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in this issue:

AUGUST 2007

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Health Care Edition

A Littler Mendelson Newsletter specifically for the Healthcare Industry

Eleventh Circuit Joins Growing List of Federal Courts to Reject the Medical Staff Peer Review Privilege in Federal Discrimination Cases

By: Jerry C. Newsome and Mark T. DeLoach

On June 12, 2007, in the case of *Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007), the Eleventh Circuit Court of Appeals held that the medical staff peer review privilege does not apply in federal civil rights cases. As it becomes increasingly clear that federal courts will not recognize this privilege in discrimination cases, healthcare providers should be mindful that peer review records, which were once thought to be held under the strictest confidence, may now be subject to discovery and disclosure in future litigation.

The Medical Staff Peer Review Privilege

All 50 states and the District of Columbia have statutes that protect from discovery and disclosure any records containing reviews of medical professionals conducted by their peers. In enacting these statutes, state legislatures recognized the importance of encouraging physicians to be candid and vigorous when called upon to evaluate their peers, without the fear that their evaluations could later be used for other purposes such as a medical malpractice lawsuit. Without such a privilege, an important oversight process in the medical profession, medical care itself could suffer.

Adkins v. Christie – The Eleventh Circuit's Analysis

Dr. Russell Adkins filed suit against Houston Medical Center ("HMC") and several HMC physicians alleging that HMC and the individual physicians discriminated against him based on his race in HMC's peer review and disciplinary process. The peer review process was used to investigate Dr. Adkin's medical practice and eventually led to his suspension and termination from HMC.

During discovery, Dr. Adkins' attorneys requested documents relating to the peer review of all physicians at HMC during the time he was employed. HMC refused to provide this information arguing that it was protected from disclosure by Georgia's medical peer review privilege. The Georgia statute at issue states that "[t]he 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 health services arising out of the matters which are the subject of evaluation and review by such committee." O.C.G.A. § 31-7-143. The Georgia Supreme Court has interpreted this statute as placing "an absolute embargo upon the discovery and use of all proceedings, records, findings, and recommendations of peer review groups and medical review committees in litigation." *Emory Clinic v. Houston*, 258 Ga. 434 (1988). The United States District Court for the Middle District agreed with the Georgia Supreme Court and held that the privilege applied. Consequently, the court entered a protective order that prevented Dr. Adkins from obtaining any peer review records. Ultimately, Dr. Adkins was unable to present any evidence of discrimination in the peer review process, and the district court granted HMC's motion for summary judgment.

On appeal to the Eleventh Circuit, Dr. Adkins argued that the peer review privilege did not apply in federal discrimination cases. The Eleventh Circuit recognized that it must balance two competing interests. On one side is the interest served by the peer

review privilege: "the privilege would promote vigorous oversight of physician performance." *Adkins*, 488 F.3d at 1328. On the other side is the interest served by disclosure of the peer review records: "the discovery of evidence essential to determining whether there has been discrimination in employment." *Id.* at 1329. Ultimately, the Eleventh concluded that the discovery of evidence of employment discrimination outweighed the benefits of a confidential peer review process. The Eleventh Circuit reversed the district court's decision, holding that Dr. Adkins should be allowed to obtain the peer review records.

Other Courts Have Reached a Similar Conclusion

In *Adkins*, the Eleventh Circuit (which covers Alabama, Florida, and Georgia) concurred with the Fourth Circuit (which covers Maryland, Virginia, West Virginia, North Carolina, and South Carolina) and Seventh Circuit (which covers Wisconsin, Illinois, and Indiana) that had already held that the medical peer review privilege did not apply in certain federal cases. The Seventh Circuit refused to apply the privilege in *Memorial Hospital v. Shadur*, 664 F.2d 1058 (7th Cir. 1981), an antitrust case in which the plaintiff sought the discovery of medical peer review documents in order to demonstrate that the defendant used the review process in an effort to destroy his practice and limit competition. The Seventh Circuit concluded that recognizing the privilege would effectively bar the plaintiff from proving his claim altogether. In *Viramani v. Novant Health, Inc.*, 259 F.3d 284 (4th Cir. 2001), an employment discrimination case, the Fourth Circuit refused to apply the privilege, holding that "[t]he interest in facilitating the eradication of discrimination by providing perhaps the only evidence that can establish its occurrence outweighs the interest in promoting candor in the medical peer review process."

Although the Eleventh Circuit only relied on prior decisions of the Fourth and Seventh Circuits, other courts have reached similar conclusions regarding the medical staff peer review privilege. For example the Sixth Circuit, in *Alba v. Marietta Memorial Hospital*, 202 F.3d 267 (6th Cir. 2000) (unpublished decision), noted that the peer review privilege is not recognized in federal antitrust cases. In *Sabatier v. Barnes*, 2001 WL 175234 (E.D. La. Feb. 22, 2001), a district court in the Fifth Circuit refused to recognize the privilege in an employment discrimination case.

What Do These Decisions Mean for Healthcare Providers?

It is important to note that, thus far, the medical staff peer review privilege continues to be applied in medical malpractice lawsuits, and lawsuits brought under other state laws, which is certainly good news for hospitals and physicians. However, the Eleventh Circuit's recent decision confirms that, although every state has enacted a medical staff peer review privilege, that privilege may be meaningless in federal civil rights actions. Therefore, healthcare providers should recognize that the "confidential" information contained in peer review records may not be so "confidential" after all. Although healthcare providers should continue to encourage physicians to be candid during the peer review process, employers cannot promise physicians complete confidentiality.

Although peer review records may be discoverable in federal discrimination cases, it does not mean that all confidentiality of such materials is lost. The *Adkins* court noted that district courts "are well-equipped with a variety of mechanisms to ensure that peer review materials, once furnished through discovery, are not compromised by wayward hands." *Adkins*, 488 F.3d 1329-30. Healthcare providers should be aware of these "mechanisms" and, when appropriate, ask the courts to use them. For example, before producing peer review materials to plaintiffs, healthcare providers can seek *in camera* judicial review of the materials and redaction of confidential information that is not relevant to the employment discrimination lawsuit. Also, healthcare providers can and should obtain protective orders that prevent plaintiffs and their attorneys from sharing peer review information with third parties and otherwise preserve the confidentiality of such information outside the confines of the immediate litigation.

Healthcare providers should also be aware that once litigation is underway or becomes reasonably foreseeable, medical staff peer review information will be subject to litigation holds and discovery requests, and, therefore, must be preserved. Failure to do so could result in sanctions for spoliation of evidence.

Finally, the Eleventh Circuit's recent decision should serve as an important reminder to everyone involved in the medical peer review process that the process must always remain free from unlawful discrimination.

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