IADC COMMITTEE NEWSLETTER

MEDICAL DEFENSE AND HEALTH LAW

JUNE 2015

IN THIS ISSUE

Mark Hansen and Tyler Pratt review a recent Illinois Appellate Court decision holding that a physician was not entitled to seek disclosure of credentialing information obtained by a hospital prior to withdrawing an offer of employment to the physician.

Illinois Court Considers Physician Lawsuit Seeking Information Used by Hospital in Assessing Potential Employment

ABOUT THE AUTHORS

Mark D. Hansen is a shareholder in the Peoria, Illinois office of Heyl, Royster, Voelker and Allen. He has extensive experience in complex injury litigation, with an emphasis in medical malpractice, professional liability, and product liability. He can be reached at mhansen@heylroyster.com.

Tyler J. Pratt is an associate in the Peoria, Illinois office of Heyl, Royster, Voelker & Allen. He focuses his practice in the areas of medical malpractice and professional liability. He can be reached at tpratt@heylroyster.com.

ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee recently added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:

Mark Hansen
Vice Chair of Publications
Heyl, Royster, Voelker & Allen
mhansen@heylroyster.com

Hospitals take great care in their employment decisions. The process requires an honest and candid assessment of a potential candidate's qualifications. In order to make informed decisions, including credentialing, hospitals must seek feedback from a candidate's past professional associates. In return for a reference's honest assessment, the information is held in strict confidence. Without this protection, many physicians could be reluctant to objectively evaluate their peers.

Thus, given the importance of ensuring confidentiality, it is not surprising that the issue is addressed in the Illinois Medical Studies Act ("Medical Studies Act") (735 ILCS 5/8-2101 *et seq.*) and Illinois Health Care Professional Credentials Data Collection Act ("Credentials Act") (410 ILCS 517/15(h)). Despite the importance of confidentiality, not all physicians are deterred from demanding hospitals disclose to them the information collected. Employed physicians are generally able to obtain the information. However, in its decision, the Illinois Second District Appellate Court made clear that the privileges established by the Medical Studies Act and Credentials Act outweigh any individual private right to the information on the part of physicians who are applicants for employment. *Davis v. Kewanee Hosp.*, 2014 IL App (2d) 130304.

Factual Background

Dr. Davis was an anesthesiologist. *Davis*, 2014 IL App. (2d) 130304 at ¶3. In August 2008, he pursued a full-time position as an anesthesiologist at Kewanee Hospital ("Hospital"). *Id*. In November 2008, the Hospital's CEO extended him an offer of employment that was contingent on credentialing by the Hospital. *Id*. The Hospital then initiated its credentialing process and review of his qualifications. *Id*. ¶ 4. As part of this process, Dr. Davis completed several Hospital documents, including the Hospital's "Release of Liability and Practitioner's Statements," which authorized the Hospital to consult with anyone who had been associated with him. *Id*. On December 18, 2008, the Hospital sent Dr. Davis an employment agreement. *Id.*

In January 2009, Dr. Davis communicated with the Hospital's medical staff assistant and its CEO regarding the credentialing process. *Id.* ¶ 5. On January 29, 2009, the Hospital withdrew its offer of employment. *Id.*

Almost three years later, Dr. Davis demanded that the Hospital produce copies of all data from every source the Hospital used in making its decision to withdraw the offer. *Id*. ¶ 6. The Hospital informed Dr. Davis that neither its "Medical Staff nor its Board of Trustees reached a conclusion" on his application, and that his file had been "closed prior to the commencement of the credentialing review process." *Id*.

The Hospital refused to provide the information and Dr. Davis subsequently filed a Complaint against the Hospital on October 17, 2012, seeking the disclosure of the information. *Id*. ¶ 7. Dr. Davis alleged that the Hospital's decision was based on comments

made by persons at one of his previous employers, and, furthermore, that the Hospital's refusal to disclose the information violated both the Medical Studies Act and the Credentials Act. *Id*. The Hospital moved to dismiss the Complaint, contending the confidentiality exceptions of both were inapplicable because the offer of employment was withdrawn prior to the Medical Executive Committee's ("MEC") file review. *Id*. ¶¶ 12, 13. In other words, the Hospital argued that because no credentialing decision had been made, the exception did not apply, and all the credentialing information remained confidential. *Id*. ¶ 13.

The trial court granted the motion to dismiss, finding there was a distinction between employment and credentialing decisions, and the credentialing exceptions to the Medical Studies Act and the Credentials Act did not apply because the medical staff assistant's affidavit made it clear that no credentialing decision had been made. *Id*. ¶ 17. Thereafter, Dr. Davis appealed the trial court's order dismissing the case. On appeal, the Hospital contended the Medical Studies Act and Credentials Act do not create a private right of action. *Id*. ¶¶ 24, 43.

