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Health Care Law

Caught Between a Rock and a Hard Place

Improving Health Care vs. Increased Liability Exposure

By Zulima V. Farber, David M. Wissert
and Jessica L. Herbster

Specific legislation on the federal level and in each state is required in order for health-care organizations to have clear protection of investigative and other self-evaluative materials. In the meantime, they must comply with reporting requirements while fighting with tied hands to keep self-evaluative materials confidential in subsequent litigation.

To satisfy Medicaid and Medicare reimbursement eligibility requirements, most hospitals, nursing homes and psychiatric facilities are accredited by the Joint Commission on Accreditation of Healthcare Organizations. However, health-care organizations are finding it impossible to meet the joint commission's accreditation requirements without exposing the organization to substantial legal risks.

Specifically, while the commission requires health-care organizations to implement procedures to identify the underlying causes of any unexpected

Farber is a member of Lowenstein Sandler of Roseland. Wissert and Herbster are associates in the firm's litigation department.

deaths or serious injuries that occur at the accredited organization (what the joint commission refers to as "sentinel events"), the commission cannot guarantee that these self-evaluative investigations and documents will remain confidential.

Indeed, in a recent unpublished opinion, the Law Division held that a hospital's sentinel event reporting documents were discoverable in a malpractice action. See *Reyes v. Meadowlands Hospital Medical Center, et al.*, Docket No. HUD-L-2996-00 (N.J. Super. Law Div. April 12, 2001) (reconsideration denied July 20, 2001).

At the heart of the commission's policy requiring that sentinel events be reported and investigated is the desire to foster honest and thorough internal evaluations of policies and procedures that impact on the public health and patient outcomes. However, there is an extreme tension between this goal of frank reporting, honest evaluation and effective corrective action on the one hand and the discoverability of such materials in any litigation that may arise from the sentinel event on the other hand.

The public policy in favor of improving medical care through honest evaluations is undermined if these evaluative materials can be used against the

health-care organization as admissions of liability in the litigation that will follow. Health-care organizations have used various federal and state statutory and common-law protections in their attempts to shield self-evaluative materials from disclosure in the event of litigation. These protections vary widely from state to state, are limited under federal law and are insufficient to ensure protection of sentinel event reports.

Common-Law Protections

In the absence of federal or state legislation, defendants have resorted to arguing that the common-law privilege of self-critical analysis protects the confidentiality of their medical peer review or other quality assurance documents.

New Jersey first recognized the privilege of self-critical analysis in *Wylie v. Mills*, 195 N.J. Super. 332 (Law Div. 1984). In *Wylie*, the court held that the privilege protected an internal corporate investigative report of an automobile accident involving the plaintiff employee. While noting that the privilege "prevents disclosure of confidential critical, evaluative and/or deliberative material whenever the public interest in confidentiality outweighs an individual's need for full discovery," the court also made it clear that the privilege does not protect factual information. New Jersey courts have subsequently applied this privilege to various peer review materials and activities.

In *Estate of Hussain by Hussain v. Allan Gardner*, 264 N.J. Super. 208 (Law Div. 1993), the court held that statements made by the defendant physician to a hospital's quality assessment committee relating to the management

and treatment of the plaintiff's decedent fell within the self-evaluation privilege and therefore were not discoverable in a malpractice action. In addition, in *Bundy v. Sinopoli*, 243 N.J. Super. 563 (Law Div. 1990), the court held that opinions, criticisms or evaluations contained within a hospital's peer review committee file were protected from disclosure by the privilege of self-critical analysis in a malpractice case).

In *McClain v. College Hospital*, 99 N.J. 346 (1985), a malpractice case, the Supreme Court applied the reasoning of the self-critical analysis privilege to a claim of executive privilege to shield certain confidential investigative records that the State Board of Medical Examiners had generated. Although the issue before the Court involved a licensing board's investigation as opposed to peer review materials, the Court explained that the concerns were the same. Both types of investigations invoke "serious and important questions of public policy deserving careful consideration by the courts." The Court held, however, that these important public policy concerns could be overcome by a showing of particularized need for the information "more compelling than the agency's interest in confidentiality."

