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Peer-Review Privilege Narrowing as Health Care Changes

Ben Seal, The Legal Intelligencer

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A shift toward limiting the privilege afforded to health care providers by the Peer Review Protection Act has placed a heightened burden on doctors and hospitals attempting to keep internal discussions from being used as evidence in medical malpractice litigation, attorneys said.

As a result, health care professionals and their counsel are engaged in a fight to "protect the protection" amid doubts about the continued utility of the peer-review process and the act that shields it from plaintiffs, lawyers said.

"[PRPA] immunities are going to become increasingly irrelevant," said Clifford A. Rieders, a medical malpractice plaintiffs attorney at Rieders, Travis, Humphrey, Waters & Dohrmann. "It's inconsistent and incompatible with modern patient safety and with the network structure providing medical care."

As the health care field becomes increasingly institutional and corporate in nature, systemic negligence is a growing concern, and courts are opening the door to plaintiffs seeking discovery from hospitals in an attempt to prove their claims, Rieders said. Health care professionals seeking to evaluate practices and openly exchange information about medical care are now facing added pressure to ensure their analysis meets the requirements of the PRPA in order to maintain its protection.

"Doctors and health care providers are far more concerned about it than they used to be in the past, and I think that could have a chilling effect on candor [in discussing medical care]," Dean Murtagh, who focuses on medical malpractice defense at German, Gallagher & Murtagh, said.

Eric Weitz, a plaintiffs attorney at Messa & Associates, said the increased focus on patient-safety initiatives since the Medical Care Availability and Reduction of Error Act's passage in 2002 has given rise to approaches beyond internal root-cause analysis, diminishing the utility of the peer-review process. Weitz and Rieders are both members of the Pennsylvania Patient Safety Authority, a state agency created under MCARE to help reduce and eliminate medical errors in the field by identifying problems and recommending solutions.

As large health systems have proliferated, risk management has gained a new profile, Weitz

said. Hospitals are now too sophisticated to allow internal discussions to fall outside of the protections of the PRPA, he said.

Veronica Richards of Richards & Richards, chair of the Pennsylvania Association for Justice's medical malpractice section, said the public policy behind peer review sounds good, but patient safety is more than ever an institutional mandate, presenting other avenues for evaluation of care.

"There's a chilling effect on creating the documents in a context where it may get disclosed to the other side," Weitz said. "When you combine that historic chilling effect and the uncertainty of the [PRPA] with entities that now have other tools available to them—where they can accomplish the same or better results without having to run that risk—I think, unfortunately, the peer-review process is becoming kind of a non-issue."

Murtagh said peer review is as important as ever, but when performed without following the strictures established by the PRPA, "it can be a real boon for a plaintiff's lawyer." The situation complicates attempts at hospitals to openly discuss past incidents in order to learn from them, he said.

As an example, Murtagh pointed to an incoming director at a large hospital group. The director wanted to sit down and talk with staff, educate them on certain issues, but grew concerned about having a discussion that fell outside the protections of the PRPA. If the director referred to a specific case, could it be discoverable down the line, given that it wasn't a formal peer review?

What if a hospital's anesthesiologists attend a staff meeting to brainstorm ideas? Would the protection be in place if they referenced certain incidents?

It's becoming more and more difficult to protect peer-review information, according to defense attorney Gary Samms at Obermayer Rebmann Maxwell & Hippel.

"The more decisions there are that allow plaintiffs to get statutorily protected information, [it] can act to disincentivize health care providers from having these necessary and important peer-review committees," Samms said.

When that happens, he said, patient safety can be inhibited.

The only way to avoid questions about what material falls under the PRPA is to prospectively prepare for them, Murtagh said. He counsels clients to follow a checklist in order to adhere to the act's requirements and ensure a teaching exercise won't be available to plaintiffs in potential future litigation.

The act describes peer review, in part, as "the procedure for evaluation by professional health care providers of the quality and efficiency of services ordered or performed by other professional health care providers, including practice analysis." It gives immunity to those providing information to a peer-review organization and confidentiality to records involved in the process, as long as they aren't available from an original source.

The confidentiality issue has been the subject of recent litigation, and attorneys said the courts are beginning to tighten the protection, creating opportunities for plaintiffs. Rieders said it's a move back to the original intent of the act, and an important one as health care becomes more corporate.

"In order to be able to prove systemic negligence, you have to be able to investigate the system," Rieders said.

Gary Solomon of Lowenthal & Abrams represented the plaintiff in Venosh v. Henzes, an Aug. 7 Superior Court decision that held a peer review initiated by an insurance company to decide whether to maintain a business relationship with the doctors being reviewed is not privileged. Hospitals are changing their policies and procedures in an effort to get certain information protected by the act, he said.

Even when the PRPA is pierced and information is made available in discovery, it's often "boilerplate," Solomon said, not the type of evidence that will turn a case. Weitz agreed, saying he never plans on getting anything internal that will help his case.

But the possibility exists for a golden piece of evidence to come from an internal discussion that didn't meet the PRPA's standards, Solomon said, so plaintiffs will continue to pursue it and health care professionals will continue to seek the act's protections.

Richards said that because of the fact-specific nature of PRPA cases, "there is absolutely no uniformity throughout the state." Some judges simply accept the defendants' claims that material is protected, while others lean toward allowing discovery of similar material, she said.

Even appellate precedent, like the Venosh case, can only go so far to delineate the law of the land because each case has its own set of facts, Solomon said.

Murtagh said plaintiffs don't chase potentially privileged material as much as they once did, but the defense bar is still focused on "protecting the protection." In any medical malpractice case that comes through the door, he said, it could be an issue.

"It's a case-by-case situation and the only way to pre-empt it is to do everything right to begin with," he said.

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