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Health Law

Limits to Peer Review Privilege

Privacy laws and concerns regarding confidentiality often prevent physicians from serving on peer review boards.

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Dr. Mikalla, an international medical graduate, was admitted to a surgery residency program at a large urban medical center. After completing the program, Dr. Mikalla was offered staff privileges at the hospital and stayed on performing general surgery. He never felt entirely comfortable at the hospital and even after several years did not perceive that he shared the esteem of either his colleagues in surgery or his division chief.

In performing a laparoscopic procedure, Dr. Mikalla inadvertently punctured the iliac artery of the patient, causing loss of blood and a life-threatening emergency. He repaired the puncture, and the patient recovered. The incident was discussed at a subsequent M & M at which Dr. Mikalla explained the occurrence and its resolution.

About 5 months later, Dr. Mikalla received notice that the hospital's peer review committee had suspended his staff membership and clinical privileges pending further investigation of the incident. After a full hearing, the hospital's medical board voted to terminate Dr. Mikalla's medical staff privileges. Dr. Mikalla saw this as out-and-out discrimination on the basis of his race and ethnicity—a violation of his civil rights. Dr. Mikalla brought a suit for discrimination against the hospital, alleging that his peers would not have suspended the surgery privileges of an American-born surgeon under the same circumstances. To demonstrate his point, Dr. Mikalla solicited the records of the hospital's peer review committee meetings for the last 20 years, up to and including his own. The hospital denied his request for the records by pointing to state legislation that protects the privacy of peer review committee records. The trial court disagreed with the hospital's reading of the state's peer review privilege statute and ordered the hospital to turn over its peer review committee documents. The hospital lost its appeal and eventually produced more than 40,000 peer review documents for use as evidence in a jury trial to determine whether Dr. Mikalla's termination was discriminatory in relation to American-born surgeons.

Legal Analysis

The above facts are adapted from *Virmani v Novant Health, Inc* in which the US Court of Appeals for the Fourth Circuit considered the extent of peer review confidentiality privileges [1]. While medical peer review practices date back at least 50 years, legal issues surrounding privacy protections for the peer review process did not materialize until the late 1980s. In 1986, Congress responded to national concerns regarding physician competence by passing the Health Care Quality Improvement Act (HCQIA) to establish a central data collection service, known as the National Practitioner Data Bank, to monitor the credentialing of physicians by hospitals and states [2]. Prior to the HCQIA, each state's Board of Medicine acted as the repository of information concerning physicians, but it was well known that states were not successful at disseminating such information; physicians whose privileges or licenses were revoked in one state often went to another state to practice. The National Practitioner Data Bank accomplished Congress's central purpose of putting teeth into the peer review process but incidentally caused physician reluctance to serve on peer review committees. Congress addressed the issue by providing immunity from liability under certain federal laws (such as antitrust) for physicians who serve on peer review committees [3]. Congress did not, however, recognize the absolute confidentiality of peer review records in passing the HCQIA. In other words, physicians who serve on peer review committees may not be personally sued for their testimony under federal law, but there are no

federal privacy protections for their peer review records.

Statements made by reviewers in peer review documents could strengthen discrimination cases brought against the review board by the physician under review. Evidence in peer review documents that reflected poorly on the physician being reviewed might also be used by patients in cases against that physician or by HMOs and other health care providers in suits against the physician under review. The possibility that physicians who serve on peer review committees may be exposing themselves to future claims and actions made some physicians reluctant to participate in peer review. To overcome physician disincentives to serve on peer review committees, states enacted legislation to protect the absolute confidentiality of the peer review process.

Currently, 50 states and the District of Columbia have enacted peer review privilege statutes [4]. While each state's statute varies in scope and description, all offer immunity to those who participate in peer review [5]. State courts consistently apply their state privilege statutes to protect the integrity and confidentiality of the peer review process, yet federal court enforcement remains inconsistent.

State statutes that protect the confidentiality of the peer review process serve to assure physicians that records and statements made during peer review committee meetings cannot be used as evidence against them during litigation [6]. For example, physician negligence is a matter of state law, and, thus, malpractice suits brought by injured patients against physicians are heard in state courts. A state's peer review privilege statute binds the state court in such actions; peer review records remain confidential in malpractice suits and cannot be used as evidence either for or against a defendant physician.

