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Newsletters

Medical Litigation Newsletter - March 2012

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Hospital Peer Review and Quality Improvement Privileges: A Multistate Survey

Hospital medical staff departments, and quality assurance departments and committees, often collect and maintain information and documents relevant to pending medical malpractice litigation. An occurrence which becomes the subject matter of litigation often has been reviewed by quality or peer review committees. Also, medical staff members or other personnel are subject to a credentialing process during the appointment or reappointment of privileges at a facility. This process generates a collection of information and documents that may also be relevant in litigation. Counsel representing plaintiffs are becoming more aggressive in seeking out credentialing, peer review and quality assurance materials. Defense counsel must consequently be familiar with the protections provided under state law for information and documents related to critical quality improvement processes.

Arizona

The Arizona health care quality assurance and immunity statutes can be found in the Arizona Revised Statutes under "Public Health and Safety," Chapter 25, Article 1. In Arizona, written standards and criteria are to be made available to all health care providers who are subject to, or otherwise involved in, a quality assurance process. If a health care provider furnishes records or information as a part of the process and does so *without malice*, such provider is not subject to legal action or civil damages. "Malice" is defined as "evil intent and outrageous, oppressive, or intolerable conduct that creates a substantial risk of tremendous harm to others." Malice is to be determined by the court and must be based on a finding from "clear and convincing" evidence.

Florida

In Florida, post-occurrence peer review or quality review performed by a hospital or other health care provider is no longer privileged from production in a civil suit. In November 2004, Florida voters amended the Florida Constitution, providing an inherent right to know about adverse medical incidents. Many viewed this amendment to be a significant change from existing case law and Florida statutes with regard to quality assurance review and privilege regarding medical incidents. After much debate as to the application of the amendment to past and current cases, the Florida Supreme Court issued a series of opinions

Attorneys

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addressing these concerns.

Illinois

In Illinois, protection of peer review and quality assurance materials is provided under the Illinois Medical Studies Act (IMSA), found at 735 ILCS 5/8-2101 and 735 ILCS 5/8-2102 of the Illinois Code of Civil Procedure.

The IMSA provides protection for any materials initiated, created, prepared or generated by a peer review committee. The entity asserting the privilege has the burden of proof in the argument concerning its application. If counsel for a patient or claimant presses for the documents or information at issue, it becomes appropriate for a court to make a determination as a matter of law after in camera inspection of the materials.

Indiana

All proceedings of a peer review committee are confidential in Indiana. Moreover, all communications to a peer review committee are considered privileged communications. However, the governing board of a hospital may disclose the final action taken with regard to a health care provider without violating the provisions of the peer review statute.

Missouri

In Missouri, the protection of documents and information related to review of care provided to a patient is governed by Mo. Rev. Stat. § 537.035. That section indicates that "interviews, memoranda, proceedings, findings, deliberations, reports, and minutes of peer review committees" are not subject to discovery. It prevents discovery of any of the proceedings of review, but specifically provides that information otherwise discoverable—for example the testimony of a treating physician regarding the treatment—is not immune simply because it was presented in the course of a peer review process.

Wisconsin

In Wisconsin, the protections afforded health care providers for peer reviews are codified in Wis. Stat. §§ 146.37 - .38.

Wis. Stat. § 146.37 provides civil immunity for individuals acting in good faith participating in the review or evaluation of health care providers' services or facilities, as long as the review is conducted in connection with any program organized or operated to help improve the quality of health care or to avoid improper utilization of health care providers' services or facilities. In other words, individuals who participate in peer review or utilization review for health care providers and act in good faith are not liable for damages resulting from any act or omission occurring during the course of the review or evaluation.

