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# A “Review” Of Peer Review – The Eighth District Reiterates The Standard For Claiming Privilege

by Brenda M. Johnson

In the health care setting, “peer review” is a term used for internal quality review investigations conducted by health care providers. Under Ohio law (as is the case in all other states), these investigations are subject to a statutory privilege, the purpose of which is “to protect the integrity of the peer review process in order to improve the quality of health care.”<sup>1</sup> At the same time, the privilege is not without limits. First among these limits is the fact that a party claiming the privilege must first establish that a peer review committee meeting the statutory requirements in fact existed, and that the documents or information for which privilege is claimed were in fact generated in the course of the peer review process.

At the end of last year, the Eighth District Court of Appeals issued the most recent opinion setting forth the standards that must be met in order for a health care provider to claim the protection of the peer review privilege. In *Smith v. Cleveland Clinic*,<sup>2</sup> following and building upon standards already articulated by other districts, the Eighth District reaffirmed that the statutory privilege must be read narrowly, and that the party claiming its protection must establish, through independent evidence, that a proceeding meeting the statutory definition was in fact convened, and that the materials at issue were generated in the course of the proceeding.

## A. Overview Of The Peer Review Statute

Ohio’s peer review statute, R.C. § 2305.25 *et seq.*, extends certain privileges and immunities

to peer review committees, which are defined by statute as committees organized by qualifying health care providers to conduct “professional credentialing or quality review activities involving the competence of, professional conduct of, or quality of care provided by health care providers,” or “any other attendant hearing process initiated as a result of a peer review committee’s recommendations or actions.”<sup>3</sup> Section 2305.252, in turn, provides that “[p]roceedings and records within the scope of a peer review committee . . . shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care entity or . . . provider . . . arising out of matters that are the subject of evaluation and review by the peer review committee.”

The peer review privilege set forth in R.C. § 2305.252 did not exist at common law.<sup>4</sup> Thus, as with any statutory privilege, R.C. § 2305.252 “must be strictly construed against the party seeking to assert it and may be applied only to those circumstances specifically named in the statute.”<sup>5</sup> Moreover, “[a] health care entity asserting the R.C. 2305.252 privilege bears the burden of establishing the applicability of the privilege.”<sup>6</sup>

## B. *Smith* Reiterated The Threshold Requirements That Must Be Satisfied For Peer Review Privilege To Be Invoked

Ohio courts consistently have held that a party seeking the protection of R.C. § 2305.252 must first establish that the information at issue

does, in fact, fall within the statute's protection. To do so, the party claiming privilege must present more than a mere assertion that the privilege applies. Instead, the party must present evidence that a proceeding meeting the statutory description of a peer review committee was, in fact, convened, and that the records at issue were prepared by or for the use of that committee.

In *Rinaldi v. City View Nursing & Rehabilitation Center, Inc.*,<sup>7</sup> for instance, the Eighth District held that merely asserting in a privilege log that certain documents titled "investigation report" or "incident statement" were subject to the statutory privilege was not sufficient. Instead, it was incumbent on the party asserting the privilege to present to the trial court some form of independent evidence indicating that the records were prepared as a part of a peer review committee's functions, and that a committee performing functions listed in R.C. § 2305.25(E) had in fact been convened.<sup>8</sup> In *Giusti v. Akron Gen. Med. Ctr.*,<sup>9</sup> the Ninth District held that it was not enough for a hospital to show that it had a quality review process in place – instead, the hospital had to show that the events at issue had in fact been the subject of a quality review proceeding, and that the statements in question had actually been made as part of that proceeding.<sup>10</sup> Likewise, in *Smith v. Manor Care of Canton, Inc.* ("Manor Care"),<sup>11</sup> the Fifth District observed that "as a bare minimum, the party claiming the privilege must bring to the court's attention the existence of such a committee and show the committee investigated the case in question."<sup>12</sup>

