Health Law

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What Every Litigator Needs to Know About the Medical Studies Act

Background

The Medical Studies Act (Act), 735 ILCS 5/8-2101 et seq. (2004), was enacted to encourage medical practitioners to engage in voluntary self-critical and candid evaluation of their peers in the interests of reducing morbidity and mortality and advancing the quality of health care. See Roach v. Springfield Clinic, 157 Ill. 2d 29, 623 N.E.2d 246 (Ill. 1993). To promote this goal, the Act is designed to facilitate effective practitioner participation in studies and programs by alleviating practitioner concerns such as loss of referrals, retaliation, and exposure to tort and malpractice liability by privileging certain materials used in the peer review process. See Ardisana v. Northwest Community Hospital, 342 Ill. App. 3d 741, 795 N.E.2d 964 (1st Dist. 2003). The underlying principle is that, absent such privilege, medical practitioners would be reluctant to critically evaluate their colleagues. Roach, 157 Ill. 2d at 40 (citing Richter v. Diamond, 108 Ill. 2d 265, 269, 483 N.E.2d 1256 (1985)).

Whether documents constitute internal quality control measures within the protection of the Act is a factual determination. The trial court’s factual findings will not be reversed unless they are against the manifest weight of the evidence. Protected information is both non-discoverable and inadmissible where the privilege applies. 735 ILCS 5/8-2102 (2004). Thus, the effect of the Act is to immunize defendant hospitals, physicians, and members of peer review committees for statements made and opinions rendered during peer-review and medical studies. However, despite amendments to the Act expanding the types of covered entities, recent decisions increasingly narrow the scope of this immunity. The approach adopted by Illinois courts is case-specific and fact-intensive, focusing on the purpose, process, and timing of the contested documents.

Privilege Applies Only to Information Generated By or For a Protected Committee

In Roach, 157 Ill. 2d 29, the Illinois Supreme Court declined to adopt the broad scope of privilege advocated by the hospital, declaring the Act was never intended to shield hospitals from potential malpractice liability. In Roach, among other claims, the plaintiff sought recovery from the hospital, alleging the hospital was negligent in failing to make general anesthesia available on a timely basis. The plaintiff attempted to establish the hospital’s liability for the unreasonable delay in providing anesthesia by calling the nurse anesthetist as a witness.

The nurse anesthetist testified that he received no notice until 12 minutes after the time indicated on hospital records and was not advised of the possibility of an emergency cesarean section when he reported for work. Although he stated he did not know the reason for the delay, he admitted he discussed the matter with the hospital’s chief of anesthesiology, who explained that new secretaries in
the obstetrics department were responsible for the delay. When asked about the conversation, the defendant objected and asserted privilege. The trial court, after hearing the testimony outside the jury’s presence, sustained the objection. The appellate court affirmed the ruling, finding the explanation provided by the chief of anesthesiology to the nurse anesthetist was “information of” the medical staff of an “accredited hospital” that was “used in the course of internal quality control for the purpose of improving patient care” within the meaning of the Act.

Finding the appellate court’s conclusion misguided, the Illinois Supreme Court held that “[w]hat the law actually protects is not information of a hospital’s medical staff, but information of “committees of licensed or accredited hospitals or their medical staff . . . .” According to the court, the legislative history surrounding the addition of ‘medical staffs’ to the Act and prior case law suggest that where a committee is comprised of the hospital’s medical staff, the committee must be involved in the peer-review process before the privilege attaches. Otherwise, the court reasoned “[i]f the simple act of furnishing a committee with earlier acquired information were sufficient to cloak that information with the statutory privilege, a hospital could effectively insulate from disclosure virtually all adverse facts known to its medical staff, with the exception of those matters actually contained in the patient’s records,” thereby thwarting the purpose of the statute by eliminating all incentive for improving patient care.

