State Peer Review and Federal Subpoenas: Is There Any Protection?

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A question of concern for those involved in peer review activities is whether their work will remain privileged, particularly in cases involving federal claims. The Health Care Quality Improvement Act (HCQIA) affords participants immunity from damages, provided they satisfy the four standards for peer review actions.[1] HCQIA immunity is not applicable to claims arising under state or federal civil rights actions or certain antitrust claims.[2] HCQIA did not create a federal privilege for peer review actions—that issue is governed by state law. As a result, the likelihood of successfully asserting the peer review privilege depends on the extent to which federal claims are involved.

The purpose of the peer review privilege is to promote effective review of medical care provided to patients.[3] The goal is to "ensure . . . citizens of the highest quality of medical care, while protecting them from incompetent, unqualified medical treatment."[4] In state law matters, such as malpractice actions, courts continue to enforce the privilege. However, in cases involving federal claims, the privilege has been successfully challenged, requiring hospitals to disclose peer review materials in response to subpoena and discovery requests. Such disclosures include documents involving the plaintiff but also have required disclosure of peer review materials concerning physicians uninvolved with the subject litigation. This result has caught hospitals and medical staffs by surprise. Peer review counsel should apply the lessons learned in these cases and should advise clients that in federal matters, they may be compelled to disclose otherwise-privileged materials—and plan accordingly.

Federal Issues = Federal Rules

In assessing whether to enforce a privilege in federal matters, the court looks to Federal Rule of Evidence (FRE) 501, which states, "The privilege of a . . . person . . . shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a . . . person . . . shall be determined in accordance with State law." Using this rule, courts have compelled the production of peer review materials in antitrust, civil rights, and whistleblower cases.

In *Williams v. University Medical Center of Southern Nevada,*[5] the defendant asserted the privilege in response to the plaintiff's pursuit of peer review documents as part of an antitrust complaint. The court found for the plaintiff, stating it is well settled in federal question cases with pendant state law claims that the law of privilege is governed by common law interpreted by the federal courts. In reviewing case law from other districts, the court noted the majority of courts that have considered creation of a federal common law peer review privilege declined to do so.

There are a number of civil rights cases where plaintiffs sought peer review documents. In *Mattice v. Memorial Hospital of South Bend,*[6] the physician alleged he was subject to peer review action in violation of the Americans with Disabilities Act and also asserted various state law claims. Dr. Mattice sought production of certain peer review information, and the hospital refused, asserting the privilege. The court ruled federal privilege law governed, notwithstanding presence of pendant state law claims. In applying FRE 501, the court noted that nearly all cases weighing state law peer review privileges versus the interests advanced by federal antidiscrimination laws ruled the privilege does not preclude the discovery of peer review materials.

A leading case is *University of Pennsylvania v. EEOC,* a Title VII matter[7] in which the U.S. Supreme Court considered allegations of sex discrimination raised by a female professor denied tenure. The plaintiff sought production of her evaluations as well as those of other similarly situated male candidates whom, she alleged, received more-favorable treatment. Asked to apply a "peer review privilege," the court stated it would not create an evidentiary privilege unless it promoted sufficiently important interests to outweigh the need for probative evidence. Finding for the plaintiff, the court noted that generally, privileges contravene the public right to see evidence, particularly in civil rights matters, where disclosure of peer review information is often necessary to determine whether illegal discrimination occurred. "An alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation. There may be evidence of discriminatory intent and of pretext in the confidential notes and memorand[a] which the [college] seeks to protect."[8]

In *Gargiulo v. Baystate Health,*[9] the plaintiff also sought peer review materials related to her performance and that of similarly situated physicians in her residency program. The hospital refused, citing the state peer review privilege. The court again compelled production of the requested materials after applying the balancing test of FRE 501.

The courts use the same analysis in cases alleging violation of the Emergency Medical Treatment and Labor Act (EMTALA).[10] In *Guzman-Ibarguen v. Sunrise Hospital,*[11] the plaintiff sought the hospital's internal investigative documents related to a patient suicide. The plaintiff alleged the hospital violated EMTALA by failing to provide the patient with an appropriate screening examination, as well as several state law claims. The court held that FRE 501 was the appropriate analysis but concluded that suicide is a malpractice matter, and therefore a state law issue. The court conducted an in-camera review to assess the degree to which the

requested materials pertained to the federal claim. A similar result was reached in *Guzman v. Memorial Hermann Hospital.*[12]

The same analysis is often used in federal whistleblower suits. In *Singh v. Pocono Medical Center,* the plaintiff alleged he was subjected to peer review action in retaliation for raising quality-of-care concerns in violation of the protections of the federal whistleblower act and other state and federal claims.[13] The court compelled production of the requested documents in light of the federal claim.

