your honor, I would not. And in fact...

BAKER: How can you say it applies later on?

CULP: I'm sorry?

BAKER: How can you say that it will apply later on?

CULP: The privilege in this case - there may be a process or a procedure in this circumstance where we would want the trial courts to make some sort of prima facia initial determination of malice. And indeed, we have anticipated that...

BAKER: What if they've asked for a jury trial? You're asking for a very critical fact finding by the judge when the other side has asked for a jury or you've asked for a jury? Don't you think not? Malice is the key to where you're protected by the act

from liability or suit isn't it?

CULP: Yes, your honor.

BAKER: Well with malice you don't have a suit.

CULP: Yes, your honor. I agree with all that.

BAKER: Well, then how can you say malice immediately waives the entire privilege portion of the act?

CULP: I think that in our discovery procedures in Texas there are, from time to time, opportunities where the Court has to make an initial determination. Has there been a prima facia showing malice? And, only after you get over that initial hurdle do you go beyond and get what you actually want.

OWEN: But if your position is that you can't establish malice without getting the documentation from the peer review committee, where does that...

CULP: Well, the problem with the arguments made so far is that some of these other opportunities are available to you. There are other sources by which you can gather some information which is instructive on the issue that would be before the Court. And you could go to those other sources and use those to show a prima facia case of malice, not prove it...

OWEN: _____

CULP: Well, in this particular case there were acts of _____ as the Court well knows, we have the actual letter in this case that the offending doctor delivered to the review committee and we took the deposition of the doctor and he has admitted that some of the statements in there were false. We happened to get that because I think there was some other hearing process that occurred or some disclosure while this process was underway and we got access to the letter. There are some opportunities where by chance or by going to third parties or other circumstances where you could show that prima facia case of malice. We've done that in this case. That's what was concluded that there was a prima facia case of malice made before he concluded that we were entitled to these records.

BAKER: _____ that the two sections that talk about malice also apply in the totality to the privilege that is provided by the same act.

CULP: I think it must your honor. Again, the problem that has been presented so far is that the statute recognizes a cause of action occurred within these peer review

processes, not outside these processes - in the process. If you show malice and there is malice ,if you show the peer review process and you show malice, wrongful conduct within that process, then you're entitled to get information. You have a claim. The point they want to make is that well, what if he says it on the golf course. Well fine, you have a claim for that that is not covered by the statute. The point here is that the statute creates a claim for activity conducted within the peer review process and the only way you could pursue that claim is if you know what happened in the process and that is really the point now. I want to be the first to admit that counsel has focused on certain aspects of the statute that says you are only entitled to get certain things. You can only get it in certain circumstances. That's true. There is some ambiguity in this statute. There is no doubt about it. There are some ambiguities. But just as clearly this statute says there is a claim for wrongful conduct if you show malice then you have a claim and if there is a statutorily recognized claim for malice that occurs within the process then necessarily we cannot interpret the statute to say you can't get any information related to that process. And just because the statute doesn't specifically say you get discovery if you show malice I don't think that this Court should conclude that therefore you cannot get it. Placing that sort of statutory construction on the statute I think, would be very inconsistent and very inappropriate.

BAKER: Do you have any legislative history that supports that view?

CULP: We have not presented any, your honor.

BAKER: I noticed that your malice section was _____ with very little authority.

CULP: It's a common sense argument, I think.

OWEN: What about legislative history on an amendment of 4495(b) that says documents _____. Do you have any legislative history on that?

CULP: Again, we didn't present any of that, your honor. The only information I have in that regard is that there was some information that the changes to 163 I think it was, really had nothing to do with whether the statute was being changed to impact initial credentialing which is at the heart of what my opponents are arguing here and what is at issue in my case - initial credentialing and I think the *Barnes* decision and a lot of the court of appeals cases interpreting *Barnes* have concluded that it doesn't cover initial credentialing. I don't think there is any legislative history that would suggest the change was designed to cover initial credentialing.

HECHT: Do you agree that the possibility on disclosure of this information would likely make people less candid in their comments?

CULP: No, I don't.

HECHT: Do you think they will just tell you exactly what they think even if they know that they may face a lawsuit?

CULP: I think you can take either position but I think it's just like when you have a witness in the courtroom. When we talk outside the courtroom and we're not put under scrutiny and we don't know that it's important - I sometimes say some things that probably aren't right - I'm being a little loose with my language -it's not very important. We put a witness up on the witness stand and he's sworn to tell the truth and we know that there are significant consequences, every one of us would be much more careful about what we say.