In contrast, in the context of a discrimination case in which the plaintiff sought to discover the documents relating to the employer's internal investigation of the plaintiff's complaint, the Court rejected the defendant's claim of privilege. See *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524 (1997). While, as in the malpractice cases, the Court acknowledged the public policy concerns implicated when communications involving self-critical analysis are disclosed, the Court opted for a balancing test that takes into account the competing concerns. In so doing, the Court rejected application of a per se privilege and specifically "disavow[ed] the statements in the lower court decisions that have accorded materials covered by the supposed privilege near-absolute protection from disclosure."

In a recent unpublished opinion, *Musto v. Waldman*, Docket No.: A-5863-99T3F (N.J. Super. App. Div. Dec. 19, 2000), the Appellate Division distinguished *Payton* by noting that *Payton* involved a claim of ineffective remedial

measures in the context of a sexual harassment investigation, and, therefore, the self-critical, evaluative materials were highly relevant to the plaintiff's claim as well as to the defendant's affirmative defense that remedial measures were sufficient. In contrast, in *Musto*, a malpractice case, the evaluative portions of a hospital's internal reports of a suicide investigation were not relevant to the plaintiff's claim.

The *Musto* court reasoned that if a plaintiff seeks evaluative information, the plaintiff may offer such information through an expert or other discovery means. The court concluded that "[w]here the relevancy of such documents is either non-existent or slight, the 'exquisite weighing process' endorsed by the Court in *Payton*, justifies nondisclosure."

Although *Payton* appears to reject the privilege of self-critical analysis, careful reading of the opinion reveals that it expressly requires a court to undertake a detailed analysis of the competing interests at issue. The Court noted that in a discrimination case, that balancing will normally tip in favor of disclosure because the materials sought are highly relevant to a defendant's affirmative defenses and because of the strong public policy in eradicating discrimination.

In the context of a malpractice claim, the public's interest in improving patient care through a hospital's self-evaluative reports that are aimed at identifying the root causes of medical errors should generally outweigh a plaintiff's interest for disclosure of the investigative reports. However, the current state of the law is such that the public policy of health-care improvement can only be accomplished by a health-care organization's creation of potentially damning documents.

It follows then that, under the balancing test of *Payton* as applied in *Musto*, the public policy of improving health care outweighs the need of the individual plaintiff in a malpractice action to discover evaluative materials. But, in the recent unpublished opinion *Reyes*, the court held otherwise.

In *Reyes*, the Law Division held that a hospital's investigative report of the death of the plaintiff's decedent in accordance with joint commission requirements was discoverable in its entirety.

Citing *Payton*, the court rejected the hospital's argument that such documents were protected by the privilege of self-critical analysis. The court concluded that the plaintiff's interest in obtaining discovery to prove his malpractice claim outweighed the hospital's need to keep such reports confidential.

The *Reyes* court did not view the hospital as a promoter of the public welfare and rejected the argument that public disclosure of these materials would undermine the ability to obtain candid reports from health-care providers in future cases. The court was particularly influenced by the fact that no New Jersey statute or regulation shields such materials from disclosure.

Reyes demonstrates that reliance on the common law for protection of these types of materials is insufficient and signals the need for legislation to protect the confidentiality of materials created to promote the public policy of improving health care and patient outcomes. Existing statutory protections are inadequate in New Jersey.

State Statutory Protections

N.J.S.A. 2A:84A-22.10 provides immunity to individuals who participate in peer review activities in New Jersey. However, neither the statute nor the corresponding regulations protect materials related to such reviews. The only statutory privilege for peer review documents in New Jersey is found in N.J.S.A. 2A:84A-22.8. The statute protects the confidentiality of data obtained by utilization review committees in their review of the quality of care given to Medicaid patients.

In *Todd v. South Jersey Hosp. System*, 152 F.R.D. 676 (D.N.J. 1993), the court held that documents created within a utilization committee were not discoverable. In addition, the privilege is extremely limited and cannot be expanded to include other committees' materials, such as materials generated by peer review committees. In *Young v. King*, 136 N.J. Super. 127 (Law Div. 1975), the court held that the utilization privilege applies to utilization committees only and should not be broadened to include other committees.

