



Resident files and the peer review privilege

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During a recent malpractice action, a subpoena requesting a resident's evaluation file was delivered to the department of surgery. Unfortunately, the files were surrendered, effectively losing any claims the department might have had for a "peer review" privilege in that case. As medical malpractice actions become more common and more contentious, any plaintiff's attorney who can show weaknesses in a resident's past performance may try to use that information to bolster his claims of negligence if the resident is involved.

In an effort to deflect any future subpoenas requesting a resident's file, we reviewed the Tennessee law in regard to the "peer review privilege." The different states may or may not recognize this privilege, but our review may allow other departments that train residents to develop a strategy to fight this very serious attack on our ability to candidly evaluate the residents we are training.

Under Article V of the Tennessee Rules of Evidence, privileges are described by which a person may refuse to produce an object or writing when requested to do so by the Court.¹ The privilege that the department of surgery should claim is the "Medical Review Committee-Informant Privilege," which is part of what is known as the Tennessee Peer Review Statute. The Tennessee Peer Review Statute defines a "peer review committee" as "any committee of a state or local professional association or society...the function of which, or one of the functions of which, is to evaluate and improve the quality of health care rendered by providers of health care service to provide intervention, support, or rehabilitative referrals or services, or to determine that health care services rendered were professionally indicated, or were performed in compliance with the applicable standard of care...."²

In a recent Tennessee case—*Alexander A. Stratienko, MD, v. Chattanooga–Hamilton County Hospital Authority et al*—the Supreme Court of Tennessee held that "information, documents, or records otherwise available from original sources are subject to discovery pursuant to Tennessee Code Annotated section 63-6-219(e), but only to the extent that they are not requested from the peer review committee and are not otherwise privileged."³ In *Stratienko*, appellee Stratienko was trying to discover the "peripheral vascular

credentials" of another physician with whom he had had a physical altercation. Stratienko's hospital privileges had been suspended because of the altercation. Stratienko was able to get a temporary restraining order prohibiting the suspension and he was looking to support his claim to have the suspension reversed. The court held that Stratienko could not get the requested information from the peer review committee but he was free to obtain the information from other sources as long as other privileges did not apply.

Although the facts in this case did not address a resident's performance file, the case is relevant to this discussion. In *Stratienko*, the Tennessee Supreme Court recognized that the purpose of the Peer Review Law is "to encourage committees made up of Tennessee's licensed physicians to candidly, conscientiously, and objectively evaluate and review their peers' professional conduct, competence, and ability to practice medicine." These are the same activities that surgical faculty engage in during their meetings to evaluate residents' progress during their training. There is a strong public interest in surgical training programs and their ability to train competent surgeons who can operate and take care of patients safely and independently. This training would clearly be impaired if residents could not be evaluated in confidence—which would occur if the records of the meeting were subject to discovery.

Although there isn't a Tennessee case dealing with the peer review privilege as it relates to the personnel files of surgical residents, there is a

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case from Texas that is pertinent to this issue. In *Garza v. Scott and White Memorial Hospital*,⁴ a federal district court held that resident evaluations were privileged under the Texas Peer Review Statute.⁵ In *Garza*, a surgical resident was being sued for medical malpractice. As an employee of the hospital, the plaintiff was hoping to establish that the hospital was negligent for credentialing (hiring) this particular resident, and they needed the files to support that claim. The court held that these documents fell under the statute and were privileged. As a result, the residency program director did not have to release the file.

The plaintiff's attorneys may still try to obtain the information in the files, but they will have to do it in a different way, such as by directly questioning the attendings and the resident during a deposition. They can do this because, although the peer review proceedings are protected, the facts that may have been used by the committee are discoverable. Artfully posed questions regarding the experience and training of a resident may be asked during the deposition and they must be honestly answered, but this may be less hazardous than revealing the cryptic minutes of the faculty meeting for resident evaluations.

Of course, claiming that the resident's evaluation file is privileged is only the first step in deciding this legal issue. Under the Tennessee Rules of Civil Procedure Rule 26.02 section (5), the opposing party in the action will have to be informed that you are withholding the requested information and you must provide him or her with enough information so that he or she can assess the applicability of the privilege. If opposing counsel disagrees with the claim, the court will have to hear arguments and then make a decision as to whether or not the privilege applies.

We believe that a resident's evaluation file is privileged and should not be made available even if subpoenaed for discovery. Only through candid discussions can the surgical faculty critically evaluate their residents so that, ultimately, the quality of care can be improved for the community. The courts will need to decide on this issue. If the first court rules that the files are not privileged, an appeal should be made to a higher legal authority. It is important that surgical faculty be able to evaluate their residents in confidence so

that they can fulfill their obligations in training future surgeons for the U.S. and the world.

Resident evaluation files are not the only documents that the plaintiff's attorneys would be interested in mining. It would be prudent for all institutions involved in surgical education to have their legal departments evaluate the structure and function of their conferences (such as morbidity and mortality), records, minutes, and evaluations to be sure that they are structured in such a way as to meet state-protected peer review materials to the extent needed to survive legal attack. Ω

References

1. Tennessee Rules of Evidence, Article V: Privileges, Rule 501 (1990).
2. Tennessee Peer Review Law, Tenn. Code Ann. Section §63-6-219(c) (1967).
3. *Alexander A. Stratienko, MD, v Chattanooga-Hamilton County Hospital Authority, et al*, No. E2005-01043-SC-S09-CV—Filed May 14, 2007.
4. *Garza v Scott and White Memorial Hospital*, 234 F.R.D. 617 (2005).
5. Texas Health & Safety Code, §161.032.

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