Analysis

Shifting Sands of the Peer Review Privilege

By Ian M. Williamson and Theresamarie Mantese, Mantese Honigman Rossman and Williamson PC, Troy, MI

Introduction

In 1986, Congress enacted the Health Care Quality Improvement Act (HCQIA).[1] Among other things, the HCQIA provides medical professionals with qualified immunity from tort liability based on their participation in the peer review process.[2] This grant of qualified immunity was designed to improve patient care by encouraging self-policing among medical professionals.[3] In the aftermath of the HCQIA and its subsequent state analogues, attorneys have been embroiled in a decades-long battle over the discoverability of documents related to peer review proceedings.

Most state legislatures have enacted statutes that provide varying degrees of protection from disclosure for documents generated during peer review proceedings. These peer review privileges often protect documents from disclosure during litigation, depending on the specific content of the documents, the types of claims asserted, and the forum.[4]

This article discusses recent case law, from a variety of jurisdictions, examining judicial treatment of medical peer review privileges. We specifically explore recent developments in the protection of incident reports and similar factual documentation used during the peer review process, including attempts to shield documents from disclosure via the Patient Safety and Quality Improvement Act of 2005 (PSQIA).[5]

Peer Review and Professional Review Actions

Documents may qualify for statutory protection from disclosure if they relate to a peer review action as defined under a state regulatory scheme or, in some limited circumstances, a "professional review action" as defined under the HCQIA.[6] Professional review actions (and, in general, peer review actions) include actions or recommendations by professional or peer review bodies that are taken or made during a professional or peer review activity. Under the HCQIA, a "professional review action" is an action based on the (i) competence or (ii) professional conduct of an individual physician, that (iii) may adversely affect the physician's clinical privileges or membership in a professional society.[7] State regulatory schemes typically cover self-critical analyses in the health care context and/or activities similar to those set forth in the definition of a "professional review action" under the HCQIA. The HCQIA includes some confidentiality provisions, but they only apply to specific transmission of information from peer review bodies such as reporting to the National Practitioner Databank.[8] While state regulatory schemes relating to peer review often provide more protection than the HCQIA for related documents, these regulatory schemes are rarely held to create an absolute privilege.[9] The applicable statutes typically cover investigations, assessments, or actions by or on behalf of a health care entity that may affect a practitioner's staff privileges. These peer review actions may be performed by medical staff members or by an outside body or agency.

When Is a Peer Review Triggered?

The point at which a peer review action actually begins or ends is a consistently thorny issue in the context of peer review privilege. For example, when employment issues trigger a peer review action, there is rarely a clear line as to when the employment dispute ends and a peer review action begins. However, this issue is an important factor in determining whether the peer review privilege will cover employment records. Most state regulatory schemes that provide a privilege for peer review materials do not cover documents generated before a peer review process begins, after it ends, or in the ordinary course of business.[10]

Participants in a peer review action sometimes believe, mistakenly, that *all* information gathered in the investigative stages falls within applicable peer review privileges. As the upcoming discussion of specific cases demonstrates, even jurisdictions with clearly established peer review privileges lack certainty as to what the privilege actually covers.

For example, suppose a hospital department chief decides to inquire on an informal basis into a complaint that a surgeon acted in a disruptive and unprofessional manner towards a resident in the operating room. No staff member has filed a formal, written complaint about the conduct, which came to the chief's attention during general conversation among staff members. The department chief sends the physician a letter, or asks her orally to come to an open meeting to discuss the incident. The letter does not state that the informal meeting may result in a professional review action. At the meeting, there may be a Human Resource Officer or others who take notes or write factual summaries during the meeting. This information is placed in the physician's credentialing or employment file.

In this situation, is the information obtained during the informal meeting protected under an applicable peer review privilege if a formal professional review action ultimately takes place? There is no clear answer to this question, though some courts have declined to apply peer review privileges to personnel file information.[11] There is a tension to some extent between the employee's right to his or her personnel files and the hospital's right to protect information that is the basis of a peer review action.