HECHT: Well, but if I say tell me what you think about Bob Jones, you don't have to. You can if you want to. And if you do and you can't prove it all, then you may face a lawsuit and liability. Now, tell me what you think. Wouldn't you say, under those circumstances, I think I'll pass?

CULP: Your honor, I think that I as a lawyer, have ethical obligations to turn in my other lawyers for malpractice. It is an ethical obligation that I have and...

HECHT: How many times have you done it?

CULP: Well, your honor, I've thought about it sometimes since those ethical changes have occurred but I think that what it has done is that it makes us worry about it and if we know we have that responsibility and that obligation and you think very carefully does this rise to the level where I have an obligation to report it? Now, there's both and bad. I'm reluctant to do it because I don't want to turn in a fellow lawyer, on the other hand I know that I have this duty to do so.

GONZALEZ: The bottom line is that you don't want to buy a lawsuit.

CULP: You don't, but we also want these processes your honor, to have integrity and to have fairness and you want accurate information and there's no protection in this statute for that if you give as broad a protection as they have requested.

OWEN: Would you agree that the legislature has made the call, at least to a doctor who is on staff, and there is some sort of peer review that these doctors are confidential and that the policy waived in favor of full disclosure? The legislature needs to come out on that side of the scale and rebalance it to where we think that confidentiality does promote _____. Would you agree with that?

CULP: I would not agree with that and here's why I wouldn't agree. If you look

at the Court's decision in *Barnes*. If you look at the Court's decision, I think it was in *Jones* in 1977, if you look at the court of appeals decisions that have come down in their interpreting this statute, I'm here to tell you it is fraud with uncertain ambiguity and very difficult to know what all these terms mean and the scope to which they are supposed to apply.

HECHT: Can they make that call?

CULP: I think there are very, very serious due process issues raised if they make that call and they apply it to the doctor who is actually affected. If they apply it to the doctor who is denied these privileges and his medical practice is thereby ruined as it was in this case, I think there are very, very serious due process considerations.

HECHT: Why are there any more serious considerations than are involved in the attorney-client privilege?

CULP: The attorney-client privilege has its exceptions and the attorney-client privilege doesn't apply - only applies under very certain specific sets of circumstances. The attorney-client privilege does not affect the rights of third parties in any respect at all because what that client communicates to the lawyer is privileged, but if he has incriminating evidence that he gives to that lawyer - that's not privileged. I can't take a document, as a client, that I have and give it to my lawyer and give a privilege to it. Can't do that. So there are no third parties affected in the attorney-client privilege. I actually think, your honor, that there are some analogies to be made to the legal system here. And I think that if you consider, for example, judicial decision making, the deliberative process there is absolutely protected. You can't get in to that deliberative process and perhaps this statute could be interpreted so that you can't get in to the deliberative process but, when we have information provided to judges and they make their decisions, y'all go back there and talk, we can't ask you what you talked about but we know everything that you have that you made your decision on and that's what they are keeping us from having here. We don't know what they had to make this decision on and that's what they want to keep us from having. When we put witnesses on the stand in the courtroom and the witness has immunity, we can't sue that witness if he doesn't tell the truth. Now he does so under penalty of perjury and he has to have personal knowledge.

HECHT: Would it be possible to meet your concerns by disclosure of information identifying the person who was giving it?

CULP: Your honor, my response to that is when you take a deposition of a witness, frequently the first thing the witness will say to you is some broad, or you see this in the courtroom, they make some overbroad statement that is bad for your client and it is only when you get an opportunity to cross examine when you say, Mr.

witness, you say my client is a bad person, now let me know specifically why you say my client is a bad person and by the time you break it down, you find out he happened to have been a participant in one deal and his conclusion is based on that or it is based on what a hundred other people have told him. That's why it is important to know the details behind the information and not just the generalities that they say they want to provide us although there is no absolute obligation in the statutes for them to do that.

OWEN: _____ the statute are, why should we apply different standard under the statute to credentialing as opposed to peer review with someone who is on staff?

CULP: Your honor, I think that that question is purely one of statutory definitions and I know I got a headache in the last few days trying to figure out what these terms mean, what they're supposed to apply to, reading the case authority on it, trying to understand what the case authority - how that impacts the definitions. I think that an argument can be made as peer review is not initial credentialing. I think an argument would be made that peer review is initial credentialing and whether it should be or not I think ultimately is up to this Court and I think it turns on the language of the statute but I also think it turns on what Justice Phillips said in his concurring opinion in *Barnes*. What Justice Phillips said was that he wanted to try and draw guidelines that promote the purpose of the statute and certainly one of the purposes of the statute here is to have a cause of action for malicious conduct.

