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Peer Review Protections in Indiana

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Indiana law has traditionally provided broad protection to records and information utilized in the "peer review" process, and has granted broad immunities to those participating in the process. During the 2000 session of the General Assembly, however, one House member submitted a bill which would have removed some of the provisions which currently prohibit disclosure of peer review records. This bill would have enabled patients to access the records and the final action of a peer review committee by submitting a request for that information. Although the bill did not pass, it may serve as a signal that these peer review protections could be altered in the future.

For the purposes of this article, "peer review" refers to the evaluation process utilized by a hospital or other health care facility to monitor the quality of the care provided by that institution. This process may be used to evaluate the qualifications of a physician or other health care provider during the credentialing process, or to monitor the overall patient care rendered by that individual. A hospital may also engage in peer review in order to investigate a specific incident or to evaluate the merits of a complaint against an individual's professional performance or other conduct.

Policies behind privilege and immunity provisions

In most cases, information relating to these self-monitoring activities is considered privileged in order to "foster an effective review of medical care." *Community Hospitals of Indianapolis, Inc. v. Medtronic, Inc.*, 594 N.E.2d 448, 451 (Ind. Ct. App. 1992). The peer review privilege is intended to encourage a health care facility to engage in a retrospective analysis of the health care providers who practice there, and to frankly evaluate the providers' performance, in order to improve the quality of care rendered at the facility. This privilege also protects the

individuals who participate in peer review committees, including health care providers, attorneys, and staff. This confidentiality allows these individuals to provide more substantive and thorough evaluations without fear of liability.

Current peer review statutes further promote the evaluation process by granting broad immunity from liability for damages to all peer review committee members and individuals who assist them. The federal Health Care Quality Improvement Act, 42 U.S.C. § 11111 *et seq.*, provides immunity for damages under either federal or state law to anyone who participates in a peer review process so long as his actions were reasonable and taken in good faith. The participant must take those actions in the reasonable belief that they were in the furtherance of quality health care, and must engage in reasonable efforts to obtain the facts of the matter. The participant must afford adequate notice and hearing or other fair procedures to the subject of the investigation, and his action must be reasonably warranted by the facts. 42 U.S.C. § 11112(a). Indiana law incorporates these federal requirements, and provides similar immunities for actions taken in good faith. *See* I.C. § 34-30-15-14 to 34-30-15-19.

Statutory requirements to assert privilege

Currently, Indiana law places strict limitations on the discoverability and admissibility of "peer review" information in order to promote these principles and protect the individuals involved. In order to successfully assert the peer review privilege, however, one must establish that the information sought to be protected satisfies statutory requirements.

First, the information must relate to a "professional health care provider." The term "professional health care provider" is not limited to physicians or hospitals, but encompasses a wide variety of professions, including nurses, therapists, technicians, pharmacists, chiropractors, social workers, and even managed care organizations. I.C. § 34-6-2-117. However, these individuals are not all entitled to receive all the benefits contained within the peer review statute, as only "independent practitioners" are entitled to a hearing and appeal. I.C. § 34-30-15-6.

Second, the information must relate to the qualifications of a health care provider, an evaluation of the care rendered by a provider, or the merits of a complaint against a health care

provider. *See* I.C. § 34-6-2-99(a)(1) (defining duties of peer review committee). When evaluating the care rendered by a provider, the committee may consider the accuracy of that provider's diagnosis, the appropriateness or quality of the care which was given, and whether that provider utilized reasonable services and procedures during the care. I.C. § 34-6-2-44(a). The Indiana courts have declined to protect communications outside these three areas, since this type of protection would expand the privilege past its intended scope and would not promote these self-monitoring activities. *See Ray v. St. John's Health Care Corp.*, 582 N.E.2d 464, 472-73 (Ind. Ct. App. 1991). The legislature has specifically provided that information regarding the charges for the services which were rendered or the methods used in arriving at that diagnosis is not considered to be part of the evaluation process. I.C. § 34-6-2-44(b). In addition, evidence of "financial incentives" offered to or withheld from private psychiatric hospitals or preferred provider organizations is not protected. I.C. § 34-30-15-22.

