

LAW WATCH

99-28

A Legal Newsletter from Foley & Lardner

JUL. 8, 1999

Although hospitals and medical groups initially were distressed when the U.S. Supreme Court declined to review a case involving state peer review protections last month, careful review of the decision reveals it is not cause for alarm. The effect of the Supreme Court's decision was to let stand a federal trial court's holding that peer review documents are discoverable in federal cases brought under the Emergency Medical Treatment and Active Labor Act, also known as EMTALA. The trial court's decision is not legal precedent, however, and hospitals and medical groups should proceed with their important peer review functions.

Background

The controversial *Redbud* decision stemmed from unfortunate events that began in February of 1996. The parents of Cody Burrows, an 11-month old boy, brought their feverish son to the Emergency Department of Redbud Community Hospital, a district hospital in Northern California. Doctors said that Cody was suffering from an ear infection and sent him home. When Cody's condition did not improve, his parents brought him back to the hospital twice in the following two days.

On his second return, Cody was treated by Wolfgang Schug, M.D., an emergency department physician who determined that Cody required more specialized treatment at a hospital that had a pediatric intensive care unit. At Dr. Schug's direction, Cody's parents set out for Santa Rosa, a trip across mountain roads that took about one and one half hours. When Cody arrived at the hospital in Santa Rosa, he was in cardiac arrest. He died two days later.

U.S. SUPREME COURT DENIES REVIEW OF FEDERAL DECISION ALLOWING ACCESS TO PEER REVIEW MATERIAL

Executive Summary

Action: *On June 7, 1999, in Redbud Community Hospital v. U.S. District Court for the Northern District of California, the United States Supreme Court declined to review and let stand a federal trial court decision that held California's peer review protection (Evidence Code section 1157) does not apply in federal cases brought under the federal "patient dumping" law, the Emergency Medical Treatment and Active Labor Act, also known as EMTALA.*

Impact: *Although troubling on its face, the Redbud decision should have little impact on peer review because it cannot be cited as legal precedent and because the lower court's reasoning was based on unusual facts.*

Effective Date: *Immediately.*

The Lawsuit

Cody's parents filed a lawsuit in federal court alleging violations of EMTALA, the federal law that prohibits "patient dumping," as well as state law claims of medical malpractice, wrongful death, emotional distress and

spoliation of evidence. State prosecutors also filed criminal charges against Dr. Schug, including second degree murder, involuntary manslaughter and child endangerment. (The criminal charges were not an issue in the federal trial court litigation.)

As the parents prepared their case, they attempted to obtain information pertaining to the proceedings and records of the hospital peer review meeting that addressed Dr. Schug's treatment of Cody. The hospital objected, saying those documents were protected by California's peer review immunity statute, Evidence Code section 1157. Section 1157 provides that the records and proceedings of peer review bodies are immune from discovery. Dr. Schug also objected, claiming the release would violate his right to privacy.

The plaintiffs argued that that the information was necessary to prove some of their claims. As section 1157 is a state statute, they contended that the limitations it imposes on California courts do not apply in federal court.

The Decision

In an unpublished opinion, the U.S. District Court ruled that California's peer review protection did not apply to a federal lawsuit that raised claims under EMTALA and the state malpractice law. Finding that the cause of action was based on a federal source (EMTALA), the court held that the Federal Rules of Evidence applied instead.

Two other factors were important to the court's analysis. First, it determined that the records of the peer review proceeding itself were relevant to

some of the plaintiffs' claims. Unlike simple malpractice cases, where the alleged misconduct can be proven without reference to later peer review documents, this case included allegations that the hospital engaged in misconduct during the peer review meeting itself. Specifically, plaintiffs alleged that hospital representatives decided to alter and destroy medical records during the meeting. Therefore, while the court left open the possibility that it might apply the peer review protection to future malpractice claims, it agreed with the plaintiffs that records of the meeting were necessary in this case to prove some of their allegations.

Second, the court rejected Dr. Schug's privacy claims in part because the criminal court already had decided to allow prosecutors to review the peer review records in connection with Dr. Schug's state court criminal trial. The court determined that because of this prior release, only minimal damage to Dr. Schug's privacy would result from a second release. (Dr. Schug was later acquitted of the criminal charges.)

Implications for Peer Review Committees

Although the court's decision initially may appear damaging to peer review, in reality, the implications for peer review committees are minimal. First, the decision is not a legal precedent. The decision was not published, and the California Court of Appeals, the California Supreme Court and the U.S. Supreme Court each declined to consider the case. This leaves only the unpublished district court decision, which cannot be cited in future litigation. Hospitals also must keep in mind that, even if it could be cited, the **Redbud** reasoning would apply only in federal court cases. The vast majority of malpractice and other lawsuits are brought in state court where section 1157 is alive and well.

Second, the decision does not break new ground in that hospitals very seldom have been afforded peer review protection in federal courts. While courts may apply a limited protection in some cases, there is no statutory

privilege that applies in federal court. Thus, peer review records always have been discoverable in most federal court cases.

Finally, the **Redbud** decision is very fact specific. Critical to the decision was the fact that the case included allegations of misconduct that occurred during the peer review proceeding itself, as well as the fact that a criminal court already had released the sought-after material.

It is possible that savvy plaintiffs' attorneys may search for EMTALA claims to attach to routine malpractice claims, now more than ever, with the hope that they will be able to bring lawsuits in federal court and uncover sensitive peer review information. Health care attorneys and professional associations undoubtedly will monitor these cases for a trend.

Nonetheless, peer review committees generally should continue to rely on state peer review protections, as the **Redbud** decision does not call for significant changes to the peer review processes. Peer review continues to be an essential function of hospitals and medical groups to ensure health care quality, to monitor risk management and liability concerns and to discipline physicians, when necessary. In some truly sensitive cases involving potential EMTALA violations, hospitals may wish to involve legal counsel in the investigation of the matter in order to benefit from the attorney-client privilege, which is valid in both state and federal court.

If you have questions regarding the **Redbud** decision, or if you require assistance on a specific matter at your facility, please contact **Carol Isackson** or **Margaret Duncan** in our San Diego office, **Robyn Meinhardt** in our Denver office, **Lowell Brown** or **Karen Weinstein** in our Los Angeles office, **Shirley Paine** or **Inge Penner** in our San Francisco office, or the member of the firm who normally handles your legal matters.

Law Watch is a review of recent legal developments prepared by the law offices of *Foley & Lardner*.

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