Connecticut Law Tribune
OCTOBER 5, 2009
VOL. 35, NO. 40 • $10.00
An ALM Publication
CTLAWTRIBUNE.COM

Doctors Win Fight To Keep Records Private

Malpractice bar split over lawmakers' quick move to trump high court ruling

By THOMAS B. SCHEFFEY

Most people would not like it if their job evaluations could be made public. The same holds true for doctors. And that's led to a recent debate in Connecticut over whether records from hospital "peer review" sessions can be made public.

In August, the state Supreme Court ruled that, under the Freedom of Information Act, a patient could access peer review documents from the state's only public hospital. The decision riled the medical community as doctors wondered whether records from private hospital peer review sessions might also be made public someday.

And so, within four weeks of the release of the Supreme Court decision, the legislature moved to bar FOIA requests for peer review documents. Connecticut, like nearly every other state, has a form of privilege that limits release of peer review records.

The debate is hardly an academic one. Not only might such records be used by a patient choosing a doctor but they would become grist for attorneys involved in malpractice suits and other claims against doctors.

"I've tried to pierce peer review, and it's been a major fight," said Avon lawyer Susan Smith, who currently represents a number of plaintiffs suing St. Francis Hospital over claims that one of its doctors, the late George Reardon, molested dozens of patients. Though it does not appear that Reardon was ever subjected to peer review, Smith said that in other cases hospitals "throw up the peer review exemption the way people throw up the attorney-client sign – all the time."

Paul Edwards, a partner with the New Haven plaintiffs' firm of Stratton Faxon, is also representing scores of Reardon child-molestation plaintiffs. He began his career as a defense lawyer with many doctors as clients, and knows how doctors value peer review.

"I was shocked at the Supreme Court's decision," he admitted. Even though access to peer review proceedings would aid medical malpractice claimants, Edwards didn't favor it. Peer review confidentiality is sacrosanct in the medical profession, he said, adding that he was not surprised hospitals and doctors acted fast to reverse the effect of the Supreme Court interpretation.

Outside of the medical profession, few people are familiar with the peer review process, said Pullman & Comley health care lawyer Elliot B. Pollack, a former member of the state Physicians Review Board.

In peer review sessions, doctors can freely criticize their colleagues' shortcomings without fear of having candid assessments become weapons in malpractice cases. As Pollack explained, "Peer review is a very significant quasi-judicial process that exists below the radar of most Americans. It initially takes place within a hospital department, such as surgery. It may move to a so-called Mortality and Morbidity committee," and ultimately lead to termination of a doctor's hospital privileges. Severe peer review penalties are reported to the state Department of Public Health, which can then launch more severe, public disciplinary proceedings, Pollack said.

The state's confidentiality statute prevents peer review "proceedings" from being "subject to discovery or introduction into evidence in any civil action" for or against a health care provider. It also states that no one attending the peer review can be required or allowed to testify about that information.

Law Tribune File Photo

Hartford attorney Michelle DeBarge said doctors worried that peer review records collected by the state health department would be subject to Freedom of Information Act requests.

'A Stone Wall'

The underlying case that prompted the Supreme Court ruling involved a retired Enfield salesman, Louis Russo, who was considering a malpractice lawsuit against his urologist, Dr. Jacob Zamstein. Russo wanted to find out why Zamstein lost his privileges at the University of Connecticut's Dempsey Medical Center.

The state's lone public hospital, Dempsey, in Farmington, is unlike the dozens of private hospitals in Connecticut. It qualifies under the Freedom of Information Act as a public agency, subject to FOI provisions.

After receiving Russo's FOI request, the hospital provided only the minutes of the meetings in which the doctor's privileges were curtailed, and none of the specific peer review details Russo wanted. "Peer review is horrible. It is a stone wall for people like me who want to sue a doctor," Russo said in an interview.

Russo appealed to the state Freedom of Information Commission, which ruled in his favor. The agency construed the peer review statute as applying only to civil court actions but not to its administrative proceedings as an executive branch agency.

UConn hospital officials then took the case to the state Supreme Court. On Aug. 25, in a decision authored by Justice C. Ian McLachlan, the high court agreed that the statute that prevents peer review data release through civil discovery doesn't apply to Freedom of Information Act requests.

McLachlan approached the question as one of straightforward statutory construction, guided by the "plain meaning rule." He found that the word "discovery" in the statute coming right next to "evidence" logically referred to the civil pre-trial discovery process.

The Freedom of Information Act, in contrast, refers to "disclosure" of records, balancing government and private needs for confidentiality, McLachlan wrote. The majority decision recognized that the general rule under the FOI act favors disclosure of government records.

The four-justice majority also contrasted a civil court action and an FOI administrative proceeding. Disclosure of peer review records through an FOI request, McLachlan wrote, "may have the same 'chilling effect' on doctors that the legislature sought to avoid. That possibility, however, cannot convert `discovery' to 'disclosure'; nor can it make administrative proceedings into civil actions."

McLachlan acknowledged that this interpretation of the law might be counter to the legislative intent. And the high court rolled out a red carpet invitation for the legislature to fix its language if it wanted to.

In dissent, Justice Flemming L. Norcott consulted the legislative history, which he called "scant." Lawmakers in 1980 based the statute on peer review protections in other states. As then-Rep. Richard Lawlor said at the time, the idea was to "allow for some confidentiality in peer review proceedings with regard to any hospitals and medical facilities."

If an FOI request could pierce this confidentiality, Norcott reasoned, the legislative purpose would be defeated.

A Quick Fix

In three weeks, lobbyists for the Connecticut Hospital Association were urging lawmakers to undo the impact of the decision. A provision added to a bill that implements the state budget exempts peer review matters from Freedom of Information Act requests. The nullifying language was quietly signed into law by Gov. M. Jodi Rell on Sept. 25.

Hartford Attorney Michelle W. DeBarge, a member of Wiggin and Dana's 10-lawyer health practice, explained the sense of urgency in the medical community. She noted that while private hospitals are not subject to FOIA, the Department of Public Health (DPH) frequently obtains peer review material for its investigations. And the health department is subject to the FOIA.

The concern in the health care community, DeBarge said, "was that an individual could request that information of the DPH and thereby obtain peer review information that originated in a private hospital. The whole point is to protect the peer review process, to encourage free and frank discussion that improves patient care. This [legislative fix] is important because it helps insure the integrity of the process," she said.

Not all members of the bar saw it that way. Smith, the Avon lawyer, expressed surprise that the Supreme Court case could be changed by legislature after its regular session had ended. "That's a non-financial bill — I thought you can only pass money things in a [special] session like this. So they put a 'rat' on the bill?" she said. A "rat" is lobbyists' slang for an under-the-radar amendment to address a narrow issue, often without a prior public hearing.

And Bridgeport plaintiffs' lawyer Richard Bieder, of Koskoff, Koskoff & Bieder, has serious misgivings about the medical profession having discovery-proof proceedings. "What's to keep a person from lying about everything during peer review, if they know they're never, ever, going to be called to account?" he asked. ■