The Medical Studies Act

The Medical Studies Act provides in pertinent part:

> All information, interviews, reports, statements, memoranda, recommendations, letters of reference or other third party confidential assessments of a health care practitioner's professional competence, or other data of . . . committees of licensed or accredited hospitals or their medical staffs, including . . . Credential Committees . . . used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care or increasing organ and tissue donation, shall be privileged, strictly confidential and shall be used only for medical research, increasing organ and tissue donation, . . . or granting, limiting or revoking staff privileges or agreements for services, except that in any health maintenance organization proceeding to decide upon a physician's services or any hospital or ambulatory surgical treatment center proceeding to decide upon a physician's staff privileges, or in any judicial review of either, the claim of confidentiality shall not be invoked to deny such physician access to or use of data upon which such a decision was based. 735 ILCS 5/8-2101.

The Appellate Court did not address whether employment or credentialing decisions differ, or even whether the commencement of the credentialing process affected the confidentiality provision. Instead, the Court addressed whether the Medical Studies Act creates an express or implied right of action for a physician.

A. No Express Right of Action Exists Under the Medical Studies Act

The Appellate Court first addressed whether the Medical Studies Act gave Dr. Davis an express right of action for an alleged violation of the confidentiality exception. Relying heavily on persuasive authority from the Illinois First District Appellate Court, the Appellate Court quickly disposed of the issue, finding that the above language of the Medical Studies Act did not grant anyone an express right of action for a violation of its confidentiality provisions. *Id*. ¶ 27, citing *Tunca v. Painter*, 2012 IL App (1st) 110930.

B. Dr. Davis Does Not Have an Implied Cause of Action Under the Medical Studies Act

The Appellate Court next considered whether Dr. Davis had an implied right of action under the Act. *Id.* ¶¶ 28–40. The Court first noted that where a statue does not expressly provide a private cause of action, one may be implied if the circumstances satisfy the following four-part test: (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute. *Id*. ¶ 28, citing *Tunca*, 2012 IL App (1st) 110930.

In its reasoning, the Court determined Dr. Davis failed the first part because he was not a member of the class which the Act intended to benefit. *Id*. ¶ 35. The Court noted the purpose of the Medical Studies Act was "to ensure that members of the medical profession would effectively engage in self-evaluation of their peers in the interest of advancing the quality of health care." *Id*. Therefore, the Medical Studies Act was intended to benefit the general public, not doctors. *Id*.

Moreover, because the existence of the confidentiality exception did not alter the overall purpose of the Medical Studies Act, Dr. Davis was not elevated into the class of people it was intended to benefit. *Id*.

With respect to the second part, the Court held that the Medical Studies Act was designed to prevent increased rates of death and illness; not "the loss of referrals that could result from the dissemination of information generated during a physician's peer review process." *Id*. at ¶36.

The Court also found Dr. Davis' case failed at the third step because giving physicians a private right of action pursuant to the confidentiality exception would "swallow the protections afforded by the Medical Studies Act." *Id*. ¶ 37. The Court again noted that the purpose of the Medical Studies Act was to ensure honest peer evaluation and promoting Dr. Davis' goal of identifying the individual or individuals who he believes wrongly disparaged him, would discourage those individuals from honestly sharing information in the future. *Id.* Therefore, Dr. Davis' goals and purposes were inconsistent with the Medical Studies Act's purpose of ensuring

honest peer evaluation to advance the quality of health care. *Id*. ¶¶ 35, 37.

Finally, the Court also found Dr. Davis' case failed the fourth part of the test because even without a finding of an implied right of action, he could pursue a common-law remedy like a slander action. *Id*. ¶¶38, 39.

Unable to satisfy any parts of the test, the Appellate Court concluded Dr. Davis did not have an implied private right of action under the Medical Studies Act. *Id*. ¶ 40.

The Health Care Professional Credentials Data Collection Act

The Court next focused its attention on the Credentials Act. The Credentials Act provides:

> Any credentials data collected or obtained by the health care entity, health care plan, or hospital shall be confidential, as provided by law, and otherwise may not be redisclosed without written consent of the health care professional, except that in any proceeding to challenge credentialing or recredentialing, or in any judicial review, the claim of confidentiality shall not be invoked to deny a health care professional, health care entity, health care plan, or hospital access to or use of credentials data. 410 ILCS 517/15(h).

Once again, the Court concluded Dr. Davis did not have any private cause of action, express or implied. *Id*. ¶ 52.

A. No Express Right of Action Under the Credentials Act

After reviewing the language of the Credentials Act, and articulating the purpose of the Credentials Act, the Court swiftly concluded in one sentence that the Credentials Act did not contain an express right of action. *Id*. ¶ 47.