OWEN: This statute was written after that dissent.

CULP: Well, one of the statutes was...

OWEN: 4495..

CULP: I thought it was the other one but I could be mistaken. I thought 163 was changed after the *Barnes* decision.

OWEN: In any event, what specific statutory _____ that you say we submit to in deciding what the parameters of medical peer review committee are? _____.

CULP: Well, my opponent gave you all a summary here and I think he's probably pointed out the key language that is at issue. What is not clear to me when I look at that language is there is an emphasis on an evaluation of services. It seems to me like that implies that we're talking about things that have happened in that hospital. Not things that have happened in some other hospital and I think that's a reasonable argument and one can scratch their head about what does this exactly mean and I'm not sure I've got any guidance I can give to the Court on which way they should come

down on but I do think that's probably where you need to be focused, at least from my judgment.

CORNYN: If by transmitting information contained in peer review committee documents to another hospital is considered credentialing, which appears to be permitted under subdivision (h), it says it may be disclosed to another peer review committee, appropriate state or federal authorities and that sort of thing, doesn't that gut the privilege? If you say it doesn't apply to credentialing doesn't that thereby disclose the basis upon which earlier hospitals granted credentials?

CULP: Your honor, I'm not sure I can answer that. I know when I tried to study it I got very confused as I tried to track the language of the various definitions of the provisions in the section - with the cases - and I could never get clarity in my own mind who I really thought had the best argument. I don't think it makes a difference as it relates to the affected doctor.

CORNYN: Whether it affects credentialing or not?

CULP: Correct. I think the fact that there is a cause of action for malice in the statute necessarily requires this Court to conclude that you can get discovery. It has to conclude that.

CHIEF: Any other questions? Thank you.

CULP: Thank you.

GEORGE: May it please the Court. I am Jim George and I'm here for CBS Television and we're a defendant in the lawsuit brought by a doctor who had his privileges revoked in Little Rock, Arkansas and was brought before the Arkansas Licensing Commission. Before that litigation was concluded, he moved to Texas and resumed his practice. He resumed his practice in Brownwood. Now, one of the ironies of our broadcast and this argument is that we pointed out a failure in the system of communications by doctors. Dr. Leipzig had lots of problems in Arkansas. No question that he lost his privileges at North Little Rock Hospital. No question that the Board of Medical Examiners of Arkansas sued him to try to take his license away and no question that he closed his practice down and moved to Texas where he already had a license and tried to resume practice. We reported that to the people of this country in a 48 Hours broadcast and he's suing us for millions of dollars claiming his reputation was injured. We have, in effect, tried to communicate what in 1986, the Congress of the United States said was the purpose of the Federal Healthcare Quality Improvement Act. Remember the chronology of this. In 1986 in the fall, Congress passed a statute, the Healthcare Quality Improvement Act, that required when you discipline a physician, not when you credential him, but when you discipline a

physician to send a notice of that discipline, and it doesn't apply to credentialing, at least by the legislative history and not on the face of the statute, to send notice about discipline you suspend the surgical privileges for 30 days to the State Board in your state and to the federal government's registry. The next spring we passed in Texas, the statutes before you, 4495, which added section 506 in the spring of 1987 for the very purpose of carrying out, according to Senator Brooks, and the legislative history we've recounted, to carry out the purposes of the federal act. There is not a word in the legislative history of that statute that speaks to credentialing at all. It is all in the context of disciplining the physician and reviewing their work in the hospitals. And we believe that the statutory language, _____ ask a question about where can I find it, we believe that the language in section 102(9) where it describes what a medical peer review is, refers to activities conducted in the hospital, quality of care rendered by the healthcare practitioner, reports made to medical peer review committees, it includes the accuracy of diagnosis and other kinds of activity going on in the hospital itself, not the application process, to get to be an employee of the hospital. Now I have to admit that it doesn't say credentialing is not public. It doesn't say that. But you're here to construe a privilege that, as the Court has pointed out by its questions, will necessarily inhibit the search for truth in courtrooms. All privileges do that. And courts have, as this Court said in *Jones*, as this Court said in *Jordan v. The Fourth Court of Appeals*. As this Court said in *Barnes*, privileges that inhibit the truth searching in courts are narrowly construed. Ambiguities come down expansion of the privilege. Justice Phillips said in the concurring opinion in _____ that the privilege should be "I would hold that if the function and purpose of a duly constituted committee is the improvement of patient care and the treatment through self-evaluation and critical review, then it's covered by peer review privileges." The application Dr. Leipzig said, which is one of the things we are trying to get, the application, what did he say to Brownwood? He's suing us and we can't get it because he says he doesn't have a copy, Brownwood does, would be covered under Justice Phillips' rationale he says that's the scope of the privilege of reply because that follows the purpose of the act and remember, *Barnes* was decided not before the passage of 4495, but after.

