

Advanced Credentialing and Privileging Retreat

TACKLING TODAY'S TOUGHEST
CREDENTIALING CHALLENGES

Day 1

Greeley | MEDICAL STAFF INSTITUTE
HCPro



Can I Be Sued?

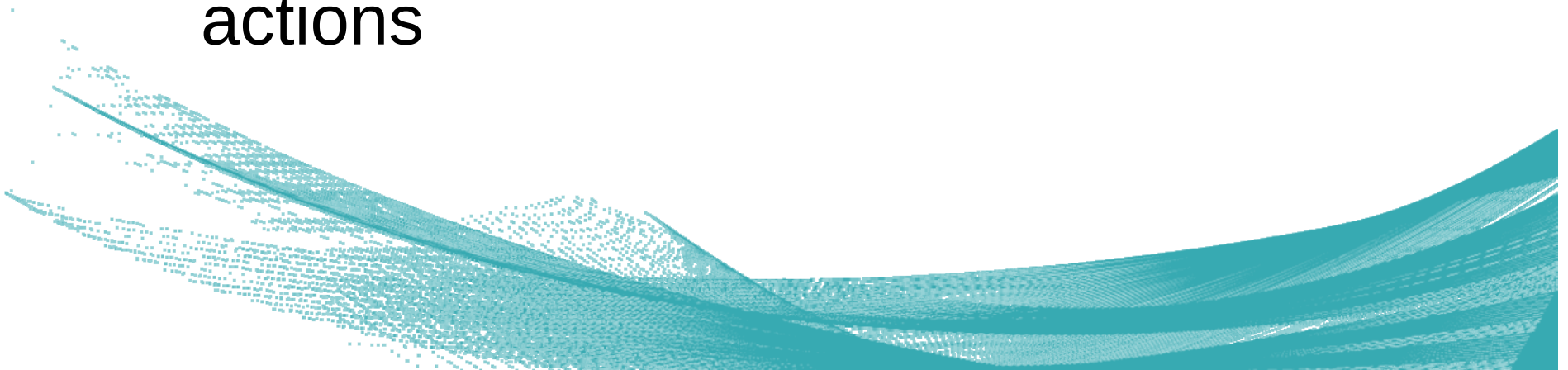
Legal protections for physician leaders
who make the tough calls

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Areas of Risk

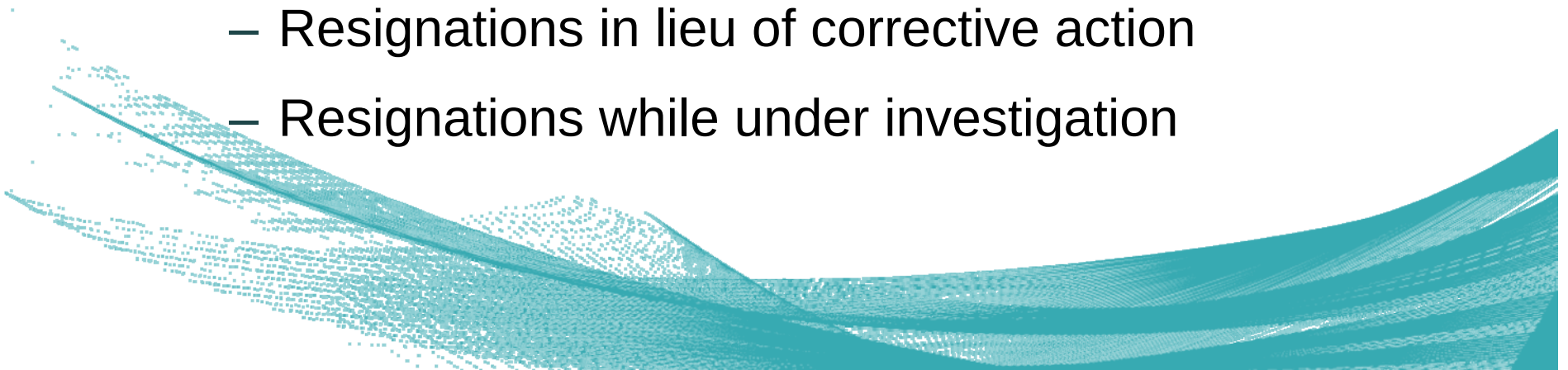
- Denial of applications
- Denial of appointments
- Denial of reappointments
- Reporting physician impairment
- Imposition of non-reportable remedial actions



