Pennsylvania case reminds Ohio hospitals of the importance of adhering to provisions of peer review statute

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A recent Pennsylvania Supreme Court decision, Reginelli v. Boggs, 0 WAP 2016, 21 WAP 2016, 23 WAP 2016 (Pa. Mar. 27, 2018), has been raising a number of questions regarding the strength of a state peer review privilege based upon the Court's decision that the Pennsylvania peer review privilege (PA Privilege) did not apply to the "performance file" of an emergency medicine (ED) physician. However, the decision is very consistent with decisions of Ohio courts regarding Ohio's peer review privilege (OH Privilege).[1] The decision also provides some very good reminders of what needs to be in place if a health care provider seeks to take advantage of the peer review privilege, regardless of the state in which the provider is located.

The Pennsylvania statute extends peer review protection to designated entities when they use a peer review committee for designated quality activities. In this case, the medical director for the exclusive emergency medicine provider (EMRI) (who was an EMRI employee) conducted performance reviews of the ED physicians (who were also employed by EMRI). The facts seemed to indicate that the review was for EMRI as well as for the hospital. A medical malpractice plaintiff demanded production of an ED physician's performance file. Both EMRI and the hospital objected to the demand, both claiming the file was protected by the PA Privilege.[2] Under a strict construction of the statutory provisions of the PA Privilege, the Court rejected both claims. As to EMRI, the Court found that it was not a provider recognized by the statute. It refused to accept EMRI's argument that it was "close enough." As to the hospital, the Court found that, although the hospital was a designated provider, there had been no involvement of a peer review committee. It further rejected the argument that the medical director qualified as a committee.

What does this mean in Ohio?

- Every state has its own peer review statute and is governed by its own state court decisions. Although an Ohio court might look to another court for common law principles, it would not look to another court (such as this Pennsylvania decision) for purposes of construing an Ohio statute.
- As a general principle, courts do not like privileges, because they inhibit the flow of information. Accordingly, privileges are almost always strictly construed. "Close" still only counts in horse shoes and hand grenades.
- Prior to its revision in 2003, Ohio courts, under strict statutory construction, refused to extend the Ohio Privilege to HMOs, because they were not listed as designated entity. [3] This, then, became one of the major revisions made to the statute, which now has a broad definition of "health care entity."
- The Ohio statute — like the Pennsylvania statute — only extends protection to a peer review committee, not to an individual.
- Although arguments were made in the Pennsylvania case of potential waiver of the PA Privilege, the concept of waiver was incorrect. Most privileges contain a waiver provision (e.g., a patient can waive the physician/patient privilege); the OH Privilege does not. Instead, it states that peer review information (defined as information used solely for peer review purposes) is not subject to discovery in any civil proceeding. For example, if a quality review is in a physician's medical staff file and employment file, the review is not subject to discovery from the medical staff file. The information is, however, discoverable from the employment file, because that information was used for employment purposes. And if the review is kept in a single file that is used for both peer review and employment, the file will be considered "public" and discoverable.
- Consistent with the prior bullet, if this case had been in Ohio, the court would have also held that because the performance file was used for a non-peer review purpose (an EMRI employment review of its physicians), the file would have been discoverable from EMRI even if the hospital had a peer review protected file.

Here are some key takeaways from the decision for Ohio health care entities:

- Be sure you qualify as a health care entity. This means you must have a peer review process that is only used for peer review purposes.
- Be sure you have a peer review committee — and be sure it looks like other committees (e.g., members, minutes, etc.).
- Be sure any individuals who participate in peer review (e.g., department chairs) are acting by or on behalf of a peer review committee. This must be reflected in a written document such as a peer review policy or other medical staff governing document.
- Check your contracts for medical services — does it obligate the entity (such as the anesthesiology group) to participate in medical staff peer review? If so (and they usually do), does the contract make clear that the group may not take peer review information and use it for an employment purpose? If not, it should.

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[1] Ohio Revised Code § § 2305.25, et seq.

[2] It did not help that EMRI argued that it was the only entity entitled to the privilege, that it maintained the file "solely" on behalf of EMRI and that it did not share the file with the hospital. In contrast, the hospital argued that the medical director conducted the peer review on behalf of both EMRI and the hospital and that it had a copy of the file. In fact, contrary to EMRI's claim, the hospital produced the file to the court for an in camera inspection.

[3] Lomano v. Cigna Healthplan of Columbus, Inc., 83 Ohio App.3d 40, 613 N.E.2d 1075 (1992).

Authors

Catherine M. Ballard

Partner

Columbus
614.227.8806
cballard@bricker.com