Courts may be less sympathetic to physicians' efforts to obtain peer review information relating to other medical professionals. In *Colorado Med. Bd. v. Office of Admin. Courts*, for example, the Supreme Court of Colorado recently invoked the peer review privilege to deny a physician's request for production of "letters of concern" from the Colorado Medical Board to licensed physicians regarding patient care and other issues that the Board found concerning.[12]

The Continued Battle over Incident Reports or "Underlying Facts"

One of the most common areas of dispute regarding the application of peer review privileges involves incident reporting and/or contemporaneous recording of observations.[13] Staff members at hospitals and other health care facilities typically prepare "incident reports" to document events or circumstances not consistent with routine hospital operations or patient care, whether large or small. Contemporaneous factual reporting of this nature is often required under relevant state and/or federal law, administrative regulations, or accreditation standards. For example, Joint Commission-accredited health care facilities must engage in Sentinel Event analysis when, among other things, patients die, sustain injuries, or are deemed to have been endangered while on the premises.[14]

This contemporaneous documentation can be a discovery target by plaintiffs in malpractice/wrongful death actions and by physicians engaged in resulting credentialing, privileging, and/or databank reporting actions. Health care facilities engaged in such litigation may raise peer review privilege arguments in efforts to avoid production of incident reports or similar contemporaneous reporting. These efforts have no guarantee of success, however, and in 2014, courts in several jurisdictions declined to apply peer review privileges in such circumstances.[15]

Harrison and the Backlash Against Increased Disclosure in Michigan

In the recent Michigan case of *Harrison v. Munson Healthcare, Inc.,* the Michigan Court of Appeals analyzed case law from several jurisdictions in determining whether factual information included in a hospital incident report, but not in the patient's medical record, should be privileged.[16] The plaintiff sustained burns during surgery, and Munson's operating room witnesses claimed to have no recollection of how they occurred.[17] However, at trial, Munson's former O.R. manager testified that an incident report should have been prepared, which the trial court then reviewed in camera.[18] The trial court determined that Munson did know how the burns occurred and knowingly presented a defense inconsistent with recorded facts in its possession; declared a mistrial; and sanctioned Munson and its counsel.[19]

On appeal, the defendants argued that the incident report in question was protected by Michigan's statutory peer review privilege, and should not have been considered by the court.[20] The appeals court held in a lengthy, published opinion that a

The point at which a peer review action actually begins or ends is a consistently thorny issue in the context of peer review privilege.

distinction must be made between "factual information objectively reporting contemporaneous observations or findings and 'records, data, and knowledge' gathered to permit an effective review of professional practices."[21] In other words, while the portion of the report reflecting a deliberative review was privileged, the factual information set forth on its first page was subject to disclosure.[22]

The pushback from hospitals came quickly. Within four months after release of the *Harrison* opinion, the Michigan Supreme Court accepted an application for leave to appeal filed by Covenant HealthCare in *Krusac v. Covenant HealthCare*, a case involving a patient's fall from a surgical table.[23] In Krusac, the plaintiff sought production of an incident report created shortly after the fall when it became clear that the relevant medical records were not consistent with witness testimony. After an in camera review of the report, the trial court cited to *Harrison* and ordered production of the first page, and Covenant HealthCare filed its interlocutory appeals.

Covenant HealthCare is now seeking to overturn *Harrison* and avoid producing the factual portion of its incident report. At least ten *amicus* briefs have been filed thus far, the majority of which advocate for reversal of *Harrison*.[24] Michigan courts have broadly applied peer review privilege in the past, as the Sixth Circuit recently recognized when it upheld the use of peer review privilege to bar production of a hospital incident report in *Lloyd v. St. Joseph Mercy Oakland*.[25] The alacrity with which the Michigan Supreme Court took up this issue could mean that *Harrison's* impact will be short-lived.

PSQIA Cannot Bar Routine Incident Reports from Disclosure in Kentucky

While the Michigan courts limited the application of statutory peer review privilege in *Harrison and Krusac*, the Supreme Court of Kentucky barred hospitals from using the PSQIA as a means to protect incident reports from disclosure. The PSQIA provides confidentiality for information gathered for reporting to a Patient Safety Organization (PSO). The privilege and confidentiality language included in the PSQIA is substantially more robust than in the HCQIA, enacted 30 years before. The PSQIA establishes a federal statutory privilege for quality assurance information of the type often used in peer review

proceedings, so long as the information is collected for the purpose of reporting it to an outside PSO qualified to aggregate and study such information.[26]

In *Tibbs v. Bunnell*, a plaintiff in a malpractice action sought production of all incident reports relating to the allegedly substandard care.[27] The defendant sought entry of a protective order barring production on the grounds that the only existing incident report was created through a Patient Safety Evaluation System put in place by the hospital's PSO, and was therefore privileged under the PSQIA.[28] The Supreme Court of Kentucky, relying in part on the Department of Health and Human Services' interpretation of the PSQIA, ruled that the PSQIA was not intended to replace other information collection activities mandated by other laws or regulations.[29] Since Kentucky Administrative Regulations mandate that health care facilities prepare and maintain incident reports as a condition of licensure, incident reports could not become Patient Safety Work Product (PSWP) protected from disclosure under the PSQIA.[30]

While the *Tibbs* court rejected efforts to broadly protect all incident reports under the PSQIA, the policy underlying the PSWP privilege recently led at least one federal court to recognize a medical peer review privilege under federal common law.[31] Accordingly, there still appears to be room for the PSQIA to expand the application of a medical peer review privilege in cases involving claims under federal law.