SPECTOR: Most hospitals - do they have one committee that does what is termed peer review and another that does credentialing?

GEORGE: I don't know. In fact, I suspect that they had some places that had two committees, some places they had one and some places the same people did both jobs.

SPECTOR: Do they also have peer review that is separated by the specialty surgery peer review?

GEORGE: I don't know the answer to that since I don't represent hospitals as a

general matter, but people like CBS. I don't know what they do as a practical matter. I believe that the functionality rather than the label, what they do as Justice Phillips pointed out in his concurring opinion, ought to be the touchstone from which this decision is made. How do you make the decision as the scope of the privilege and my answer to that is look at what they do. Now, whether they do something to a physician that they have under their _____.

BAKER: They send them this report. What if they do both? Have one committee that does both.

GEORGE: Then you...

BAKER: The possibility to be all privileged...

GEORGE: No, Judge Baker, when they wear the fireman's hat and they're looking at what goes on in their hospital, the activity that's happened in their hospital, is what they do when they're doing it that makes the privilege.

BAKER: Your basis argument says that you cannot construe the definition of a peer committee to include credentialing.

GEORGE: You can, but you shouldn't.

BAKER: Why shouldn't we?

GEORGE: Because it is not required by the language of the statute and we have a long tradition in this Court, and the courts throughout the country, of not expanding privileges more than absolutely required and the...

BAKER: Would you agree that earlier cases were pretty expansive but the legislature seemed to have cut back?

GEORGE: Well, the legislature has not spoken about this since March of 1987. Remember, this statute, article 4495, goes into effect September 1, 1987.

CHIEF Let's talk about 161.031 et seq. 1989 which at least, until recently, appeared to be _____.

GEORGE: That statute seems to be the most broad statute. It covers all _____. It does not cover, at least it says _____. Justice Phillips, you said in *Barnes* you would limit its application to conform to the _____ of the act which you said was those activities involving improving patient care...

CHIEF: The _____ before this new statute was ever written.

GEORGE: No, that's not true. This new statute went into effect September 1, 1987. *Barnes* came down June 1, 1988.

CHIEF: 161 did? 1987?

GEORGE: Oh, 161 was...

CHIEF: I'm trying to get on, in the remaining time, on to the broader statute.

GEORGE: The statute, on its face, covers every committee the board of director of _____ Hospital Corporation of America I suppose. You had said that the breadth of the construction of that statute in *Jones v. Texarkana*, was an error and should be _____ to the construction that was apparently given in *Jordan* and *Barnes*. I believe you were right.

GONZALEZ: Mr. George, how do you respond to the argument? I know you do not represent hospitals, but whatever you say here will affect the quality of healthcare, I think, in Texas. Without complete confidentiality, peer review committees work...

GEORGE: It's the question of...

GONZALEZ: You lose candor and without candor there is no peer review. How do you respond to that argument?

GEORGE: Well, the question of what is peer review - does initial application - first Leipzig sends an application to Memorial Hospital of Brownwood and they have never heard of the man.

GONZALEZ: The statute says all communication...

GEORGE: The question...

GONZALEZ: It doesn't say some, it says **all**.

GEORGE: He is the applicant and they don't do anything. They send him an application. There is no reason to believe he is more or less candid about it. In fact, as Justice Spector said, the facts that you know, we found that people who wore white sheets and covered their head and thus acted incognito, nobody knew who they were, we don't trust them. I've heard that Jim George has stolen from his clients. But I can't tell you who it is.

OWEN: Would you agree that's permitted where a committee is reviewing a doctor on staff, the white sheets, as you put it, is statutorily permitted?

GEORGE: I think that the statute can't be construed narrower than that. I think as Justice Phillips said in the concurring opinion, when the committee is looking at whether or not a particular doctor appropriately treated a particular patient in their hospital it is privileged under the scope of this privilege.

OWEN: Why would it be any different for credentialing?

