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Hindsight Is Bittersweet: Quality Improvement Studies as Evidence in Inmate Litigation

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You can build effective health care systems through the use of QIS without creating, or at least minimizing, evidence that might be used against you

There is inherent value in continuing quality improvement studies (QIS) insofar as they shed light on what affects health outcomes and, consequently, allow providers to improve on health care efficacy and efficient use of resources. Critical to the success of QIS is fostering an environment where providers are able to speak candidly about what occurred and in assessing their own conduct as well as the conduct of their peers. To encourage the use of QIS, all of the states except for New Jersey have enacted legislation that makes QIS, also referred to as peer review, material privileged so long as the statutory provisions are strictly complied with.

These laws benefit health care providers as defined therein by protecting both the process and documents generated by peer review from being admitted or even discovered in subsequent litigation. This protection may be limited to state court proceedings. Claims against correctional health care providers, however, are often litigated in federal court. Consequently, claims filed pursuant to Section 1983—the statute that provides for the private enforcement of federal constitutional rights—may not be entitled to protection from state law privileges as federal courts are generally not bound by these state laws. Therefore, the materials generated throughout the QIS process may be discoverable in inmate litigation.

This article discusses representative state QIS laws and how they have been applied in the federal courts where inmate cases are typically litigated. The article will conclude with practice tips and recommendations.

In litigation in federal court, all relevant material is discoverable unless an evidentiary privilege applies. Federal Rule of Civil Procedure 26(b)(1) frames the contours of permissible discovery in federal courts: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party ...." Evidence is relevant if it has the tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Plaintiffs' attorneys will likely argue that discovery of peer review documents should be permitted, absent a privilege, because they are vital to uncovering facts necessary to prove their case.

Assertions of evidentiary privilege in federal court are governed by Federal Rule of Evidence 501, which requires application of federal privilege law to each element of a claim except those where state law "supplies the rule of decision." Put another way, federal privileges apply to federal law claims (e.g., violations of civil rights) and state privileges apply to claims arising under state law (e.g., medical malpractice). When there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than the state law privilege, is the controlling rule.

Ninth Circuit

In *Leon v. County of San Diego*, 202 F.R.D. 631 (S.D.Cal. 2001), the plaintiff sued the county, the sheriff's department and the sheriff for alleged medical malpractice and violations of the civil rights of an inmate who died while in custody. The discovery dispute involved the plaintiff's request for two binders contained in the nurses' station at the detention facility entitled "peer review" and "weekly unit meetings." The defendants responded that the requested documents were irrelevant and privileged under California's peer review law, California Evidence Code §1157.

California's peer review law says, in relevant part, "Neither the proceedings nor the records of organized committees of medical ... staffs in hospitals, or of a peer review body, as defined in Section 805 of the Business and Professions Code ... shall be subject to discovery."

In making the threshold determination of whether the requested documents are relevant, the court noted that to prove municipal liability under Section 1983, the plaintiff must show that the unconstitutional deprivation of rights arose from a governmental custom, policy or practice. In concluding that the plaintiff's discovery request was relevant, the court found that the nurses' review of the level of care they provide to inmates may reveal a custom, policy or practice of the municipality as well as levels of training provided to the nurses.

Although the court recognized that the California peer review law represents an important policy objective, the court declined to recognize it in the case before it. The court reasoned that it made no sense to permit state law to determine what evidence is discoverable in a case brought against state actors for abuse of power.

Eleventh Circuit

In *Jenkins v. DeKalb County*, 242 F.R.D. 652 (N.D.Ga. 2007), the plaintiffs brought an action under Section 1983 against a county and jail officials, alleging violations of civil rights surrounding the death of an inmate. The discovery dispute arose from a postdeath "mortality and morbidity" report prepared by an employee of a correctional health care company. The defendants argued that the report was privileged under Georgia's peer review law, which says, in relevant part, "The proceedings and records of a review organization shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action ..." (Ga. Code Ann. §31-7-133(a)).