New Jersey Enforced an Absolute Statutory Peer Review Privilege

In 2004, the New Jersey legislature passed the Patient Safety Act, which imposed specific evaluation and reporting requirements for adverse events and created a statutory privilege shielding related deliberative communications.[32] The New Jersey Supreme Court analyzed the Patient Safety Act privilege in *C.A. ex rel Applegrad v. Bentolila*, a medical malpractice case in which the plaintiff sought production of a memorandum prepared within a week of the alleged malpractice titled "Director of Patient Safety Post-Incident Analysis."[33] After an evidentiary hearing, the trial court held that the document was covered by the statutory privilege, though the hospital had not strictly complied with the Patient Safety Act in creating it.[34]

An appellate panel reversed on the grounds that the memorandum was not "exclusively created in compliance with the Patient Safety Act and its associated regulations . . ."[35] However, the high court determined that the regulations in question were not adopted until four years after the New Jersey legislature enacted the Patient Safety Act, and therefore could not be used to evaluate activity that took place in the interim period.[36] The court held that the hospital's actions satisfied the requirements of the Patient Safety Act as they existed at the time, and noted that "the self-critical analysis required . . . entails not only the decision-making that leads to the reporting of an adverse event, but also the development and collection of information necessary for that determination."[37] The New Jersey Supreme Court took a distinctly different view of underlying factual information than the *Harrison* court in Michigan, and the Michigan Supreme Court could follow suit in the *Krusac* case.

One of the most common areas of dispute regarding the application of peer review privileges involves incident reporting and/or contemporaneous recording of observations.

Conclusion

Courts across the country are split on whether or not incident reports and underlying facts should be protected from disclosure through the application of peer review privileges, but some recent opinions broadening litigants' ability to obtain factual information are under attack. Recent case law analyzing peer review privilege demonstrates that parties seeking to protect factual information or impressions from disclosure should regularly re-examine their existing processes in light of changes in jurisprudence in this constantly shifting landscape. Further, parties seeking disclosure of arguably privileged material may be able to raise new arguments based on recent judicial interpretations of statutory and common law peer review privileges—but some of those interpretations may not be around for long. C

About the Authors

Ian Williamson (iwilliamson@manteselaw.com) began his legal career as a corporate litigator, and has developed a substantial level of expertise in litigating disputes among owners of closely held business entities. Over time, as Mr. Williamson represented increasing numbers of medical practitioners in corporate disputes, he expanded his practice to include health care law in order to accommodate the needs of his clients. Mr. Williamson represents medical professionals involved in credentialing and

licensing actions, assists medical professionals with business entity maintenance and contract needs, and represents individuals and entities in civil litigation, administrative actions, and before various regulatory authorities. Mr. Williamson is a Partner at Mantese Honigman Rossman and Williamson, PC in Troy, MI, where he has practiced since 2004.

Theresamarie Mantese (tmantese@manteselaw.com) has over 34 years' experience as a litigation and health care attorney. She focuses her practice primarily on representing and advising health care providers and professionals in matters such as group practice and other business organizations, contracts, third party payer audits and reimbursement, fraud-and-abuse issues, professional license disciplinary actions, hospital staff privilege actions, legislative issues, and joint ventures. In 1995, Ms. Mantese relocated to Michigan and co-founded a health care law firm and she has been at the forefront of evolving health care policy and legal issues, regularly contributing her time to speaking before heath care associations and organizations. She has also been an author on current topics relating to health care law. She obtained several significant settlements that appeared in statewide publications. Her clients include health care providers, physicians, and health care and business entities. Ms. Mantese currently is an attorney at Mantese Honigman Rossman and Williamson PC where she practices health care law and business litigation.