Areas of Risk

Imposition/recommendation of a reportable disciplinary action

- Summary suspension
- Suspension
- Denial of appointment/reappointment
- Termination
- Reduction in clinical privileges/membership
- Mandatory consultations requiring prior approval
- Resignations in lieu of corrective action
- Resignations while under investigation



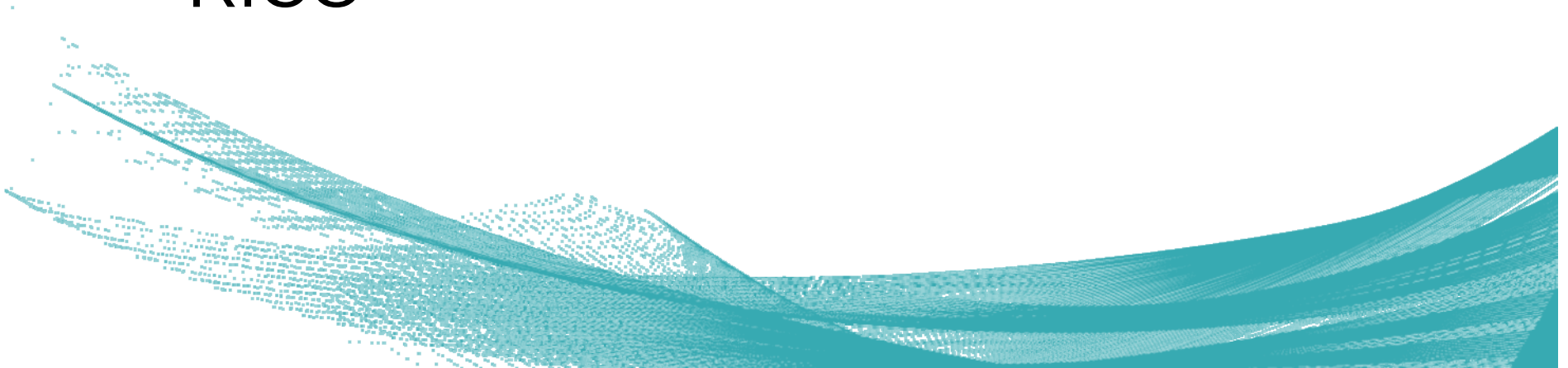
Types of Legal Claims Filed

- Breach of contract
- Violation of bylaws
- Antitrust (group boycott, monopoly)
- Discrimination (age, race, sex, religion, ADA)
- Tortious interference



Types of Legal Claims Filed

- Infliction of emotional distress
- Defamation
- Fraud/conspiracy
- Interference with physician/patient relationship
- RICO



