Appellate court case puts peer-review protections in danger

MAR 29, 2019

Tanya Albert Henry
Contributing News Writer

Physicians in Michigan are in danger of having peer-review documents become discoverable in court cases if a trial court ruling isn't reversed on appeal.

The Litigation Center of the American Medical Association and State Medical Societies and Michigan State Medical Society recently filed a friend-of-the-court brief urging the Michigan Court of Appeals to reverse the lower court decision that takes away the assurance that any knowledge or documents provided during the peer review process will be confidential.

If peer review isn't protected, the "purpose and effectiveness" of the privilege will be undermined and physicians won't be as willing to participate in reviews that have been crucial in reducing morbidity and mortality and improving patient care, the AMA Litigation Center told the appellate court in its brief filed in *Dwyer v. Ascension Crittenton Hospital*.

The hospital appealed the case after a trial court judge ordered a Michigan hospital had to provide parts of a physician's credentialing file to the plaintiff in a medical liability lawsuit.

The trial court said the file must be made available to the plaintiff because the privilege only applies to documents in the committee's deliberations, discussions, evaluation and judgment; when a member of the peer review entity "generated" an email and sent it directly to a peer review entity member; or when it was prepared at the request of a peer review entity member.

But the several decades of law on the subject do not limit the privilege, the AMA Litigation Center brief argues. "To the contrary," the brief says, "Michigan's peer review privilege has historically spanned the bounds of the peer review process."

Safety gains exceed plaintiff need

The amicus brief concludes that the trial court rewrote statutes designed to protect the materials from being discoverable during litigation. It notes that the judge opined that “if all materials viewed by peer review committees were deemed undiscoverable, a hospital could never be held accountable for any negligent act within the purview of the committee.”

But that rationale is wrong, the AMA Litigation Center tells the appellate court.

Hospitals can be held liable—and are regularly held liable without opening up these documents, the brief says. With the exception of the contents of the peer-review file and deliberations of the peer-review committee that are privileged, plaintiffs can use the same discovery mechanisms generally available to plaintiffs in other lawsuits.

As for treating peer review differently, “the legislature has determined that the importance of fostering a candid evaluation of the practices within the hospital outweighs all other competing considerations,” the brief states. It goes on to note that the trial court wasn’t “authorized to disturb the balance reached by the legislature with respect to this issue.”

Laws support broad protection

Because lawmakers recognize the importance of confidentiality, Michigan’s peer-review privileges are written into the law so that physicians and others involved in patient safety can conduct candid evaluations and discussions key to improving future care, amici tell the court.

Michigan law directed the state’s hospital administrators to create peer review committees. And the state enacted a law that “protects peer review activities from intrusive public involvement and from litigation,” the AMA Litigation Center brief points out quoting legal precedent on the issue.

The brief also shows how the courts have repeatedly held that the peer review privilege is broad and that the Legislature intended to keep peer review records from discovery.

In asking that the lower court decision be reversed, the brief says the trial court “disregards the plain language of these clear and unambiguous statutes, imposing distinctions, conditions and requirements upon exercise of the privilege that are not expressed in the statutes.”