GEORGE: Because it is not clearly said. I think it is not even inferred that credentialing is. If the legislature intended the credentialing wherever, go back to the corpus of the statute, it is to send over to the State Board all the reports about what happened. Justice Cornyn pointed out a few minutes ago you pass over the reports. That requirement in federal law doesn't apply to credentialing. Denial of credentials doesn't get reported to anybody. It is the discipline that gets reported and this fact sheet was passed in the spring of 1987 to implement the federal law about reporting discipline. And that's the scope of the _____.

CHIEF: Any other questions? Thank you.

CORNYN: Counsel, could I ask you to address in 4495(b) section 4, it says "this act is not intended to make substantive changes or to alter prior judicial interpretation unless the subject matter in this act is substantively changed or new matter is expressly added or old matter is expressly deleted. What are we to make of that in this contest?

COUNSEL: That gave me a headache too Judge. I think that it's not of import here because the *Barnes* decision, the *Jordan* decision, the *Jones* decision, all pertain to the predecessor's statute of the current health and safety code provision and did not, in any way, address article 4495(b) 5.06. None of those decisions addressed at all the privilege found in 5.06 and it must be remembered, and I think this is critical that this Court, when it had to write the *Barnes* opinion and the *Jones* opinion and the *Jordan* opinion was dealing with a statute that was very broad and which, on its face, restricted discovery of information and that statute did not have the specific definition of guidance that the legislature gave us in 4495(b) 5.06 and 1.03. This Court had to decide in *Barnes* what are we going to do with this very broad statutory privilege in 4447(d)(3) and it had to look at what it thought the purpose of the statute might be and it had to construct some narrow guidelines for its application but here, in the case of 5.06 and article 4495(b) the legislature defines medical peer review. The legislature told you in the handout that I have given you in section 103(a)(5)(b), it told you what the purpose was right in the middle of the page at the bottom of page 14. For the purposes of further quality medical or healthcare. Down in subsection 9 it defined medical peer review for you and I urge you to consider the language including

evaluation of the qualifications of professional healthcare practioners and of patient care rendered by those practioners. And in the definition of medical peer review committee in subsection 6 authorized to evaluate the quality of medical and healthcare services, the competence of physicians.

BAKER: What's your response to the argument that that just means after a physician is already on the hospital staff and therefore we should construe it to not include it, to not include the credentialing activity of any one or more committees?

COUNSEL: Justice Baker, I believe that that argument is specious on its face. I don't think it makes any common sense for anyone to think that we need to _____ patients become malpractice _____, perhaps even killed by doctors who we were not able to fully and properly credential and then after we have some dead patients in our hospital...

BAKER: He's not arguing that. He's saying you can properly credential them but we want to see what you have to do so. And you're saying no you can't do that.

COUNSEL: I'm saying we cannot properly credential. I think candor is the key and candor is not going to happen unless we have a privilege.

CHIEF: _____ policy differences between dealing with a new person where recommendations are coming from the outside and dealing internally where a lot of information that a quality review committee is going to get is going to be from somebody who had a relationship with the person under investigation for years and presumably will have a relationship in the future in a much different situation say than contacted somebody who was chief of staff 10 years ago.

COUNSEL: I believe that, as a practical matter, it may be easier for a peer review committee to investigate the details of what someone might be saying if those events had occurred at that hospital, then it would be for that committee to...

CHIEF: But there are stronger reasons for confidentiality if you are talking about people who are dealing with the person under investigation.

COUNSEL: Absolutely.

CHIEF: But you can _____, whether or not the legislature has drawn it is the question for us but why did _____.

CHIEF: I agree with you. I want to add one point that was brought up. It is very clear under section 5.06(b) that actions by peer review committees that adversely affect the staff privileges of a physician are reportable under the Federal Healthcare

Quality Improvement Act section 11151, subsection (i). So, when a person is credentialed and is denied staff privileges, that is a reportable act to the federal data bank. So that federal protection is there and we don't need CBS news or any other media to alarm or inform the public of those events.

SPECTOR: I didn't understand that. If after they are credentialed, if they lose their privileges?

COUNSEL: No ma'am. If when they are initially credentialed, if they are denied privileges, that is reportable under the federal statute to the federal data bank.

OWEN: What statute is this cite to?

COUNSEL: There are two provisions. One is 5.06(b).

OWEN: No, the federal statute.

COUNSEL: It is the Federal Healthcare Quality Improvement Act which is cited in the briefs. It is section 11151, subsection (i).

CHIEF: Any other questions? Thank you counsel.