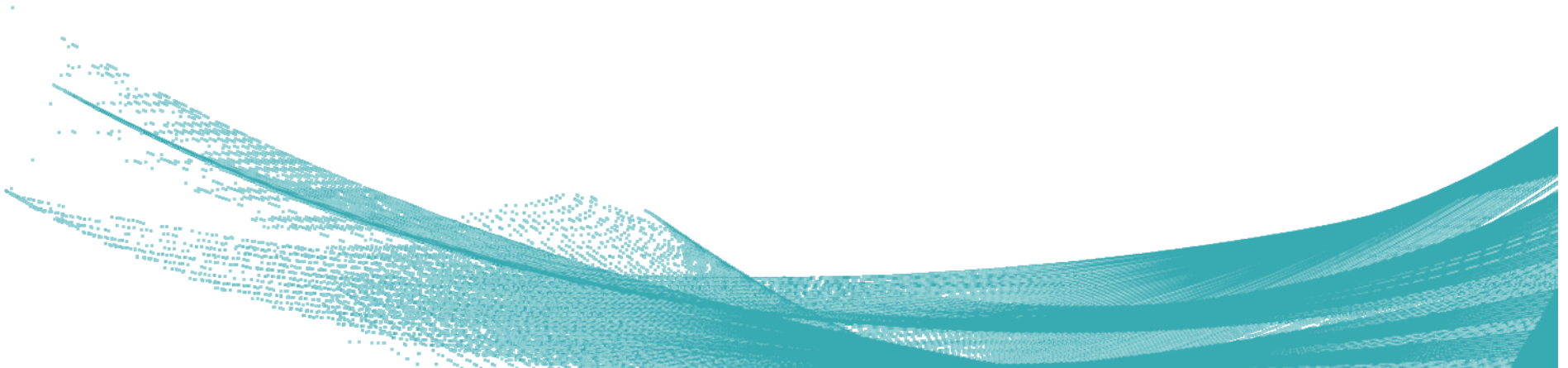
Legal Defenses and Protections

- Rule of non-review: Courts do not exercise jurisdiction over the denial of initial applications by private hospitals
- Courts defer to judgment of medical staff and hospital
- No constitutional legal or other right to obtain medical staff membership and privileges
- Substantial compliance with bylaws
- Proceedings were fair
- Hospital has fiduciary obligations to make reasonable decisions based on quality and financial considerations



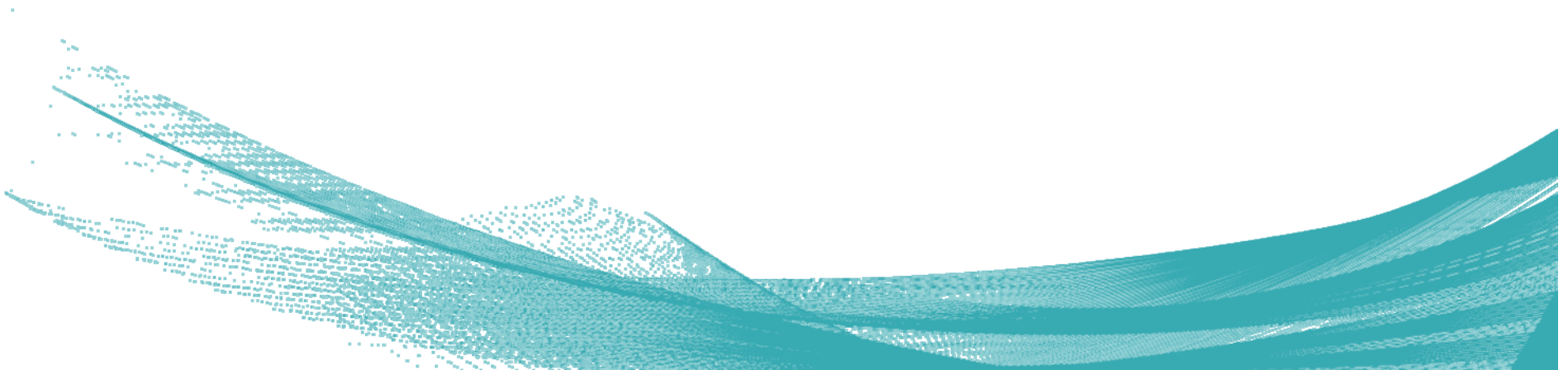
Legal Defenses and Protections

- Disciplinary actions based on compliance with state licensing, federal COPs, accreditation and other regulatory requirements
- Courts have ruled that independent physicians are not employees under Title VII
- Only one federal circuit court has held that independent physicians can seek ADA protection