Endnotes

1 42 U.S.C. § 11101 et seq.
2 42 U.S.C. § 11111(a).
3 42 U.S.C. § 11101(3) – (5).
4 In cases pending in federal court solely on the basis of diversity of citizenship between parties, courts are more likely to apply state peer review privileges.
5 42 U.S.C. § 299b-21 et seq.
6 42 U.S.C. § 11151(9).
7 Id.
8 42 U.S.C. § 11137(b)(1).
9 *See, e.g., Harrison v. Munson Healthcare, Inc.,* 304 Mich. App. 1, 32 (2014), holding that Michigan's statutory peer review privilege codified at Mich. Comp. Laws § 333.20175(8) and Mich. Comp. Laws§ 333.21515 does not apply to "objective facts gathered contemporaneously with an event."
10 *See, e.g.,* Ardisana v. Nw. Cmty. Hosp., Inc., 795 N.E.2d 964, 971 (Ill. App. 2003).
11 *See, e.g.,* Sabarwhal v. Mount Sinai Med. Ctr., No. 09 CV 1950, 2011 WL 477693 at *4 (E.D.N.Y. Feb. 4, 2011) (Most information in personnel files would not qualify as peer review materials).
12 *Colorado Med. Bd. v. Office of Admin. Courts*, 333 P.3d 70, 73 (Colo. 2014). The court held that the letters are "private admonition[s] sent directly to the licensed doctor with the purpose of directing the doctor to a corrective course of conduct." *Id.*
13 The arguments for and against an incident report privilege have been advanced for decades. *See, e.g.*, Cynthia J. Dollar, Note, *Promoting Better Health Care: Policy Arguments for Concurrent Quality Assurance and Attorney-Client Hospital Incident Report Privileges*, 3 Health Matrix 259 (1993) (Arguing in favor of a privilege barring incident reports from disclosure).
14 *See* The Joint Commission's Sentinel Event Policy and Procedures, *available at* www.jointcommission.org/Sentinel_Event_Policy_and_Procedures/.
15 *See, e.g., Parkview Nursing and Rehabilitation Ctr. v. Texas Dep't of Aging and Disability Servs.,* No. 03-11-00480-CV, 2014 WL 5140377 at *8 (Tex. App. Jan. 10, 2014) (Nursing home incident reports and logs not protected from disclosure under Texas law because they are made and maintained in the regular course of business and contain no analysis, but "only facts about the incident"); *Ridenour v. Glenbeigh Hosp.*, No. 100550, 2014 WL 2048007 at *2 (Ohio Ct. App. May 15, 2014) (Incident report detailing a patient's fall and subsequent injuries was not privileged under Ohio law because it was not prepared "specifically" for the hospital committee that performed peer review, even though copies of such reports were routinely sent to the committee).
16 *Harrison v. Munson Healthcare, Inc*., 304 Mich. App. 1 (2014).
17 *Id.* at 4.
18 *Id.* at 5.
19 *Id*.
20 *Id*. at 23. See also Mich. Comp. Laws § 333.21515, which provides that "The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena."
21 *Id*. at 30.
22 *Id*. at 34.
23 *Krusac v. Covenant Med. Ctr., Inc.,* Supreme Court No. 149270, currently pending before the Michigan Supreme Court.
24 *Krusac v. Covenant Med. Ctr., Inc.* appellate briefs, including amicus briefs, are available at http://courts.mi.gov/Courts/MichiganSupremeCourt/oral-arguments/2014-2015/Pages/149270.aspx.
25 *Lloyd v. St. Joseph Mercy Oakland,* 766 F.3d 580, 588 (6th Cir. 2014) (PEERS incident report held to be privileged from disclosure by federal district court under Michigan law, upheld on appeal).
26 *See* 42 U.S.C. § 299b-21(7), 42 U.S.C. § 299b-22(a).
27 *Tibbs v. Bunnell*, --- S.W.3d ---, 2014 WL 4115912 at *1 (Ky. 2014).
28 *Id*.
29 *Id.* at *8.
30 *Id.* at *9.
31 *See Tep v. Southcoast Hosps. Group, Inc.,* No. 13-11887-LTS, 2014 WL 6873137 at *3 (D. Mass. Dec. 4, 2014) (documents created during analysis of a patient's death protected from disclosure as privileged medical peer review material, based in part on public policy represented in Massachusetts law and PSQIA).
32 *C.A. ex rel Applegrad v. Bentolila*, 99 A.3d 317, 318 (N.J. 2014).
33 *Id.* at 320.
34 *Id.* at 321. In a possible acknowledgment of the issues and sanctions arising out of Michigan's *Harrison* case, the trial court nonetheless ordered that the presiding judge be given a copy of the memorandum to better evaluate the credibility of witnesses who were participants in its creation. *Id.*
35 *Id.*
36 *Id.* at 329.
37 *Id.* at 330.