Conclusions

Counsel should be consulted regarding any specific information or documents and whether such are protected under a peer review or quality assurance privilege. Our offices are aggressive in protecting such materials when requested in the course of civil litigation. However, protection of the materials begins long before the materials are sought by opposing counsel. The relationship between the materials that are claimed privileged and a committee functioning in a peer review or quality assurance capacity is critical to protection under the law. Peer review and quality improvement meetings should be clearly identified as such. Individuals involved in the process should be made aware of the protections claimed under the applicable state law. Documents created or requested or reviewed by the functioning committee should be marked as confidential. The process itself should be focused on quality improvement or peer review and every attempt should be made not to mix the purposes of the meetings with other non privileged business of the facility or committee. All of the involved individuals should be made aware that the documents and information protected consist of the materials generated or collected from the initiation of the process and up to the point of action after the process is completed. Of course, the facility must also restrict access to the materials so that there can be no confusion regarding whether or not the entity intends the materials to be protected and confidential.

Illinois Health Care Providers See Conflict Between New State Law and HIPAA Privacy Rule

In November 2011, the Illinois General Assembly passed Public Act 097-0623 (the Act). The Act amended the Code of Civil Procedure to mandate the release by health care providers of a deceased person's medical records upon the written request of his or her surviving spouse, adult children, parents, or siblings, in descending order of priority, if the decedent did not appoint an agent under a power of attorney for health care or the decedent's estate is not represented by an executor or administrator, and the decedent did not specifically object to such disclosure. The Act has led to conflict between relatives of decedents and health care providers, because the Health Insurance Portability & Accountability Act (HIPAA), a federal law, permits only executors, administrators and others who have the legal authority to act on behalf of the deceased individual or his or her estate to gain access to the medical records. The Act does not give the relatives listed in the law the authority to act "on behalf of" the decedent.

No Physician-Patient Relationship Created by Telephone Call from Mother to Emergency Room

The Third District Appellate Court of Illinois recently examined whether a single telephone call by a mother to her local emergency room was sufficient to create a physician-patient relationship. In *Estate of Kameryn L. Kundert v. Illinois Valley Community Hospital,* 2012 IL App (3d) 110007, the parents of a six-week-old newborn filed a wrongful death action against the hospital after the mother relied upon advice she received from an unknown person in the emergency room.

Hinshaw Representative Matters

Michael P. Russart represented a health care provider in a Medicare audit and obtained a partially favorable verdict from the administrative law judge (ALJ). Medicare claimed that based upon the inadequacy of the provider's records, the provider was overpaid by more than $103,000. Medicare had instituted collection actions to recover the overpayments. The health care provider appealed, and the collections were stayed. After a hearing, the ALJ ruled that the health care provider was entitled to payment of nearly $37,000. During the appeal, the health care provider submitted to record reviews and audits by a Medicare contractor. Now, the health care provider has a fully compliant electronic record keeping system which will guard against future audits and overpayment liabilities.

Gregory T. Snyder and Jennifer L. Johnson secured summary judgment for a hospital system client that operates a health club. Plaintiff, one of the health club's members, slipped and fell on water near the pool's edge, sustaining several fractures. She consequently sued the health system. The health club member had signed an exculpatory agreement that barred her from bringing a claim for injury due to accidents at the facility, but she claimed the water on the pool deck was a condition beyond the parameters of the exculpatory clause. Finding that water on a pool deck was a condition well within the scope of dangers that ordinarily accompany pool usage, the court entered summary judgment in favor of the health care system.

Dawn A. Sallerson and Jason K. Winslow obtained dismissal, in part, of a complaint alleging medical malpractice against defendant doctor in a case pending in Wabash County, Illinois. The original complaint alleged that the doctor transected the patient's spinal accessory nerve during a surgical procedure. After expiration of the statute of limitations and the statute of repose periods, plaintiff, the patient, filed an amended complaint adding a claim regarding the doctor's alleged failure to obtain the informed consent of the patient before the surgical procedure. Defense counsel successfully argued that the amended set of facts, which involved what the doctor purportedly said or did not say in the pre-surgical consultation phase of treatment, was a separate transaction or occurrence for purposes of the relation back doctrine than that set forth in the original complaint, which related to the doctor's alleged surgical acts or omissions. The court ruled that the relation back doctrine did not save the otherwise time-barred amended claim, focusing specifically on the patient's failure to establish that, either through the allegations in the original complaint or other evidence in the record, the doctor was put on notice that his alleged failure to obtain the informed consent of the patient was at issue in the case. As a result, the court granted the doctor's motion to dismiss as to the informed consent claim.

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