In *Manor Care*, the Fifth District held that a health care provider claiming privilege must be able to provide evidence establishing certain details about the committee, including (a) the name of the committee; (b) its by-laws or scope of authority; (c) the number

of members; and (d) some proof of the proceedings, including proof that the proceedings were aimed at quality of care or disciplinary issues.<sup>13</sup> In addition, "the party claiming the privilege must provide the court with a list of the evidence the peer review committee had."<sup>14</sup>

In *Smith*,<sup>15</sup> the Eighth District reaffirmed these requirements. *Smith* arose from a wrongful death case in which the decedent suffered a cardiac arrest and subsequent death after undergoing otherwise uneventful knee replacement surgery. After the cardiac arrest, the hospital's chief medical officer met with the family to discuss the events that had led to Mr. Smith's cardiac arrest, and in the course of a lengthy question-and-answer period admitted fault on the part of the hospital. When the family filed suit, however, the hospital claimed that the information imparted to the Smith family in the course of the meeting was subject to the peer review privilege, and sought a protective order on that basis.<sup>16</sup> In support of its motion, the hospital presented the affidavit of the chief medical officer, in which the chief medical officer attested that (a) he was the chief medical officer, (b) that he had no involvement in decedent's treatment, and (c) that his knowledge of the decedent's treatment was derived solely from a "privileged, protected and confidential Root Cause Analysis/Peer Review" conducted after the decedent's cardiac event.<sup>17</sup>

The trial court denied the hospital's motion, finding that it was not clear that the "Root Cause Analysis" constituted a peer review proceeding, and even if it had, that the hospital had waived any claim of privilege when its chief medical officer communicated its findings to the Smith family.<sup>18</sup> In its first assignment of error on appeal, the hospital claimed the trial court had erred in not finding that the "Root Cause Analysis" was a peer

review committee for purposes of R.C. § 2305.252. The Eighth District held otherwise, and affirmed the trial court.

Central to the Eighth District's holding was the fact that the hospital relied solely on its chief medical officer's affidavit, and had not provided independent evidence regarding the existence and operation of the proceeding for which peer review status was being claimed:

The defendants-appellants have not provided this court with any other evidence surrounding the Root Cause Analysis/Peer Review Committee that allegedly took place on February 24, 2010. More specifically, this court has no record of the defendants-appellants' written policies and procedures, which would presumably outline the purpose of the Root Cause Analysis/Peer Review Committee, its members, its scope of authority or any other proof that the proceedings were aimed at quality of care or disciplinary issues. More importantly, outside the affidavit of Dr. El-Dalati, we have no independent proof that this February 24, 2010 meeting was aimed at peer reviewing Mr. Smith's case.<sup>19</sup>

The Eighth District found the hospital's failure to present independent evidence of policies and procedures relating to the allegedly confidential proceedings particularly problematic in light of the representations and disclosures made to the family by the hospital's chief medical officer during the meeting at issue, where the chief medical officer provided the family with detailed information regarding the events leading up to Mr. Smith's cardiac arrest, while at the same time repeatedly representing that the peer review process had not yet occurred.<sup>20</sup> Perhaps most importantly, however, the Eighth District reiterated

its stance that labels are not sufficient to meet the burden of establishing privilege, and joined the ranks of courts that have found blanket statements in affidavits to be insufficient as well.

First, as the Eighth District noted, Ohio courts have been adamant that merely labeling a committee or a document “peer review” is insufficient to meet the burden of proving that the privilege applies to the requested information. For example, [in *Rinaldi*, *supra*] this court found it insufficient to simply title reports “investigation report” or “incident statement.” . . .<sup>21</sup>

With respect to the chief medical officer’s affidavit, the Eighth District invoked *Selby v. Fort Hamilton Hospital*,<sup>22</sup> in which the Twelfth District held that a blanket statement set forth in an affidavit from a hospital’s medical director representing that certain documents had been reviewed by a peer review committee was insufficient to establish that they had, in fact, been so reviewed, especially in light of conflicting evidence on the issue. In *Selby*, the affidavit was contradicted by the hospital’s written policies and procedures, which indicated the documents in question were used for patient care.<sup>23</sup> In *Smith*, the affidavit was contradicted by the chief medical officer’s representations to the family:

