

Legal Privilege and Hospital Patient Grievance Records

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This article examines the issue of whether hospital patient grievance records are privileged i.e. protected from discovery when a patient sues a hospital and requests the production of the patient grievance file.

In 1999, the Health Care Financing Administration (HCFA; later renamed the Centers for Medicare and Medicaid Services or CMS) mandated that hospitals establish a patient grievance process.¹ Effective September 19, 2005, CMS issued Interpretive Guidelines clarifying the patient grievance process, requiring hospitals to identify a grievance committee to investigate and resolve patient grievances.² CMS mandated that in its resolution of the patient grievance, the grievance committee must provide the patient with written notice of its decision. This notice must include the name of the hospital contact person, the steps taken on behalf of the patient to investigate the grievance, the results of the grievance process, and the date the grievance investigation was completed. CMS also requires hospitals to document its efforts to resolve the grievance and demonstrate compliance with CMS requirements.

In the course of its investigation, the grievance committee will often incorporate into its documentation information generated by the hospital's peer review or quality assurance committee. During its investigation, the grievance committee may also seek the direction from the hospital's legal counsel and document the legal advice into the patient grievance record. Particularly in the case of smaller hospitals, the grievance committee might function as the hospital's quality assurance, peer review and risk management departments.

Whether the patient grievance file is privileged may well depend upon (1) whether the federal or state court hears the case; and (2) whether the party seeking the privilege can convince the court that the grievance committee and its records fall under an available statutory privilege.

If the patient alleges a federal claim in federal court, such as an EMTALA or civil rights violation, the defendant hospital will have a tough time shielding its patient grievance records from discovery. While the specific issue of whether the federal court recognizes a privilege for patient grievance records has not been heard, the federal court's view of medical peer review privilege is instructive.

Recent federal court decisions have all but eliminated privilege from the legal arsenal of hospitals seeking to shield peer review or quality assurance records. In a case which has caused an uproar in the health care world³ the 11th U.S. Circuit Court of Appeals in June, 2007 ordered Houston Medical Center in Georgia to turn over seven years of peer review records to the plaintiff, a

¹ 42 C.F.R 482.13(2007) The Electronic Code of Federal Regulations is available at: <http://www.gpoaccess.gov/cfr/retrieve.html>.

² The Interpretive Guidelines can be found in the CMS State Operations Manual available at: www.cms.hhs.gov/manuals/Downloads/som107ap_a_hospitals.pdf.

³ The outcry is captured in the Amici Curiae Brief of the American Hospital Association, et al opposing the Adkins decision available at: <http://www.aha.org/aha/advocacy/legal/resource-library-2007.html>.

surgeon who alleged racial discrimination by a peer review committee.⁴ When making its decision, the court acknowledged that all fifty states and the District of Columbia recognize medical peer review privilege. However, the court concluded that the purpose of the peer review privilege, i.e. “to promote vigorous oversight of physician performance,” was outweighed by “the important social goal of eliminating employment discrimination.” The court noted that it was joining the Fourth and Seven Circuits which have also refused to protect peer review documents from discovery.

The peer review privilege was also disregarded when, in an August 14, 2006 ruling on a discovery motion in a federal case in Alabama, the district judge allowed the admission of CMS’ investigation report in an EMTALA action.⁵ The patient, who was 38 weeks pregnant when she arrived at the Emergency Department following an automobile accident, sued the hospital in federal court for an EMTALA violation. The patient claimed that she was told that she must wait for the obstetrician on call to decide whether to see her and the patient left without being seen. CMS investigated and concluded that the hospital had violated federal regulations. The patient sued the hospital in federal court and sought to enter the CMS report into evidence. The hospital argued that since the CMS report contained hospital quality assurance information, the report was privileged.

The judge refused the hospital’s argument, noting that federal courts often decline to apply state peer review privileges in federal question cases, such as ADA, Title VII, Sherman Act and EMTALA cases.

If the patient files a claim in state court, the hospital may also face challenges shielding the patient grievance file from discovery. The hospital must show that the available statutory privileges apply to the patient grievance committee and its documents. While the types of statutory privileges vary by state, the privileges common to most states are peer review, quality assurance and attorney-client.

For example, Ohio law prohibits the discovery of proceedings and records within the scope of a peer review committee.⁶ In order to successfully assert this privilege the hospital will have to convince the court that the patient grievance committee falls under the definition of peer review committee, which includes “a utilization review committee, quality assessment committee, performance improvement committee, tissue committee, credentialing committee. . .”

When attempting to shield the patient grievance records from discovery, a defendant might also assert a quality improvement committee privilege. Most states have laws requiring each hospital to maintain a quality assurance program similar to the federal requirement for hospitals who participate in the Medicare program.⁷ For instance New York law requires each hospital to maintain a quality assurance program to “review the services rendered in the hospital in order to improve the quality of medical, dental and podiatric care of patients. . .”⁸ and provides for the confidentiality of documents and discussions within the purview of the program.⁹ Under this same law, hospitals are required to maintain a malpractice prevention program, which involves a

⁴ Adkins v. Christie, 488 F.3d 1324 (11th Cir. 2007) electronically available at: www.ca11.uscourts.gov/opinions/ops/200613107.pdf.

⁵ Henderson v. Medical Ctr. Enter., No. 1:05-CV-823-MEF (M.D. Ala. Aug. 14, 2006).

⁶ R.C. 2305.252.

⁷ 42 C.F.R. 482.21 (2007).

⁸ N.Y. Pub. Health Law § 2805-j (McKinney 2002).

⁹ *Id.* § 2805-m.

review of services rendered and the resolution of grievances by patients that could result in malpractice claims.¹⁰

The N.Y. State Supreme Court, Monroe County denied the plaintiff's motion for disclosure of reports made to a hospital's patient relations representative.¹¹ After receiving a complaint from the patient, the patient relations representative requested quality assurance reviews from several clinical departments regarding the patient's care. The representative used these reports to prepare a letter sent to the patient explaining the findings from the hospital's investigation. The court determined that under N.Y. Public Health Law, Education Law and case law, the reports, records and documentation were exempt from disclosure. The court further determined that the hospital did not waive the privilege by sending the investigation findings' letter because sending the letter was required by New York statute.

Finally, a hospital may attempt to assert an attorney-client privilege in order to protect patient grievance records from discovery.

A ruling from the 1st Appeals Court of Ohio is illustrative. In its August 31, 2007 decision, the court agreed with University Hospitals' assertion that the incident report related to injury for which the plaintiff sued was protected by the attorney-client privilege.¹² The court concluded that the hospital met the two-pronged test set forth in *Tykes v. Luke's Hospital*: (1) that an attorney-client relationship existed, and (2) that confidential communications took place within the context of that relationship.¹³ The court in *Flynn* was persuaded that the hospital prepared the incident report for the specific purposes of notifying the risk management department and the hospital's legal counsel of possible claims for quality assurance purposes and to inform outside counsel. The implication in *Flynn* is that merely rubber-stamping documents "attorney-client privileged" or "attorney work product" will not shield the documents from privilege.

In conclusion, shielding patient grievance records from discovery in federal court may be increasingly difficult. Whether patient grievance records are privileged in a state court action, depends on whether the court is persuaded that the grievance committee and its documents fall under any of the available statutory privileges.

¹⁰ *Id.* 2805-j.

¹¹ *Swanson v. University of Rochester Daily Record* (Rochester, NY) October 26, 2005.

¹² *Flynn v. Univ. Hosp., Inc.*, 2007-Ohio-4468.

¹³ *Tykes v. Luke's Hospital* (cite (Dec. 2, 1993), 8th Dist. No. 65392.