Third, the information must relate to activities of a "peer review committee." In order to qualify for this privilege, the committee must be organized by a group of health care providers, a hospital or other health care organization or the staff or governing board of that facility, or a state or federal law or regulation. I.C. § 34-6-2-99(a)(2). At least fifty percent of the committee members must be health care providers or members of the board of the facility. *Id.* In addition, the committee must have been organized for the purpose of conducting evaluations of patient care services. *Id.*

Scope of privilege

If these criteria are satisfied, nearly all communications and information relating to the peer review activity are considered privileged and are not subject to discovery. Indiana Code § 34-30-15-9 specifically provides that "no records or determinations of or communications to a peer review committee" are subject to discovery or subpoena in any judicial or administrative action. Even if peer review records are somehow obtained, they are still not admissible as evidence in any judicial or administrative proceeding without a prior written waiver by the committee. *Id.*

The chapter further provides that a committee member or organization *shall* invoke the evidentiary privilege unless the committee has executed a written waiver of the privilege. I.C. § 34-30-15-10 (emphasis added). This requirement is a mandatory one, as immunity does not extend to any individual who violates confidentiality requirements. I.C. § 34-30-15-14.

Indiana courts have declined to place a subject matter limitation on the privilege, as this might undermine the policy behind the privilege. The Court of Appeals has stated, "[T]he peer review privilege provides protection by granting confidentiality to *all communications, proceedings, and determinations* connected with a peer review process." *Terre Haute Regional Hospital, Inc. v. Basden*, 524 N.E.2d 1306, 1311 (Ind. Ct. App. 1988) (emphasis added). Communications between peer review committee members are protected "whether they are formally made in review proceedings or made in private in such a way as to shape the opinions of the persons charged with peer review." *Ray*, 582 N.E.2d at 472.

The courts have likewise declined to limit this privilege based on the motives of the peer review committee members. Peer review information remains privileged whether or not the members acted in good faith. *Basden*, 524 N.E.2d at 1310. A bare allegation of fraud is not sufficient to defeat the privilege either; the charging party must make a prima facie showing of a crime or fraud before the peer review information will lose this protection. *Id.*

Exceptions to peer review privilege

Like every rule, the peer review privilege has its exceptions. First, the privilege cannot be used to protect information which is available through other, non-privileged sources. Indiana Code § 34-30-15-3(a) provides: "Information that is otherwise discoverable or admissible from original sources is not immune from discovery or use in any proceeding merely because it was presented during proceedings before a peer review committee." Furthermore, a committee member or other person testifying before the committee cannot be prevented from testifying about matters within his knowledge simply because this information was presented to the peer review committee. *Id.* at (b).

The committee may be required to provide additional information to a physician or other

provider who is the subject of the peer review activity. Under I.C. § 34-30-15-4, the committee must allow the provider access to any records which pertain to the provider's personal practice and have been accumulated by the committee. In addition, the provider is entitled to appear before the committee to hear the charges and findings against him and to present evidence on his behalf. *Id.* Once a finding has been made, the governing board of a hospital or other organization is permitted to disclose the final action taken with regard to the provider without waiving the peer review protections. I.C. § 34-30-15-1(d).

The committee may be required to provide information to the attorney general's office if a complaint has been filed against the provider with that office. I.C. § 34-30-15-11. The governing board is also required to report any final, substantive, or adverse disciplinary action to the medical licensing board if that action results in an alteration of the physician's staff privileges or membership. I.C. § 16-21-2-6. In addition, a hospital or provider may utilize the peer review information "for legitimate internal business purposes." These purposes may include risk management and quality review, prevention and correction of errors or problems, educational or scientific purposes, and legal defense. I.C. § 34-30-15-21.

Conclusion

Indiana law currently provides broad privileges and immunities to those individuals participating in the peer review process in order to encourage facilities to evaluate the performance of health care providers and to improve the quality of care patients receive. By reducing these protections, the legislature could seriously undermine facilities' ability to effectively investigate and act on problems which arise. Investigative materials may contain incomplete or inaccurate information, which could be prejudicial to the health care provider in another proceeding. Physicians, attorneys, and other staff members will be reluctant to serve on or assist with peer review committees if they are aware that the communications of and information gained through the investigation process will be available to others. These records may contain privileged information about other patients which may not be disclosed due to physician/patient confidentiality requirements. Furthermore, proposed changes may conflict with

the requirements of the Health Care Quality Improvement Act, which would destroy the immunities available to individuals participating in the peer review process.

Many jurisdictions have wrestled with this issue recently, and it remains to be seen whether the Indiana courts and legislature will elect to alter these protections. If these provisions are altered in the future, these changes could hold significant ramifications for both health care providers and those individuals wishing to obtain peer review information.

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