We find the *Selby* court’s rationale applicable to the instant case. Here the defendant-appellants have provided this court with nothing more than a single affidavit, which contains blanket statements from Dr. El-Dalati, as proof that a peer review committee meeting the statutory requirements was convened. Further, Dr. El-Dalati’s affidavit directly contradicts his own statements made to the family, wherein he repeatedly stated that he was part of the peer review

committee and that the peer review process had not yet begun.<sup>24</sup>

Thus, the Eighth District found that the hospital had not met its burden of proving that the peer review privilege had ever applied to any of the information provided to the Smith family, and having so found, it declined to reach the issue of whether the hospital had waived the privilege by disclosing the information.<sup>25</sup>

### C. Conclusion

While Ohio’s peer review privilege statute may seem broad in its scope, it is still a statutory privilege. The party claiming privilege must prove its applicability, and the courts, including the Eighth District, have held that the burden of proving its applicability is far from negligible. ■

### End Notes

1. *Smith v. Cleveland Clinic*, 8th Dist. No. 96751, 2011 Ohio 6648, ¶ 11 (citing *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008 Ohio 4333, 896 N.E.2d 769 (9th Dist.)).
2. 8th Dist. No. 96751, 2011 Ohio 6648.
3. R.C. § 2305.25(E)(1).
4. See, e.g., *Nilavar v. Mercy Health System – Western Ohio*, 210 F.R.D. 597, 604-605 (S.D. Ohio 2002) (physician peer review not subject to common law privilege).
5. *Ward v. Summa Health System*, 128 Ohio St.3d 212, 2010 Ohio 6275, ¶ 15.
6. *Bansal v. Mount Carmel Health Systems, Inc.*, 10th Dist. No. 09AP-351, 2009 Ohio 6845, ¶ 14; see also *Rinaldi v. City View Nursing & Rehab. Ctr., Inc.*, 8th Dist. No. 85867, 2005 Ohio 6360, ¶ 22 (“A party asserting the privilege set forth in R.C. 2305.253 [addressing peer review incident reports] has the burden of establishing that the privilege is applicable.”).
7. 8th Dist. No. 85867, 2005 Ohio 6360.
8. *Id.* at ¶ 20 (“City View presented no evidence to the trial court indicating that the records were prepared by or for the use of a peer review committee or that the records were within the scope of the functions of that committee.”); ¶ 21 (“Furthermore, City View presented no evidence to the trial court that it even had a peer review committee . . . [i]ndeed, at oral argument, City View’s counsel conceded that she did not know whether City View had a peer review committee, but merely assumed that it

did.”); see also *Bansal*, *supra* at ¶ 18 (“Absent evidence that the requested documents were created by and/or exclusively for a peer review committee, or generated by an original source and produced or presented to a peer review committee, the party asserting the R.C. 2305.232 privilege has not met its burden.”).

