Rhode Island Supreme Court Affirms Limited Nature of Peer-Review Privilege

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In its recent opinion in *Pastore v. Samson*[1], the Rhode Island Supreme Court reaffirmed its view that the "peer-review privilege" offers a *limited* protection to certain information created by properly constituted peer-review boards. The opinion provides useful guidelines as to the type of information that may be protected from disclosure to plaintiffs and other parties seeking information presented at and created by peer-review boards. As will be discussed, the principle message from Pastore is that the peer-review privilege is quite limited, and that physicians and hospitals should be mindful that not everything they may consider as "peer-review privileged" material actually is protected from discovery.

A "Discovery Melee"

Pastore's estate commenced this lawsuit against Dr. Samson, a fellow doctor, and Kent County Memorial Hospital following Mr. Pastore's death on July 12, 1998. The plaintiff's complaint alleged that Pastore died as a result of negligent care delivered by the defendant doctors. In addition to the medical malpractice claims against the doctors, the plaintiff alleged that the Hospital had negligently credentialed and granted privileges to Dr. Samson.

The lawsuit descended in what the Court termed a "discovery melee," in which the "discovery phase stalled as plaintiff and the hospital engaged in a lengthy battle over certain hospital documents concerning Dr. Samson." At issue were 750 pages that the Hospital claimed were protected by the peer-review privilege, as well as other confidentiality protections. The dispute reached the Supreme Court after numerous proceedings in the lower court, stretching-out over more than two and a half years. The specific ruling on appeal was the trial court's order rejecting the Hospital's claims of privilege, and ordering that all 750 pages be turned over to plaintiff.

The Supreme Court affirmed the production of all but one page of the documents—and even that one page was ordered to be produced with certain information removed.

The Peer-Review Privilege is "Strictly Construed" and Limited

In its analysis, the Court first reviewed the Rhode Island statutes that create the peer-review privilege as well as its past opinions interpreting the privilege. The Court noted that "two similar yet distinct Rhode Island statutes afford providers of health care the peer-review privilege," "which create a privilege for the 'proceedings' and 'records' of peer-review boards, such that those documents shall not be subject to discovery or be admissible in evidence." The Court identified the principle underlying the peer-review privilege as "the social importance of open discussions and candid self-analysis in peer–review meetings to ensure that medical care of high quality will be available to the public." Based on this principle, the Court has ruled in the past that—in the proper circumstances—a hospital is entitled to withhold "all records and proceedings before a peer-review board," even as pertaining to the allegedly negligent treatment delivered to a plaintiff himself.

You should not believe that extensive documentation or information can be protected merely because it is labeled "peer-review privilege."

Having done so, however, the Court focused the bulk of its opinion on just how limited this protection is. Relying in part on past precedent, the Court stressed that this privilege is to be "strictly construed" because it prevents potentially relevant evidence from being brought to light.[2] "The privilege must not be permitted to become a shield behind which a physician's incompetence, impairment, or institutional malfeasance resulting in medical malpractice can be hidden from parties who have suffered because of such incompetence, impairment, or malfeasance." In doing so, the Court explicitly rejected the Hospital's argument that because the privilege serves the socially beneficial "remedial" purpose of improving the quality of medical care, it should be broadly interpreted and applied.

Specific Examples of Application of Peer-Review Privilege

Having interpreted the scope of the privilege in general, the Court then turned to the specific examples presented by the case.[3] The results are instructive as to how limited the privilege is.

The first document considered was a 51-page transcript of the proceedings of a committee meeting "arising from a complaint about Dr. Samson's bedside manner while working in the emergency room[,]" much of which focused on interactions with the patient and family members. Despite conceding that the transcript was from a proceeding before a hospital committee—a necessary prerequisite for the privilege to apply—the Court examined "whether a committee investigating the bedside manner of a doctor qualifies as a peer-review board."

It does not. The Court held that the bedside manner of the Doctor was insufficiently related to the purposes of the statute to protect the transcript by the privilege. "The [lower court's] distinction between a doctor's bedside manner and the actual medical care that a doctor administers strikes us as sensible. The peer-review privilege was designed to alleviative an increase in medical malpractice lawsuits for substandard health care,

not to reduce the number of rude or uncompassionate health-care professionals – although the latter is certainly a commendable objective." Because the committee was not engaged in the sort of investigation that sufficiently met the objectives of the statute, the Court agreed that it was not a "peer-review board," and ordered the transcript to be produced.

The second document considered was a one-page report from a peer-review board that "focused not on Dr. Samson's bedside manner, but on whether or not he timely responded to a patient who needed care." This document therefore clearly constituted a "record" of a peer-review board, and certain information in it was therefore protected by the peer-review privilege.

Notably, however, even here the Court did not say that the entire single page document could be withheld. Instead, it held that any restriction of the physician's privileges, as well as the list of doctors attending the meeting, were all subject to disclosure. "Accordingly, this report is not privileged, and is discoverable, so long as it is redacted to cloak the summary of key items discussed in the meeting."

Guidelines Regarding Scope of Privilege

Pastore highlights the limited nature of the peer-review privilege. The following are some guidelines to be aware of:

- While the peer-review privilege exists, it is strictly construed. You should not believe that extensive documentation or information can be protected merely because it is labeled "peer-review privilege."
- Only "records" and "proceedings" of peer-review boards are protected, and not "documents or records otherwise available from original sources." In other words, materials that were created outside the peer-review body – including, for example, patient records – are not protected merely because they have been brought into peer-review.[4]
- Similarly, the privilege only applies to information generated by peer-review bodies, and not, for example, "records made in the regular course of business by a hospital."
- The identities of persons participating in peer-review are discoverable.
- The privilege prevents peer-review participants from testifying as to "findings, recommendations, evaluations, opinions, or other actions of the board," but the imposition of a restriction of privileges or a requirement of supervision is not privileged and is subject to discovery.

In short, Pastore demonstrates that the peer-review privilege is alive in Rhode Island—it just might not be as protective as you think.

References

1. The case citation is 900 A.2d 1067RI2006.
2. The Court noted that "[p]rivileges, by their nature, 'shut out the light'" on "the ascertainment of the truth."
3. The Court noted with some chagrin the fact that 750 pages of materials were at issue, the hospital's lawyers only discussed 2 documents, as a result limiting the Court's analysis to those two documents.
4. In fact, the Court ruled that if the hospital has such original documents in its possession, it should be required to produce them, and that the Plaintiff was not required to seek them from another original source.

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