There has been less-apparent consistency in the application of FRE 501 in Federal Tort Claims Act cases. In *Francis v. United States,* the plaintiff brought a claim for dental malpractice and wrongful death.[14] The court declined to compel production of peer review materials after applying a three-part analysis:

- Does the privilege serve private and public interests?;
- What is the evidentiary benefit resulting from the privilege?; and
- The level of recognition of the privilege among the states.

The court held there was no federal policy at stake in medical malpractice cases. It also cited the Patient Safety Quality Improvement Act[15] as evidence of congressional approval of the medical peer review process via their creation of stronger evidentiary protections for peer review materials. However, in *Sevilla v. United States,* the court ruled that federal privilege law governs in medical malpractice cases against the government.[16]

In summary, it will be a significant challenge to successfully assert the peer review privilege in cases involving federal claims. In most of these cases, hospitals will be compelled to produce the materials requested. This result is significant, particularly in the face of the growing trend of physician employment by hospitals, which extends the protections of federal civil rights laws to such practitioners. There also is a line of cases where, in some circumstances, the protections of these laws have been extended to physicians whom the hospital did not consider to be actual employees.[17]

Hospital and medical staff counsel should be mindful that in the event of a federal complaint and subsequent request for peer review information, they may well be compelled to provide the requested documents. One option is to create a patient safety organization and to treat peer review materials as patient safety work product. Doing so offers the protection of a federal privilege but also creates limitations as to how such information may be utilized.

Perhaps the best approach is to ensure that peer review complaints, investigations, and related proceedings are conducted with a critical eye toward the potential for antitrust, discriminatory, and other prohibited motivations. Counsel can be of assis-

tance in this regard by asking questions throughout the process, including:

- Do we find the allegations, and person(s) making them, to be credible? Why?
- Have we seen similar circumstances before and, if so, how did we deal with them?
- Is our proposed response proportionate to the facts?
- Have we made a reasonably thorough effort to obtain all the relevant facts and speak to everyone who could shed light on the issues under review?
- Have we given the affected practitioner a fair opportunity to present his side of the events?

Ensuring consistency and fairness will not prevent the compulsory production of peer review materials in a federal matter. However, documentation reflecting a good-faith effort to promote fairness should rebut suggestions of illegal intention in the peer review process. An objective, balanced process is the best defense against allegations of antitrust, discriminatory, or other improper motives, and if produced, should reinforce the hospital and medical staff's qualification for HCQIA immunity.

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1 42 U.S.C. § 11112(a).
2 42 U.S.C. § 11111(a)(1).
3 *Mulder v. Vankersen*, 637 N.E.2d 1335 (Ind. Ct. App. 1994).
4 *Walton v. Jennings Community Hosp.*, 875 F.2d 1317, 1322 (7th Cir. 1989).
5 760 F. Supp. 2d. 1026 (D. Nev. 2010).
6 203 F.R.D. 381 (N.D. Ind. 2001).
7 110 S.Ct. 577 (1990).
8 *Id.* at 193.
9 *Gargiulo v. Baystate Health, Inc.*, 826 F.Supp.2d 323 (D. Mass. 2011).
10 42 U.S.C. § 1395dd.
11 Nos. 2:10–cv–1228–PMP–GWF, 2:10–cv–1983–PMP–GWF (D. Nev. June 1, 2011).
12 No. H–07–3973 (S.D. Tex. Feb. 20, 2009).
13 No. 3:09–0439 (M.D. Pa. June 15, 2010); 42. U.S.C. § 1981.
14 No. 09 Civ. 4004(GBD)(KNF) (S.D.N.Y. May 31, 2011).
15 42 U.S.C. § 299b-21 *et seq.*
16 852 F. Supp. 2d 1057 (N.D. Ill. Apr. 4, 2012).
17 *See Salamon v. Our Lady of Victory Hospital*, 514 F.3d 217 (2d Cir. 2008).

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