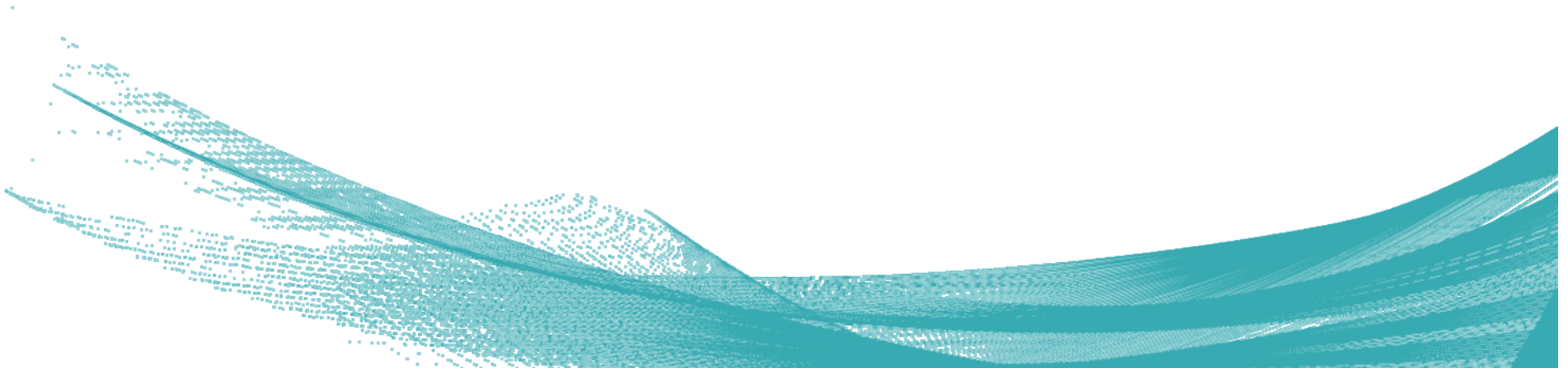
Legal Defenses and Protections

- In most jurisdictions, medical staff leaders and committees which only make recommendations subject to final review and decision of the board, are seen as agents of the hospital and therefore are unable to conspire or enter into group boycotts for antitrust purposes



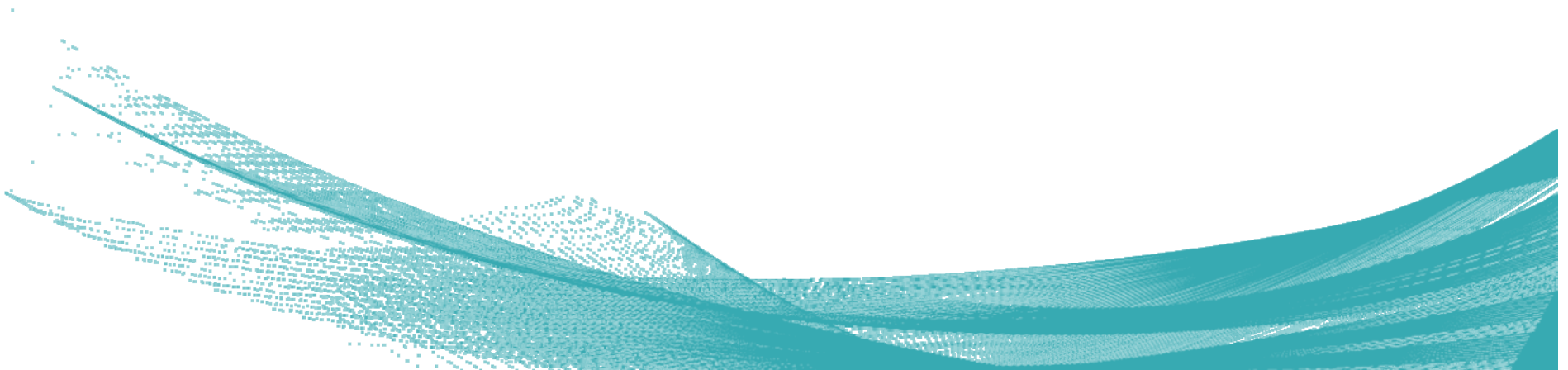
Legal Defenses and Protections

- State immunity protections
 - Most states provide that if action challenged qualifies as peer review activities, as defined under the statute, then all peer review participants are immune from civil liability unless conduct was made “in bad faith or with actual malice” or was “willful and wanton”
 - These standards are very difficult to prove



Legal Defenses and Protections

- HCQIA immunity protections
 - Peer review actions taken in compliance with hearing and other HCQIA requirements are immune from civil liability
 - Although initially applicable only in federal proceedings, most states opted into the HCQIA protection which therefore allows a hospital to assert both immunity protections



Legal Defenses and Protections

- State confidentiality statutes
 - State peer review confidentiality protections have an immunity-like protection because peer review information is not subject to discovery and is not admissible into evidence
 - The effect is to force a court to dismiss state claims because the physician cannot introduce any proof
 - Only applies to state claims and not federal claims



Legal Defenses and Protections

- Patient Safety Act/Patient Safety Organization
 - Provides even broader confidentiality and privilege protections in both state and federal proceedings
- Existing Case Law
 - 99% or more of all cases filed in state or federal court are dismissed on a motion to dismiss or motion for summary judgment (Poliner case)
 - Hospitals have insurance protections for peer review and similar activity which covers all peer review participants



