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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Peer Review Protections After Amendment 7

Portfolio Media, New York (May 14, 2008)

Florida state law protections associated with medical staff peer review information have suffered a significant blow.

In Florida Hospital Waterman, Inc. v. Buster (Waterman) and Notami Hospital of Florida, Inc. v. Bowen, (Notami), the Florida Supreme Court firmly held that Amendment 7, the Patient's Right to Know About Adverse Medical Incidents, eliminated existing statutory discovery protections on peer review information.

Hospitals and health care providers are scrambling to understand exactly what protections, if any, remain for the peer review process.

Most states have statutes providing a privilege or discovery protection to medical staff peer review information. Such protection excludes from discovery, and prevents introduction into evidence, records containing performance reviews and assessments of physicians by their peers, primarily in connection with their practices at hospitals.

The philosophy underlying this protection is that physicians must be encouraged to be candid and vigorous in the performance evaluations of their peers, without fear that those evaluations would be used for improper purposes (e.g., medical malpractice lawsuits).

A typical statute might state that the proceedings and records of medical review committees shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters that are the subject of evaluation and review by such committee.

Amendment 7 was designed to provide consumers with transparency when selecting a health care provider and to permit extensive discovery by medical malpractice plaintiffs. It passed in November 2004 by more than 81% of the Florida voters and was incorporated into Article X, Section 25 of the Florida Constitution.

In June 2005, the Florida Legislature attempted to limit the scope of Amendment 7 through an implementing statute – Section 381.028, Florida Statutes – which contained provisions to preserve peer review confidentiality and nondiscoverability, despite the language of Amendment 7.

Dozens of lawsuits followed, with conflicting opinions from various Florida District Courts of Appeal. The Florida Supreme Court, in a 4-3 ruling, found Section 381.028 unconstitutional and severed those portions seeking to preserve peer review confidentiality and nondiscoverability.

It determined that the term "peer review privilege" is a misnomer because Florida hospitals had no right to confidentiality, merely an expectancy that the statutory protections would remain in place. This expectancy is dependent upon the will of the voters.

Resolving the conflicting appellate opinions, the ruling clearly holds Amendment 7 preempts all Florida statutory peer review privileges. The Florida Supreme Court noted that "Amendment 7 heralds a change in the public policy of this state to lift the shroud of privilege and confidentiality ... "and "while [a medical provider's] history was not previously accessible [due to peer review statutes], it became accessible when the electorate approved a constitutional override of the prior statutory restrictions."

The ruling affects the following subsections of Florida statutes, which afforded discovery protections to peer review information:

– Section 395.0191(8) – "Staff membership and clinical privileges"

– Section 395.0193(7), (8) – "Licensed facilities; peer review; disciplinary powers; and agency or partnership with physicians"

– Section 395.0197(6)(c), (7), (9), (11) – "Internal risk management program"

– Section 766.101(5) – "Medical review committee and immunity from liability"

– Section 766.1016(2) – "Patient safety data privilege"

Under Amendment 7, patients "have a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." In dealing with this new constitutional right, hospitals and health care providers must be able to answer the following questions:

– What records are discoverable?

– Who can request records?

– What is the process for producing the records?

– What else does a hospital need to know?

Each question is addressed below.

What Records Are Discoverable?

Hospitals should note that "adverse medical incident" as defined in Amendment 7 is far broader than the definition of "adverse incident"used in state mandatory reporting statutes.

State reporting statutes confine the term to events "over which health care personnel could exercise control and which [are] associated in whole or in part with medical intervention ... "

Amendment 7 has no such limitation and defines "adverse medical incident" as "medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees."

Under that definition, "any act or neglect" may qualify, nor is actual patient injury required, only the possibility of injury.

Hospitals should consider how this broad definition may include, for example, records of patient falls from beds or injuries sustained in common areas or waiting rooms. It includes records of other patients, which must be stripped of identifying information in compliance with the Health Insurance Portability and Accountability Act (HIPAA).

It also includes documents not included in patient charts such as minutes and notes from peer review/QI/ morbidity and mortality meetings, practitioner credentialing files, incident reports, and patient complaints.

On the other hand, it arguably might not include records of behavioral problems with a physician or staff member, provided there is no nexus between the behavior and patient care/safety (e.g., an incident report submitted by a nurse complaining a physician verbally berated her, with no connection to patient care).

So long as the record contains information relating to an adverse medical incident, it is arguably discoverable. To the extent a record does not relate to an adverse medical incident, it is arguably not discoverable. When records are a mix of both, hospitals should consider redacting or not producing the nonresponsive information.

Who Can Access Records?

Patients have a right to access records and Amendment 7 defines "patient" as "an individual who has sought, is seeking, is undergoing, or has undergone care or treatment in a health care facility or by a health care provider."

