Peer Review Is Not Always Privileged

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Hospitals, ambulatory surgery centers and independent diagnostic centers cannot exist without physicians and other medical providers. In order to practice at those facilities, the medical professional often is required to be “admitted” to the medical staff of the facility. Although admission to the medical staff provides privileges, it often requires that the professional agree to a periodic competency review by other members of the medical staff – i.e. a peer review.

In theory, peer review is the best manner for evaluating a practitioner’s competency. Presumably, other practitioners in the same location possess an understanding of all of the factors that determine whether a person is professionally competent. In practice, because of professional jealousy, envy or simple competition, peer review has been used to “punish” practitioners who are too successful, too aggressive or who simply do not observe the unspoken rules of the professional hierarchy. In the past, a practitioner who was treated unfairly in a peer review process often would resign from the hospital and relocate. The advent of the National Practitioner Databank requiring the reporting of every negative peer review event makes relocation untenable.

The laws of all states and the District of Columbia provide that “peer review proceedings” are “privileged.” Therefore, a practitioner who contends that he or she has been injured by an unfair peer review proceeding is unable to discover what was said or done in the peer review hearing. In many instances, the practitioner is unable to determine what materials the peer review committee reviewed to make its decision.

Although the Health Care Quality Improvement Act, 28 U.S.C. §§ 11101 – 11152, grants immunity to participants in a peer review, HCQIA does not make peer review proceedings privileged. Likewise, as noted recently in Roberts v. Legacy Meridian Park Hospital, Inc., No. 3:13-cv-01136-SI (D. Ore. Apr. 25, 2014), federal courts do not recognize a “common law” privilege for peer review proceedings. Therefore, in cases in which violations of federal statutes are alleged (e.g., discrimination, antitrust), the federal courts will allow the physician to obtain discovery concerning the peer review process, including information about peer review proceedings concerning other similarly situated physicians. Consistent with this finding, the federal district court in the Roberts case allowed discovery of the plaintiffs’ peer review records as well as the peer review records of other hospital physicians in the same specialty.

For practitioners who are subject to adverse peer review, the lack of a federal peer review privilege makes federal court the best venue for any proceeding. For practitioners who are reviewers in peer review proceedings, the lack of a federal peer review privilege means that great caution should be exercised to ensure that the peer review proceeding is free of bias, prejudice or other impropriety. The record should reflect all materials considered and the basis for any adverse action.

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