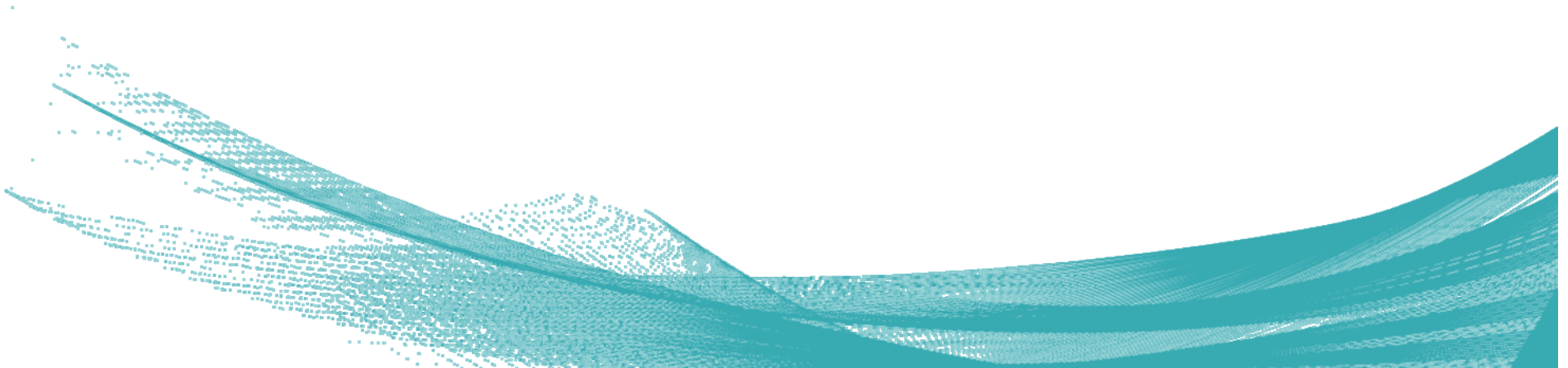
Defensive Measures to Consider in Order to Avoid/Limit Risk

- Follow your bylaws, rules, regs and policies
- Decisions to deny an application should be administrative
 - Department chairs or other practicing physicians or a medical staff committee should never be allowed to veto or unilaterally decide whether or not a physician gets an application
 - Physician and medical staff committee are best protected when only making recommendations on high risk decisions



Defensive Measures to Consider in Order to Avoid/Limit Risk

- Use absolute waiver of liability form for pre-applications and applications for appointment and reappointment
- Incorporate into bylaws an immunity provision for pre-app, eligibility criteria, appointment and reappointment procedures and decisions which include obligation of physician to pay hospital's legal fees



Defensive Measures to Consider in Order to Avoid/Limit Risk

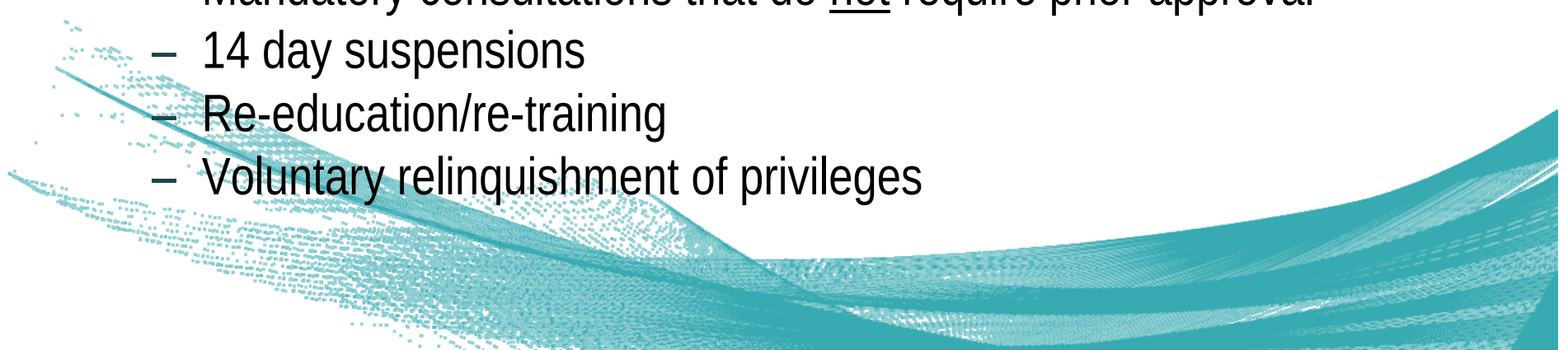
Peer review procedures should:

