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Benefits from hospital peer review may be crippled by hide-and-seek

The Illinois Supreme Court has held the purpose of the Medical Studies Act is to ensure "that members of the medical profession will effectively engage in self-evaluation of their peers in the interest of advancing the quality of health care." *Roach v. Springfield Clinic,* 157 Ill. 2d 29 (1993).

The Illinois Appellate Court has found that documents "initiated, created, prepared or generated by a peer review committee" are privileged. *Webb v. Mount Sinai Hospital and Medical Center of Chicago Inc.,* 347 Ill. App. 3d 817, 825 (1st Dist. 2004).

The act is premised on the belief that health-care practitioners would be reluctant to participate in peer review committees or engage in frank evaluations of their colleagues absent the confidentially the act affords. *Roach*, 157 Ill. 2d at 40.

However, hospitals and other health-care providers can be found attempting to circumnavigate the true purpose of the act. These health-care providers can be found to use the act as a potential shield to protect discoverable, adverse documents from being produced.

Incident reports, often intentionally titled by risk management departments as "Quality Council Reports" or "Peer-Review Findings" to better comport with the act, could contain significant information; i.e. statements from nursing staff on how a fall occurred, names of critical witnesses and all other forms of probative information that would not be included in a patient's medical records.

The act is intended to promote better health care, not to obstruct a plaintiff's right to the fact-finding process.

The act does not protect against disclosure of documents generated in the ordinary course of business, even if the documents are subsequently used by a committee in the peer review process. *Webb*, 347 Ill. App. 3d at 825 (2004).

The Illinois Supreme Court has explained "[i]f the simple act of furnishing a committee with earlier acquired information were sufficient to cloak that information with the statutory privilege, a hospital could effectively insulate from disclosure virtually all adverse facts known to its medical staff, with the exception of those matters actually contained in a patient's records." *Roach*, 157 Ill. 2d at 41 (1993).

Because of such, Illinois appellate courts look to determine when the peer review commenced to determine whether a document was created prior to or inside the peer review period. This time period is critical for courts to assess whether the act protects the document from being produced.

It is without question that hospitals and their risk management departments are aware that documents created following commencement of a peer review committee's investigation have better chances of being withheld as privileged under the act.

There certainly have been cases where a peer review was alleged to have commenced prior to the critically injured patient being transferred out of the facility for a higher level of care. Hospitals and other health-care providers can be accused on a case-by-case basis of intending to invoke immediate application of the act by immediately calling in personnel intentionally titled, for example, "Director of Quality Control" or "Quality Council Chair," to commence an investigation.

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Doing so provides the hospital with a better chance of later protecting damaging documentation from production by arguing that such documents were created within the peer review period.

Simply put, it is difficult to accept a nurse's written statement taken at 4 a.m. on the date of the event as the product of a peer review committee investigation, instead of an admissible admission.

In addition, the injured plaintiff is at a significant disadvantage. A single affidavit from a hospital representative attesting when the peer review committee investigation commenced, whether accurate or not, could protect all documents created after from production. Certainly, an injured plaintiff and their family is not in privy to information to contest such.

Unfortunately, similar liability events repeatedly occur in hospitals, such as medication errors, bed falls, miscommunication between a patient's interdisciplinary team, understaffing, etc.

In assessing whether the act applies, courts should strive to determine whether a similar, prior event has occurred, and if so, whether a subsequent "peer review" investigation was conducted that led to real corrective change.

As stated, the act's purpose is to encourage medical professionals to advance the quality of health care with the goal of preventing similar events in the future by identifying potential changes to put in place. Updated hospital policy and procedure changes are going to be documented somewhere.

Courts should be reluctant to extend the protections of the act in cases where evidence of "peer review" investigations followed prior, similar events, but no real corrective changes were ever made.

Here, this would suggest that this particular hospital or health-care provider invokes the act to later cloak documents as privileged, instead of utilizing the act for its intended purpose of implementing change to better improve patient care and safety.