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Questioning Discoverable Data In Negligent Credentialing Suits

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In *Klaine v. Southern Illinois Hospital Services* (2016 IL 118217) the plaintiff filed a negligent credentialing medical malpractice lawsuit against a physician and two hospitals where he was a member of the medical staff. Although the hospital produced almost 2,000 pages of information in response to a discovery request, it refused to deliver two groups of documents which contained three of the physicians' applications submitted in 2009, 2010 and 2011 (group exhibit F) and "procedure summaries and case histories" (group exhibit J), arguing that they were privileged under the Illinois Medical Studies Act (735 ILCS 5/8-2101) and the Health Care Professional Credentials Data Collection Act (410 ILCS 517/1 et seq.).

The trial court ruled against the hospitals and ordered the production of the requested documents, which included responses to the mandated appointment and reappointment form that the physician was required to complete pursuant to the credentials act, as well as information contained in the National Practitioner Data Bank (NPDB) reports that had been included in the application materials but not the actual individual reports.

The appellate court affirmed on appeal but ordered that certain references to an external peer review report and any patient identifying information be redacted. The Illinois Supreme Court granted the petition for leave to appeal and affirmed the decision.

Credentials Act Information is Confidential But Not Privileged

The hospital argued that the credentials act clearly made the application and responses provided by the physician both confidential and privileged from discovery when standing alone and when considered in conjunction with the MSA. The court rejected this argument. Although the court observed that the credentials act did contain language that all "credentials data collected or obtained by the ... hospital shall be confidential" (410 ILCS 517/15(h)), the court pointed out that there was no comparable provision to language contained in the MSA, which specifically states that protected information "shall be privileged ... and shall be inadmissible as evidence nor discoverable in any action of any kind in any court ... " (735 ILCS 5/8-2101, 2102).

Citing rules of statutory construction and other court cases, the court stated that "confidential" information is not the same as statutorily privileged information and therefore could be subject to discovery if found to be relevant to the claim being brought. Because the plaintiff was alleging that the hospitals were negligent when granting the physician membership and clinical privileges, it could not see how such a claim could be brought without granting access to the requested documents.

Data Bank Information Is Discoverable

The hospital also contended that the data bank information provided by the physician in his application is privileged from discovery under the Health Care Quality Improvement Act (42 USC § 11137(b)(1)), although it did not cite any cases that supported this argument. Again, the court noted that while the information is indeed considered confidential and will only be released to a plaintiff's attorney in a medical malpractice case by the data bank if it can be established it failed to query at the time of appointment and reappointment, HCQIA makes no reference to the information also being privileged from discovery. The court specifically stated:

> "Reading the confidentiality provision in paragraph (b) of Section 11137 of the Health Care Quality Improvement Act in conjunction with the Code of Federal Regulations, we believe it is clear that information reported to the NPDB, though confidential, is not privileged from discovery in stances where, as here, a lawsuit has been filed against the hospital and the hospital's knowledge of information regarding the physician's competence is at issue."

Implication and Recommendations

1. Credentials File Versus Quality File

Most hospitals have a credentials file and a quality file for each medical staff member that separates the application materials, which generally are not protected, from peer review and other quality information, which usually are privileged from discovery under state and/or federal law. In this case, it appears that there was only one combined file. Had the data bank information been separated out and placed in the quality file, there may have been a different outcome.

Hospitals should carefully review their files to make sure they are correctly divided between nonprivileged versus privileged materials.

2. Need to Review State Laws and Applicable Case Law

In light of the dichotomy between information which is "privileged" versus "confidential," hospitals should review applicable state statutes and applicable case law to determine what actual information is and is not privileged from discovery and/or admissibility into evidence in state and/or federal proceedings. The outcome of this review may affect the kinds of questions asked in the appointment/reappointment application and the information requested to determine what language is referenced. Interestingly, the actual data bank reports were not requested by the plaintiff and not provided by the defendant.

3. Protected Peer Review Deliberations

There may be a need to argue that information is being used for protected peer review deliberations and, therefore, is not discoverable. Depending on your statutory language this argument may or may not succeed.

4. Application Collections

Consider collecting application information and assessments in the hospital's patient safety evaluation system for reporting to a patient safety organization. Under the Patient Safety and Quality Improvement Act of 2005, information, reports, analyses and data collected within a hospital's identified patient safety evaluation system for reporting to an Agency for Healthcare Research and Quality-certified patient safety organization is privileged and not subject to discovery in any federal or state proceeding. Nonpublic information, such as a data bank report or information contained in the report is confidential and clearly utilized as a basis of making appointments and reappointments. Because peer review analyses designed to determine whether a physician is qualified for membership and clinical privileges can be considered a protected patient safety activity, a hospital can argue that the *Klaine* decision is clearly distinguishable because unlike the credentials act, the data bank information in question is privileged because of how it is collected and used to further patient safety and reduce risk.

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