New York Public Health Law §2805-m provides that records generat-

ed pursuant to the state's malpractice prevention program, investigations related to granting doctors hospital privileges and reports required pursuant to New York's incident reporting requirements are privileged as well. The incident reporting statute, §2805-1, applies to events of the type that are subject to review by the joint commission, suggesting strongly that joint commission sentinel event reporting materials would be protected under the statute.

Pennsylvania also provides statutory protection for peer review deliberations in Pa. State. Ann. tit. 63, §425.4. The statute provides that all proceedings and records of a review organization will be confidential and not subject to discovery or introduced into evidence in any civil action against a professional health-care provider.

Federal Legislation

There is no federal statute that specifically protects the confidentiality of self-evaluative reports such as those submitted to the joint commission in connection with a sentinel event. However, some defendants have been successful in protecting similar documents under the Peer Review Improvement Act of 1982 42 U.S.C. 1320c et seq. For example, in *Armstrong v. Dwyer*, 155 F.3d 211 (3rd Cir. 1998), the court held that documents generated by a private peer review organization under contract with the Health Care Financing Administration were not subject to discovery.

The purpose of the act is to ensure the quality of health care provided to Medicare patients. The act requires that the U.S. Department of Health and Human Services enter into contracts with private utilization and quality control peer review organizations to review the performance of doctors who provide

care to Medicare patients. In the process of its review, a federally created utilization review organization will generate and collect various documentation concerning the physician in question. The statute, which is the federal counterpart to N.J.S.A. 2A:84A-22.8, expressly prohibits disclosure of such information. This prohibition extends to information generated by the physician or hospital under review in response to the peer organization's review proceedings.

The statute is narrowly drawn and has been interpreted to apply only to federally defined peer review organizations. Because the joint commission is not an organization designated by the secretary of Health and Human Services to review the professional activities of physicians and other health-care providers who care for Medicare patients, sentinel event reports would not fall under the confidentiality provisions of the act.

Another statute that promotes the federal policy in favor of a peer review privilege is the Health Care Quality Improvement Act of 1986, 42 U.S.C. 11101 et seq. As stated in *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992), the purpose of the HCQIA is to provide for "effective peer review and interstate monitoring of incompetent physicians, and to grant qualified immunity from damages for those who participate in peer review activities" in an effort to remedy these nationwide problems.

Although the HCQIA provides for confidentiality, this only applies to information reported under the HCQIA — information the HCQIA requires a health-care facility to report to the Board of Medical Examiners or the Board of Medical Examiners to report to the secretary of Health and Human Services regarding certain corrective actions

taken against a physician. The information and documents relating to sentinel events reported to the joint commission by a health-care facility would likely not be considered privileged under the HCQIA.

District courts have reached inconsistent results in applying the federal common law as it relates to self-evaluative materials. In *Leon v. County of San Diego*, 202 F.R.D. 631 (S.D.Cal. 2001), the court held that there is no self-critical analysis privilege under federal common law. Further, in *Weekoty v. U.S.*, 30 F.Supp.2d 1343 (D.N.M. 1998), the court recognized the privilege of self-critical analysis in the medical peer review context, shielding such records from disclosure.

Consequently, depending on the jurisdiction, federal common law cannot necessarily be relied on to protect from disclosure the self-evaluative materials generated by a health-care organization when conducting a sentinel event investigation.

The patchwork of common law and statutory provisions that protect from disclosure certain peer review materials does not specifically protect materials that hospitals must compile as they analyze the root causes of a sentinel event reported to the joint commission. Without such specific privilege protection, the public runs the risk that health-care organizations' liability concerns may negatively impact their ability to conduct honest and thorough investigations of reportable sentinel events.

This state of affairs undermines the public policy in favor of improving the quality of health-care services and reducing medical errors. It also puts health-care organizations between the proverbial rock and a hard place as they try to discharge their public duty and attempt at the same time to avoid liability ■