Federal law, however, creates an exception from standard state protections for peer review records when such records are sought in civil rights cases, eg, cases alleging discrimination based on sex, race, ethnicity, religion, or national origin [7]. In the *Virmani* case, the court rejected the hospital's argument that its committee's peer review records were privileged—first, the state law privileges do not apply in federal cases; and second, the controlling federal law expressly created an exception to the state's immunity provisions in matters relating to civil rights.

Once the *Virmani* court rejected the state law privilege, the defending hospital argued for the creation of a parallel federal privilege that would apply in all federal cases. The *Virmani* court acknowledged that the issue before it was "whether the interest in promoting candor in medical peer review proceedings outweighs the need for probative evidence in a discrimination case" [8]. The hospital maintained that "confidentiality is essential to the effectiveness of medical peer review committees," that without confidentiality physicians would be less apt to serve on such committees, evaluations would be less candid, and in consequence, health care quality would suffer [9]. After acknowledging the importance of the hospital's concerns for confidentiality and health care quality, however, the court sided with Dr. Virmani, reasoning that the documents would not be used for any other purpose than the immediate case and that the national interest in eradicating discrimination outweighed the interest of promoting candor in the medical peer review process.

The hospital decided not to appeal the Fourth Circuit's decision about the peer review protection to the Supreme Court and will soon go to trial where a jury will determine whether the hospital's dismissal of Dr. Virmani was discriminatory [10]. Thus, to date, peer review documents remain privileged under state laws for medical malpractice purposes. In federal cases alleging discrimination, however, peer review records are not confidential and may have to be turned over to the courts as evidence.

References

1. *Virmani v. Novant Health, Inc*, 259 F3d 284 (4th Cir 2001).
2. 42 USC sec 11101 et seq.
3. 42 USC sec 1111(a)(1).
4. *Virmani v. Novant Health, Inc*, 259 F3d 284, 290 (4th Cir 2001).
5. New York, for example, provides that individuals serving on peer review committees shall not be liable for

damages to any person for any action or recommendations made, provided that the individual acted reasonably and without malice. NY CLS Educ § 6527(2003).
6. Eg, NY CLS Educ sec 6527(2003).
7. 42 USC sec 11111(a)(1).
8. 42 USC sec 11111(a)(1).
9. *Virmani v. Novant Health, Inc*, 259 F3d 284, 287 (4th Cir 2001).
10. Telephone conversation with Dr. Virmani's lawyer, James C. Culatta, Esq, October 2003.

Related Resources

- Albert, T. Doctors fear precedent in privileges case. *Am Med News* Nov 17, 2003. . Article discusses Adolf Lo, MD, v Provena Covenant Medical Center.
- Albert, T. Mounting tension over autonomy: Courts referee doctor-hospital battles. *Am Med News* July 21, 2003. Legal cases involving Community Memorial Hospital of San Buenaventura; Brooklyn (NY) Hospital Center medical staff; and others.
- Exeter Hosp. Med. Staff v. Bd. of Trs. of Exeter Health Res., 148 N.H. 492; 810 A.2d 53; 2002 N.H. LEXIS 160. (S Ct New Hampshire 2002).
- Lo v. Provena Covenant Med. Ctr., 796 N.E.2d 607; Ill. App. LEXIS 1186; 277 Ill. Dec. 521. (Appellate Court Of Illinois, 4th Dist 2003).
- Medical staffs need autonomy. Editorial. *Am Med News*. Sept. 15, 2003. Editorial describes Windt v Exeter Hospital, New Hampshire S Ct 2002; and Medical Staff of Community Memorial Hospital v Community Memorial Hospital, Superior Ct of Calif.
- Public Citizen, Inc. v. US Department of Health and Human Services. 151 F Supp 2d 64 (DDC 2001).

Questions for Discussion

1. What is the best way to balance physicians' interests in confidential peer review hearings with other interests such as eliminating discrimination?
2. Do you think peer review is an important part of medical school education? If so, how might this best be instituted to protect all student parties (ie, the student being reviewed and those sitting on the review committee)?

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