

New peer review confidentiality issues

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* React to this article in the Discussion Forum.

The Pennsylvania Supreme Court, in October, rendered an opinion that, according to both critics and proponents will have significant effect on the discoverability of peer review proceedings in Pennsylvania. In *Hayes v. Mercy Health Corporation*, the Court created a new exception to the confidentiality provisions of Pennsylvania's Peer Review Protection Act (the Act). Specifically, the Court held that the confidentiality provisions of the Act do not apply to a physician's challenge of his own peer review process.

Facts

In October of 1995, Mercy Catholic Medical Center summarily suspended the clinical privileges of Timothy J. Hayes, M.D., who had privileges as a general surgeon at the Medical Center. Following the suspension, Dr. Hayes requested a hearing before a peer review panel, which was his procedural right under the Medical Center's Medical Staff Bylaws. After numerous procedural complications and hearings, the peer review panel unanimously recommended that the suspension be terminated "because the facts (of the underlying case) do not support suspension." Pursuant to the Hospital's Medical Staff Bylaws, the panel then forwarded its recommendation to the Medical Center's Medical Board. At a meeting held to consider the peer review panel's decision, a tape recording was made of the Medical Board's proceedings. The Medical Board approved the peer review panel's recommendation making one minor change to the panel's conclusion: instead of stating that the facts "do not support suspension," the Medical Board's recommendation stated that the facts "do not support continued suspension." The Medical Board sent its recommendation to the Medical Center's Board of Directors for final action.

Dr. Hayes sought to challenge the Medical Board's recommendation because he feared that the Board, by advising against "continued" suspension, was implying that the initial suspension had been appropriate. In addition, a confidential source had allegedly informed Dr. Hayes that some members of the Medical Board had acted in bad faith in making its recommendation. Dr. Hayes wished to learn what had transpired at the Medical Board meeting, and this prompted him to request a copy of the taped proceedings. The Medical Center denied this request. Thereafter, the Medical Center's Board of Directors approved the reinstatement of Dr. Hayes' privileges at the Medical Center.

Dr. Hayes filed a suit to enjoin the Hospital from destroying the taped recording of the meeting and to order the hospital to furnish a copy of the tape to him.

The lower court ordered the Medical Center to produce the tape, and the Hospital filed a Notice of Appeal with the Commonwealth Court, along with an emergency application for a stay of the

lower court's order.

The Commonwealth Court granted a temporary stay. But, in an unreported opinion, quashed the Medical Center's appeal as moot, noting that Dr. Hayes had obtained the reinstatement of his privileges and that the Board of Directors' decision reinstating his privileges was not subject to further hearing or review by that court. The Medical Center filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court and Dr. Hayes joined in the request.

Section Four of the Act

The Supreme Court's decision focused on Section Four of the Act, which protects the confidentiality of peer review records "in civil actions...arising out of the matters which are the subject of evaluation and review by such committee."

Dr. Hayes argued that this language was key to his request to receive the tape because his challenge to the Medical Board's proceedings was not based upon the Medical Board's review of the quality of medical care he provided to a particular patient. In that instance, if a patient were to bring a civil action against him or the Medical Center for malpractice, the confidentiality provision would apply. Dr. Hayes argued however, that his challenge did not arise out of a substantive issue of patient care. Instead, he sought to determine the fairness and integrity of the Medical Board's review of his suspension.

The Court adopted Dr. Hayes' argument. In reaching its decision, the Court looked to the legislative history and the language of the peer review statute which, in their view, made clear that the intent of the Pennsylvania Legislature, "was to prevent the disclosure of peer review information to outside parties seeking to hold professional health care providers liable for negligence, while at the same time ensuring that such guarantee of confidentiality did not operate to shield from discovery those rare instances in which the peer review process was misused."

The Court concluded then, that because Dr. Hayes sought to learn, through internal hospital proceedings, whether this was an instance in which the peer review process was misused, Section Four of the Act did not bar him from obtaining a copy of the audio tape at issue. The Court, therefore, directed the Medical Center to provide a copy of the tape to Dr. Hayes, with a caveat: the Medical Center retained the right to seek a protective order to insure confidentiality of the contents of the tape and to limit the disclosure of the tape's contents to the specific purpose of Dr. Hayes ascertaining whether Medical Board's proceedings had been misused.

Partial Dissent

In a partial dissent, Justice Sandra S. Newman disagreed with the majority's restriction limiting Dr. Hayes' discovery of the tape recording solely to his challenge of the Medical Board's recommendation. Justice Newman stated that if Hayes desired the peer review information to support a defamation or contract claim, the confidentiality provisions of the Act should not impede his ability to get it. "Such a limitation will certainly encourage additional, unnecessary litigation," Newman wrote. "Because the restriction suggested by the majority is inconsistent with

the Peer Review Act, and pointlessly burdensome to Dr. Hayes, I join the majority in its decision to affirm...the trial court, but dissent concerning any restriction it attaches" to Dr. Hayes' use of the tape.

Reactions to the Decision

Critics of the Hayes decision believe that it will have a dire effect on peer review protection in Pennsylvania, and that the confidentiality provisions of the Act are being eroded in the context of staff privilege litigation. In essence, critics state that the Court created a plaintiff-physician exception not clearly present in the Act's statutory language. Opponents of the decision argue that if such an exception is created, it should come from the legislature, not the Supreme Court.

Critics further note that although the Supreme Court opined that it is a "rare" instance for the peer review process to be challenged based upon misuse, it is surely likely to influence physicians and their attorneys to raise fairness and integrity challenges to peer review and medical board decisions.

For the same reason, proponents of the decision believe that this physician-plaintiff exception is necessary because it will provide physicians with previously lacking protection and influence hospitals to be responsible in their conduction of peer review proceedings. In particular, proponents believe that the decrease in reimbursement, and the closing of hospitals, together with the increased use of economic credentialing in determining hospital staffs, have lead peer review organizations to function as mechanisms to weed out competitors rather than to investigate actual health care concerns. Proponents view this decision as a means of preventing the peer review process from being misused.

Immunity Protections for Peer Review Committee Members

The Act, in addition to the confidentiality provisions, contains immunity provisions which shield peer review committee members, and those individuals providing information to the peer review committee, from individual civil liability in tort and contract. However, these immunity provisions apply only:

- To committee members who act in good faith, without malice, and with due care during the review process.
- To those individuals providing information to the committee if the information provided is not knowingly false or unrelated to the peer review process.

The Pennsylvania Supreme Court has previously determined that in peer review matters, malice does not have to mean a particular ill will towards another physician, but can include recklessness for the consequences or a mindless disregard for the social duty of the committee.

As a general rule, bald allegations or speculations about malicious intent are insufficient to deny an individual immunity under the Act, and any physician seeking to circumvent the Act must have

factually specific and concrete charges.

Similarly, the federal Health Care Quality Improvement Act, although not the focus of the Hayes decision, creates a presumption of immunity from liability under federal and state law claims in contract and tort, provided that the proceedings comport with certain due process requirements and otherwise are conducted with a reasonable belief that the peer review action is warranted by the facts known and with a reasonable effort to obtain the relevant facts.

While future litigation will necessarily define the boundaries of the Hayes decision, it appears that in Pennsylvania, physicians now have the means to access documentation or recordings of their peer review proceedings. With this access it should be easier to substantiate allegations of bad faith and improper motive of the peer review committee members and to overcome the presumption of immunity. An unfortunate side effect will likely be a chilling of the peer review process.