Thus, former and prospective patients both may request records of adverse medical incidents. It does not matter that the person requesting records has never been a patient in the traditional sense at a facility. As the Florida Supreme Court stated, "we also note that [Section 381.028(7)(a)] provides that patients can only access the records of the facility or provider of which they themselves are a patient, a restriction not contained within the amendment."

At the same time, it is reasonable to limit access only to former patients and those people truly seeking treatment. Hospitals are advised to consider carefully requests for records from journalists, attorneys, and others who might not be seeking medical treatment.

What Is The Process For Identifying And Producing Records?

Because "requests for production must be processed in a timely manner," an important practical issue is ascertaining the personnel responsible for identifying and producing records of adverse medical incidents. This procedure is set forth in Section 381.028(7), a subsection the Florida Supreme Court retained as both constitutional and useful.

For hospitals and facilities, the internal risk management program is responsible for identifying and reproducing the records in accordance with Section 395.0197. In office practice settings, the physician or other licensee is responsible per Section 458.351.

Patients often fail to understand that hospitals do not maintain an "adverse medical incident" file, and that responsive records are located in a variety of places throughout the hospital. Responding to a broad request can consume significant time and resources.

Hospitals can charge for the time and expense of locating, copying, and producing the records, provided the fees do not "exceed the reasonable cost of complying with the request."

After receiving a request, but before commencing production, hospitals might consider discussing the anticipated costs with the patient seeking records. After understanding the effort required to respond to a broad request, the patient may opt to tailor or limit the scope of his or her request.

What Else Does A Hospital Need To Know?

Despite the loss of confidentiality, several protections associated with the peer review process remain. Amendment 7 applies only to records; physicians participating in peer review still cannot be compelled to testify about peer review matters. The identity of peer review committee members remains confidential and should be redacted from records.

Amendment 7 does not eliminate the statutory immunity for participation in peer review activities. Hospitals should note the law applies retroactively, and patients may request records dating prior to the enactment of Amendment 7.

Transparency And Public Reporting On Quality Of Care

Although Florida hospitals will be monitored as a litmus test on peer review, impetus behind Amendment 7 is mirrored in federal efforts to increase transparency and public reporting of quality of care. Such reporting is seen at the hospital level (e.g., Hospital Compare) and the individual provider level (e.g., Physician Quality Reporting Initiative).

In September 2007, the Centers for Medicare and Medicaid Services announced the Performance Measurement and Reporting System (PMRS). Tracking quality, outcomes, and payment rates, PMRS "will serve as a master system of records to assist in projects that provide transparency in health care on a broad scale, enabling consumers to compare the quality and price of health care services so that they can make informed choices among individual physicians, practitioners and providers of services."

Hospitals And Medical Staffs Should Take Action

Hospitals are required by the Joint Commission to perform peer review, but the Waterman/Notami ruling has the capacity to chill significantly physicians' interest in participating in the process. Hospitals are scrambling to respond to the ruling and address physicians'concerns.

Some hospitals plan to limit the type of incidents that must be revealed to peer review committees. Others may modify their current approach to peer review, favoring more discussion and little or no written notes. From a trial perspective, a court still must find that such records are relevant and admissible before they can be introduced into evidence.

If hospitals educate their physicians on new developments in public reporting, physicians can better adjust and adapt to a transparent health care environment.

Is A Patient Safety Organization The Solution?

The Patient Safety and Quality Improvement Act of 2005 (Pub. Law 109-41) introduced the concept of a federal peer review privilege in connection with information reported to patient safety organizations (PSO). Proposed regulations were issued Feb. 12, 2008.

PSOs would act as a clearinghouse for quality data, which then can be used to compare performance of hospitals in the community on similar quality indicators. The information reported to PSOs is called patient safety work product (PSWP).

As an incentive for hospitals and other health care facilities to participate and report data, PSWP is protected by a broad federal privilege. PSWP is not subject to subpoena or discovery, Freedom of Information Act requests, or any similar federal, state, local, or tribal law. With some limited exceptions, the privilege applies to federal, state, and local administrative, civil, and criminal proceedings, including proceedings against a provider.

There are a variety of requirements to create a PSO, but because a public or private entity (or component thereof) can be a PSO, hospitals and hospital systems should consider establishing their own PSO to receive their PSWP. Health plans are not eligible.

The regulations are not final, but PSOs hold the promise of being able to protect patient safety and quality-oriented process improvement communications, include quality-improvement initiative development and root-cause analysis activities.

If physicians feel assured their hospitals are taking steps to protect confidentiality, they might be more likely to participate actively in the peer review process.

– By Nathaniel Lacktman and Rick Johns, **Foley & Lardner** LLP

Nathaniel Lacktman is an associate in Foley's Tampa, Fla., office, and Rick Johns is a partner in the Orlando, Fla., office.
