

Investigations By A Medical Peer Review Committee Are Not Discoverable Unless The Committee Consents To Production Of Information In Writing

By Barker, Leon & Fancher, LLP

In Re the University of Texas Health Center, opinion delivered October 26, 2000, 2000 WL 1591005 involved the granting of a writ of mandamus in which the Texas Supreme Court held that the University of Texas Health Center at Tyler (hereinafter referred to as the Health Center) did not have to produce records concerning the results of an investigation by a medical peer review committee.

1. FACTS OF CASE

The trial court ordered the Health Center to produce information concerning an evaluation by a peer review committee of medical care provided to the plaintiff James McClain as well as other patients at the Health Center. James McClain, along with several other patients, brought suit against the Health Center as a result of infections that were contracted following open heart surgery.

McClain noticed a deposition of a corporate representative of the Health Center. The deposition notice requested that the corporate representative produce several categories of documents. The Health Center objected to the production of the documents, contending that the documents were not discoverable as the notice constituted a request to produce information about the results of an investigation of a peer review committee.

The date of the first deposition was changed and the plaintiff then filed a second amended notice and, once again, a third amended notice. The Health Center did not file objections to the second amended notice but did file objections to the third amended notice. The issue decided by the Supreme Court was whether documents prepared by a medical peer review committee were discoverable. A secondary issue was whether the Health Center had waived its privilege against the production of such documents.

2. RECORDS FROM A MEDICAL REVIEW COMMITTEE ARE NOT DISCOVERABLE

The Court found that pursuant to Texas Occupational Code §151.002 (a) (8) [formerly Texas Revised Civil Statutes, Article 4495(b) §1.03 (a) (b)] the records at issue were clearly records involving an investigation by a peer review committee of the Health Center. As such, the Court held that:

all proceedings and records of a medical peer review committee are confidential, and all records of, determinations of, and communications to a committee are privileged and are not discoverable, with certain exceptions not relevant here. (Citations omitted) Section 161.032 of the Health and Safety Code similarly provides that the records and proceedings of a medical committee are confidential and are not subject to a court subpoena.

The Court held that the records at issue were clearly "proceedings or records of a medical peer review committee" and as such were not discoverable.

3. ONLY A PEER REVIEW COMMITTEE CAN WAIVE THE PRIVILEGE AGAINST THE PRODUCTION OF RECORDS RESULTING FROM ITS INVESTIGATION AND SUCH WAIVER MUST BE IN WRITING

The plaintiff furthermore contended that the privilege against production of records from a peer review committee had been waived because (1) the Health Center failed to object to the second deposition notice, (2) the Health Center did not comply with revised Rule of Civil Procedure 193 in objecting to the production of such records, and, finally, (3) the Health Center had provided some of the requested information in answers to discovery and therefore had voluntarily waived the privilege against the production of information resulting from a peer review committee investigation.

The Court gave no credence to any of these arguments by the plaintiff. The Court held that the Health Center did not waive its objection to the production of information because the Health Center did not object to the second deposition notice. The Court found that the Health Center had clearly objected to the first and third deposition notices and all the deposition notices were substantially similar (other than the notices provided different dates for three depositions of the Health Center representative). The Court held that:

the Health Center had already made its objections clear in response to the earlier virtually identical notice and request for documents. It was not required to reiterate its objections when only the date and time of the deposition were changed.

The Court furthermore found that the Health Center did not have to comply with Rule 193 of the Texas Rules of Civil Procedure as the deposition in question and the objections thereto were all filed prior to January 1, 1999, when Rule 193 went into effect.

Finally, the Court concluded that the Health Center did not waive objections to the production of information resulting from the investigation by the medical peer review committee by partially answering an interrogatory which provided some of the information concerning recommendations by the medical peer review committee. The Court first found that by virtue of the provisions of Texas Occupational Code §160.007 (e)-(g), [formerly Texas Revised Civil Statutes Article 4495 (b), §5.06 (j)], only the peer review committee could execute a waiver. Furthermore, any waiver by the peer review committee must be in writing, as required by statute:

Unless disclosure is required or authorized by law, records or determinations of or communications to a medical peer review committee are not subject to subpoena or discovery and are not admissible as evidence in any civil judicial or administrative proceeding without waiver of the privilege of confidentiality executed in writing by the committee.

The Court also quickly dispensed with the third argument by the plaintiff that the Health Center had voluntarily waived the privilege of confidentiality by answering an interrogatory in

which the Health Center ". . . voluntarily set forth specific recommendations that its medical peer review committee had made during its investigation of the outbreak of infection." The Court decided that:

. . . the voluntary production of information about the infection control committee's (the peer review committee at issue) recommendations in response to a discovery request does not waive the privilege that protects the documents received, maintained, or developed by the committee from discovery in this suit asserting health care liability claims.

The Court noted that even if the Health Center had voluntarily provided some information developed by the medical peer review committee in answers to discovery that this did not operate as a waiver of the privilege. The Court held that a waiver of the peer review committee privilege can only exist if executed by the peer review committee itself and the waiver was clearly set out in writing. As a result, by providing information in discovery, the Health Center had not waived the privilege of confidentiality that was given by statute to a medical peer review committee.

Finally, the Court reviewed the facts of the case and acknowledged that the trial court had provided copies of the documents at issue to the Plaintiff. The Court found that the trial court could not waive the privilege of confidentiality on behalf of the Health Center as the privilege belonged to the peer review committee and not to the trial court.

ANALYSIS OF OPINION

The Supreme Court held that the only way to obtain discovery concerning investigations by a medical peer review committee is to have the peer review committee voluntarily waive such privilege in writing. We doubt that there will ever be a situation where a medical peer review committee will want to do so. Any attempts to obtain discovery of a medical peer review committee will be reviewed by the court in accordance with the strict statutory requirements for waiver.