In declining to apply Georgia's peer review law, the court found that the inherent difficulty of discovering evidence of a jail's practice and customs in a civil rights case rooted in a death of an inmate dramatically weakens the case for recognizing the privilege. According to the court, a review of a deceased inmate is not the straightforward evaluation of medical care that occurs in the civilian context. The generation of postdeath reports may include details such as when jail officials notified medical officials of a particular problem and whether there was a reason for nonmedical officials to have monitored the situation more closely. The court stated that not only is this type of information "nonmedical," but it also may shed light, or at least raise an inference, on jail customs or policies.

Seventh Circuit

In *Belbachir v. County of McHenry*, 2007 U.S. Dist. LEXIS 53727 (N.D.Il. 2007), after the suicide death of an inmate, the plaintiff sued, among others, the company that provided health care services to the jail for violations of civil rights. After the inmate died, the correctional health care company conducted a "core team meeting" where attendees discussed the chronology of events leading up to the inmate's death and the policies and procedures that were employed by the company and the jail. Subsequently, the company conducted a "root cause analysis" meeting where attendees looked into the circumstances of the inmate's death and formulated various proposals to prevent this type of event from recurring. The plaintiff requested documents from the defendant, and the defendant claimed that certain documents were privileged under Illinois' peer review law.

Illinois' peer review law says, in relevant part: "All information, interviews, reports, statements, memoranda ... or other data of ... committees of licensed or accredited hospitals or their medical staffs ... 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 ... shall be privileged ...."

In deciding whether to apply Illinois' peer review privilege, the court balanced the need for truth against the policy underlying the peer review privilege. On the need for truth side of the scale, the court noted that information related to the defendant's policies and practices was critical to the plaintiff's claim, and difficult to expose. On the other side of the scale, the court recognized the important policy considerations of the peer review privilege, including the free flow of information between health care professionals resulting in higher quality of care. Ultimately, however, the court was convinced that, in the context of a federal civil rights action brought about by the death of an inmate, the need for truth in rooting out unconstitutional state action outweighed any concern over a chill placed on the peer review process.

Practice Tips

The seemingly inconsistent manner in which the courts have applied QIS privilege laws will likely continue until Congress and the state legislatures enact legislation that is unique to correctional settings. Until then, you can build effective health care systems through the use of QIS without creating, or at least minimizing, evidence that might be used against you in inmate litigation by adopting the following practices:

• When documenting areas of concern, use generic factual descriptions such as "there were two medication errors this month" rather than "Nurse Sally committed malpractice at least twice again this month."

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• Peer review efforts should be led by medical providers who are knowledgeable about the areas of medicine under review and would be qualified to testify in court about the case—if it gets that far. Otherwise, you may be left with unsupported speculation that may be admissible as evidence even if unfounded. Also, consider an external reviewer for an unbiased consult who might have something different to add or suggest.

• If a minority opinion is asserted, document that it was considered and why the medical literature, policies and procedures or facts favor a different conclusion.

• Consider limiting those involved in QIS efforts and limiting recipients of QIS materials because you may be waiving a privilege by disclosing QIS materials to someone who is not covered under your state's QIS law.

• Remove protected health information—that is, any information that can be linked to a specific individual—from the case being reviewed.

• QIS policies should be written so that they mirror your state's QIS laws to the extent possible and those policies should be consistently followed and enforced. Floodgates open the moment you treat one patient's case differently.

• Establish a document retention policy concerning personnel and disciplinary records that is consistent with the employment laws in your state and consistently apply that policy. Employers often maintain disciplinary records even though they are not legally obligated to, and those records might come in as evidence against them.

• However, be careful not to destroy evidence about a case that you know or reasonably should know might lead to litigation as you may then be sued for spoliation of evidence.

• Do something educational and productive with your QIS findings, such as making recommendations regarding policies and procedures that might avoid a similar result, as opposed to merely gathering statistics or using it as a confrontational tool to vent frustrations.

• To ensure continuity and quality of care, arbitrarily pull charts to review instead of reviewing only the cases with bad outcomes.

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