B. Dr. Davis Does Not Have an Implied Cause of Action Under the Credentials Act

The Court next investigated the possibility of an implied right of action under the Credentials Act. Applying the same four-part test used in its analysis of the Medical Studies Act, the Court found Dr. Davis' case again failed all four parts and that no implied right of action exists under the Credentials Act. *Id*. ¶¶ 47–54.

Dr. Davis' case failed the first part because he was not a member of the class which the Credentials Act intended to benefit and again asked the Court to ignore the overall purpose of the statute. *Id*. ¶ 48. After noting there was no case law articulating the purpose of the Credentials Act, the Court reviewed the Credentials Act as a whole and concluded its purpose was to "standardize and regulate the collection of credentials data to ensure that health care entities correctly assess and validate health care professionals' qualifications." *Id*. ¶¶ 44, 48. The Court reasoned the general public, not physicians, benefit from correctly assessing and validating the qualifications of health care professionals, as it ensures that only qualified

health care professionals treat patients. *Id*. ¶ 48. Thus, the plaintiff's claim failed the first part because as a physician, he is not a member of the class the Credentials Act intended to benefit.

Dr. Davis' case also failed the second part because the Court found the Credentials Act was designed to avoid injuries caused to patients by the credentialing of unqualified health care professionals. *Id*. ¶ 49.

The Court also held Dr. Davis failed the third part because a private right of action under the circumstances of this case was inconsistent with the purpose of the statute. *Id.* ¶ 50. The Court noted the statute's purpose is to standardize and regulate credentialing information, which requires honest peer evaluations. *Id.* Disseminating this information to Dr. Davis would deter honest evaluations and conflict with the Credentials Act's purpose. *Id*.

Finally, Dr. Davis' case also failed the fourth step of the test because there was no need to imply a private right of action to remedy a violation of the Credentials Act. *Id.* ¶ 51–52. The Court noted that the statute granted the Department of Public Health the right to enforce its provisions and that the Department has promulgated rules enforcing the Credentials Act. *Id.* The Court therefore found that the statute provided a comprehensive enforcement scheme. *Id***.** Moreover, the Court noted, similar to the Medical Studies Act, Dr. Davis may pursue a common-law remedy. *Id.*

Conclusion

The takeaway from *Davis* is that physicians who are not yet employed by the hiring hospital or health care provider are not entitled to a private right of action under either the Medical Studies Act or the Health Care Professional Credentials Data Collection Act. When hiring a new physician, hospitals and other health care providers should emphasize to a candidate's references that complete and honest disclosure of a candidate's qualifications is critical to the hiring process and will be held in the strictest confidence. However, it is important to remember that *Davis* applied only in the context of a new hire. A strict reading of the decision would limit its application to candidates for employment, while a physician already employed and/or credentialed would be entitled to obtain the information under the confidentiality exception.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

MAY 2015
Illinois Court Extends Affidavit and Health-Professional's Report Requirements to Medical Battery Claims
Mark D. Hansen and Emily J. Perkins

Well, Because You Didn't Make That Drug…
Jennifer Devereaux Segers

APRIL 2015
No Really, We Didn't Make That Drug…
Jennifer Devereaux Segers

MARCH 2015
Electronic Communications Containing Protected Health Information
Robert G. Smith

FEBRUARY 2015
The False Claims Act Yesterday and Today
Stuart Miller and Jane Duke

JANUARY 2015
The Risks of Long Term Use of Narcotics for Pain Management: Preparing an Effective Cross Examination of the Over Prescriber
R. Douglas Vaughn and Sharrolyn Jackson Miles

NOVEMBER 2014
Recovery of Extraordinary Expenses Permitted in Wrongful Pregnancy Action
Mark D. Hansen and Emily J. Perkins

OCTOBER 2014
Illinois Court Issues Harsh Reminder that Physicians Must Supplement Prior Deposition Testimony with Any New Opinions before Trial
Mark D. Hansen and Melissa N. Schoenbein

SEPTEMBER 2014
Illinois Appellate Court Discusses Whether Applications for Medical Staff Privileges are Privileged from Production in Discovery
Mark D. Hansen and J. Matthew Thompson

JULY 2014
Illinois Supreme Court Rules Against Emergency Room Physicians in Resolving Split Among Appellate Districts Regarding Interpretation of Good Samaritan Act
Mark D. Hansen and J. Matthew Thompson

JUNE 2014
The Florida Supreme Court Rejects Caps on Noneconomic Damages in Wrongful Death Medical Malpractice Cases
Jeptha "Jep" F. Barbour and Jill F. Bechtold