

Focus | Health Law/Employee Benefits & Executive Compensation Law

Decoding Texas's Medical Peer Review Privilege

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Healthcare providers frequently deal with volumes of confidential information, including everything from protected patient information to sensitive financial data. Although many lawyers know that complex rules govern disclosure of those types of information, few are aware of the Texas medical peer review privilege and its unique application to information generated by medical peer review committees.

Medical peer review committees are groups within healthcare institutions that help evaluate and improve the quality of healthcare services. These committees consist of healthcare professionals who review and evaluate the performance of their peers, establish standards of care, and offer policy changes and other recommendations for improving patient care.

Medical peer review committees commonly discuss sensitive topics that may be relevant to litigation against healthcare providers. For example, a

peer review committee tasked with evaluating a specific practitioner's treatment plan may discuss, examine, or uncover material later relevant to an employment dispute, medical malpractice action, or lawsuit brought under the False Claims Act for fraudulent billing practices.

In 1999, while recognizing that threats of litigation and compelled disclosure of information would prevent the open and honest dialogue necessary for effective peer review committees, the Texas Legislature codified what is known as the Texas medical peer review privilege. Tex. Occ. Code § 160.007. To foster open discussions among medical professionals, the peer review privilege protects from disclosure in legal proceedings any records, communications, and determinations made in connection with a medical peer review committee. Under the statute, a "medical peer review committee" means "a committee of a health care entity that operates under written bylaws approved by the policy-making body and is authorized to evaluate the quality of medical and health care services or the competence of physicians."

Like other legal privileges, the peer review privilege is not without its exceptions. First, the peer review privilege does not apply to records made or maintained in the regular course of business by a healthcare provider, even though such material may have been submitted to a peer review committee for review. Second, material otherwise protectable under the peer review privilege is excepted from the privilege if a court preliminarily finds that the material is relevant to an anticompetitive action or a civil rights suit brought under 42 U.S.C. § 1983. Third, individuals and entities who participate in a qualified peer review proceeding can use otherwise protected information in litigation arising from their participation in the peer review proceeding (i) as a defendant, in support of their defense, or (ii) as a plaintiff, in rebuttal to information supplied by the defendant.

Determining whether the peer review privilege applies requires several special considerations. For example, although the peer review privilege can be voluntarily waived, doing so requires a provider to follow specific steps expressly outlined in the statute. Section 160.007(e) of the Texas Occupations Code provides that, unless disclosure is required or authorized by other law, material protected by the

peer review privilege is not discoverable or admissible as evidence in civil or administrative proceedings without a written waiver of privilege executed by the committee's chair, vice chair, or secretary. Texas courts strictly enforce the statutory text and have declined to find waiver when a healthcare provider or its counsel voluntarily disclosed protected information without a corresponding written waiver executed by the affected peer review committee.

Another challenge for advocates is that different jurisdictions apply the peer review privilege differently. For example, Texas state courts broadly apply the privilege, while federal courts have yet to reach a consensus about when such state law privileges apply in federal court.

Texas's medical peer review privilege is ultimately an important tool for improving the quality of patient care. But questions surrounding the application of the privilege can pose many challenges for legal advocates. Lawyers should make sure to consider how best to navigate the peer review privilege when advocating for their healthcare clients. **HN**

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