- Comply with legal and accreditation requirements
- Allow for early involvement of physician if issues/problems are identified so as to avoid repeated behavior
- Comply with OPPE/FPPE
- Try to resolve issues at lowest level possible or in a one-on-one meeting with Department/Committee Chair
- Document/Document/Document



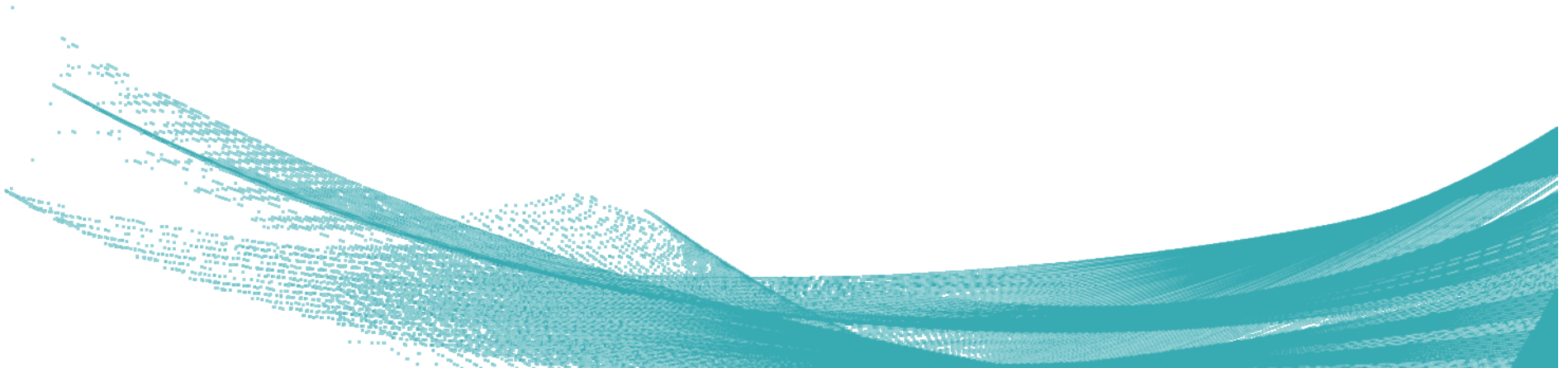
Defensive Measures to Consider in Order to Avoid/Limit Risk

If problem not resolved initially, emphasis should be on use of lesser remedial measures by Department/ Committee Chairs which are not reportable to state or Data Bank such as:

- Monitoring
 - Direct observation
 - Proctoring
 - Retrospective/concurrent reviews
 - Mandatory consultations that do not require prior approval
 - 14 day suspensions
 - Re-education/re-training
 - Voluntary relinquishment of privileges
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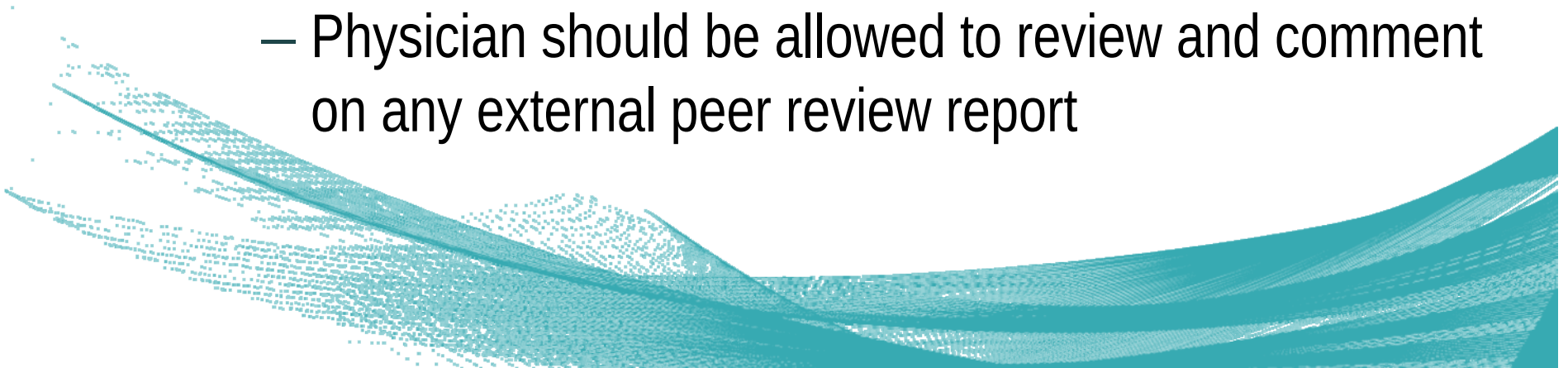
Defensive Measures to Consider in Order to Avoid/Limit Risk