9. 178 Ohio App.3d 53, 2008 Ohio 4333, 896 N.E.2d 769 (9th Dist.).
10. *Id.* at ¶ 24 (“The evidence revealed that the Hospital had a process for ‘performing quality assurance reviews of patient care’ and that Dr. Schelble was part of that process. The evidence did not prove, however, that a peer review committee ever initiated or performed any type of review of Mr. Rinehart’s death. Nor did it prove that the conversation between Drs. Schelble and Kurtz was part of a peer review committee proceeding.”).
11. 5th Dist. Nos. 2005-CA-00100, 2005-CA-00160, 2005-CA-00162, 2005-CA-00174, 2006 Ohio 1182.
12. *Id.* at ¶ 61.
13. *Id.* at ¶ 49; see also *Manley v. Heather Hill, Inc.* (11th Dist.), 175 Ohio App.3d 155, 2007 Ohio 6944 at ¶ 22 (“At ‘a bare minimum, the party claiming the privilege must bring to the court’s attention the existence of such a [peer review] committee and show the committee investigated the case in question.”, quoting *Smith* at ¶ 61).
14. *Smith v. Manor Care* at ¶ 61
15. 8th Dist. No. 96751, 2011 Ohio 6648.
16. *Id.* at ¶¶ 3-5.
17. *Id.* at ¶ 16.
18. *Id.* at ¶ 5.
19. *Id.* at ¶ 17, citing *Manor Care*, *supra*.
20. *Id.* at ¶ 18. Among other things, the chief medical officer, speaking in his capacity as a representative of the hospital, told the family that “it’s my job to communicate to you everything that we do and everything that we find,” and repeatedly stated that the peer review process had not yet started. *Id.* at ¶¶ 18-21. Because the family had recorded their conversation with the chief medical officer and his staff prior to retaining counsel, the trial court and the Eighth District had the benefit of a verbatim transcript of the discussion. *Id.* at ¶ 4.
21. *Id.* at ¶ 23 (citing *Rinaldi*, *supra* and *Flynn v. Univ. Hosp, Inc.*, 172 Ohio App.3d 775, 2007 Ohio 4468, ¶ 6, 876 N.E.2d 1300 (1st Dist.) (“[L]abeling a document an incident report does not mean that it meets the statutory definition of an incident report . . .”)
22. 12th Dist. No. CA2007-05-126, 2008 Ohio 2413.
23. *Id.* at ¶ 15.
24. *Smith* at ¶ 25.
25. *Id.* at ¶¶ 26-28.



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# The Perils of Facebook

*by Christopher Mellino and Allen Tittle*

## I. Introduction

We all get a good laugh when a professional athlete tweets or posts something ridiculous or controversial right before a big game. Social media is one of a franchise owner's or coach's worst nightmares. Players were getting so out of control that the NFL and NBA took the step of banning use of social media *during* games.

Our clients can cause us some of the same headaches. We can try to ban our clients from using Facebook during the pendency of their case but, as a practical matter, it would be very difficult and time consuming to police that, and, in all likelihood, they will do it anyway.

Social media has become a way of life, and its use is growing exponentially. As of February 12, 2012, there were 845 million Facebook users worldwide. It is not just Gen Xers or Millennials using Facebook. As of March 2010, the number of people over the age of 45 using Facebook was almost 75 million with the fastest growing segment being women over the age of 55. It seems that nothing happens in the privacy of our own homes anymore. It is all out there on Facebook or MySpace.

It is safe to assume that most, if not all, of our clients have a Facebook page and are active on it. The real question is how do we prevent our clients from blowing up their cases by content they post on Facebook?

Facebook allows a user to choose different privacy

options. Most users choose either the "public" or "friends only" options. Obviously with the public setting any content posted on a user's profile, including pictures, is available to anyone.

However, by choosing the "friends only" option the user is not limiting the content to only his or her friends list. Anytime a user posts something on a friends wall, "tags" or gets "tagged" in a photo, or "likes" someone else's post they lose control over what audience will receive that content, because that information becomes available to all the friends of their friends.

Now Facebook has just introduced Timeline, which provides even more public information. When users get the new Facebook, their timeline will automatically populate and all content that that user has ever posted on their Facebook page, including photos, will be featured on their first page. Additionally, when certain apps are used, information about the user's activity is broadcast to their friends. For instance, if you purchase a book or rent a movie through these apps, Facebook will tell your friends what you are reading or watching.

In essence, Facebook has opened up a new watering hole for defendants to attempt to go trawling for information about our clients. By and large, however, courts have shut down attempts by the defense either to require a plaintiff to turn over his or her user name and password or to subpoena the information directly from Facebook and/or MySpace.