- Rarely, if ever, should you impose a summary suspension
- If possible, try to resolve prior to imposition of formal investigation or corrective action because resignation at this point in the process is reportable to Data Bank
- Use a “bright line” definition of investigation



Defensive Measures to Consider in Order to Avoid/Limit Risk

- Clearly identify criteria for external peer review in your policies and follow them
- Criteria for external peer review should include:
 - Internal conflict of interest
 - Inadequate internal expertise for the review
- The goal should be fairness to a peer
 - Physician should be allowed to review and comment on any external peer review report



Defensive Measures to Consider in Order to Avoid/Limit Risk

- Make sure hearing procedures comply with state law and HCQIA
- Bend over backwards to be fair and accommodating to physician
- Know the language of your confidentiality and immunity statutes and comply with same
- Seek assistance of in-house or outside legal counsel



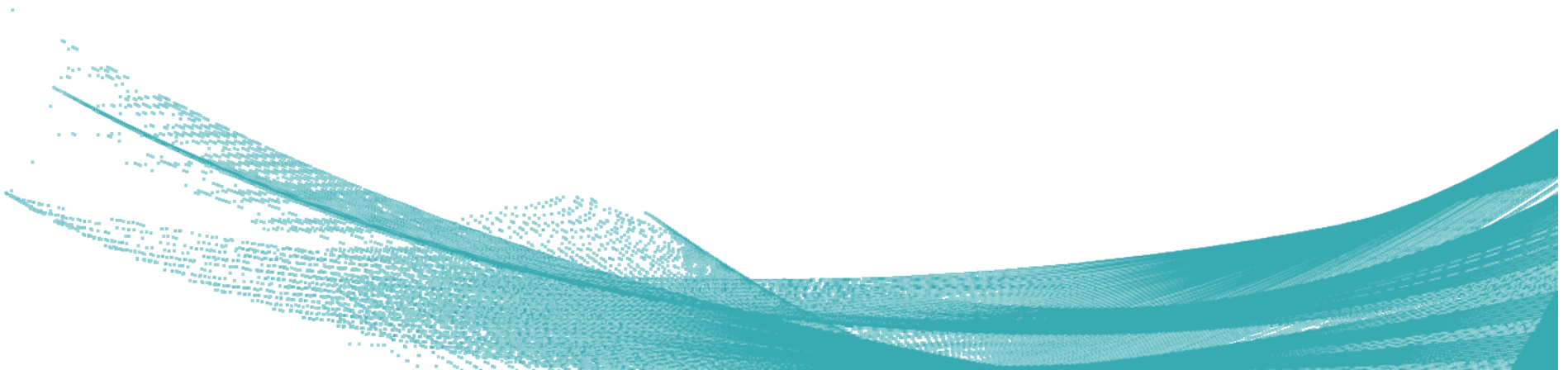
Defensive Measures to Consider in Order to Avoid/Limit Risk

- Burden of proof at the hearing stage should not be whether recommendation leading to a hearing is arbitrary or capricious
 - Instead, use a “preponderance of the evidence” or a “substantial weights of the evidence” standard which is more fair
 - Hearing Committee decisions should include specific findings and conclusions to support the recommendation



Defensive Measures to Consider in Order to Avoid/Limit Risk

- Avoid allowing physicians with conflicts of interest to participate
- Make sure that Board of Directors makes the final decision
- Make sure your actions are covered by hospital's insurance including a decision which holds a peer review participant individually liable for damages



Defensive Measures to Consider in Order to Avoid/Limit Risk

- Always consider allowing a physician to resign anywhere along the process
- Get a covenant not to sue
- Resignation is likely reportable but can negotiate Data Bank language