However, the court declined to definitively adopt this interpretation, finding the privilege inapplicable because the information gathering process was not initiated by or on behalf of any recognized committee. The court reasoned that a committee, when given its ordinary meaning, refers to more than one person, and no legal or factual basis supported imputing the Chief of Anesthesiology’s conduct to the department committee merely because of his status.

In a case of first impression in Illinois, the First District declined to recognize assisted living facilities within the purview of the Act. Pietro v. Marriott Senior Living Servs., 2004 Ill. App. LEXIS 523, 810 N.E.2d 217 (1st Dist. 2004). First, the court looked to the statutory language, concluding the Act protects only data of “medical organizations under contract with . . . other health care delivery entities or facilities,” not data of “other health care delivery entities or facilities.” As Marriott living facilities is not a medical organization, it fell outside the scope of the Act. Additionally, the court supported its interpretation with reference to several amendments to the Act adding covered entities, none of which added assisted living or long-term care facilities. Id. at *11-12. Thus, the court concluded, had the legislature intended to include such facilities within the scope of the Act, it could have explicitly done so. Id. at *12. Additionally, the court noted other statutory schemes address privilege applicable to these types of facilities. Id. at *12-13.

Nevertheless, the court found that even if assisted living facilities were intended by the legislature to be within the Act, Marriott’s residential care committee was not consistent with the type of committee protected. Citing Roach, the court stated the privilege does not extend to a quality control group within a corporate setting, but requires a specific committee capable of evaluating patient care. Id. at *13. Thus, while there were several nurses on the committee in question, other corporate and administrative members were not capable of providing the requisite self-evaluation or opinions regarding adequacy of patient care. Id. at *14. Ultimately, the court found that, even if the facility and its committee were within the scope of the Act, Marriott failed to establish that the contested documents were created by the committee; therefore, privilege was inapplicable. Id. at *17.

Privilege Applies Only to Documents
Expressly Initiated, Created, or Generated By
or For Use During the Peer-Review Process

In Chicago Trust Co. v. Cook County Hospital, 298 Ill. App. 3d. 396, 698 N.E.2d 641 (1st Dist. 1998), the appellate court strictly construed the Act, finding pre and post-deliberation documents
beyond the scope of privilege. In *Chicago Trust*, a patient became disconnected with a ventilator during a medical procedure, rendering the patient a quadriplegic. The hospital asserted the Medical Studies privilege in response to plaintiff’s request for certain ‘incident and situational’ reports. The critical factor in the court’s analysis was ensuring freedom within the deliberative process. Accordingly, documents used outside the peer review process did not warrant the same degree of protection.

The court defined the scope of the statutory privilege, holding that documents initiated, created, prepared, or generated by a peer-review committee are privileged notwithstanding subsequent dissemination outside the peer-review process; whereas documents created in the ordinary course of hospital business, for the purpose of evaluating liability, rendering legal opinions, or corrective actions by hospital staff are not privileged notwithstanding subsequent use by the peer-review committee. *Id.* at 406. Additionally, the court noted that merely labeling a document ‘confidential’ does not render it immune under the statute. *Id.*

More recently, the First District held that the privilege did not apply to a physician’s letter to a quality review committee, even though the letter was sent as part of the hospital’s established quality assurance review process. *Id.* at 57. The court found the letter not protected, since only documents specifically “initiated, created or generated by a peer-review committee” are privileged under the Act. *Berry v. W. Suburban Hosp. Med. Ctr.*, 338 Ill. App. 3d 49, 788 N.E.2d 75 (1st Dist. 2003). *Emphasis added.*

Similarly, in *Webb v. Mount Sinai Hospital and Medical Center of Chicago, Inc.*, No. 1-03-0936, 2004 Ill. App. LEXIS 299, 807 N.E.2d 1026 (1st Dist. 2004), the First District reaffirmed that the Act protects documents specifically generated for use by peer-review committees, holding documents created for the purpose of rendering legal opinions or evaluating liability potential are not privileged notwithstanding subsequent use by a peer-review committee. After review of certain memoranda and an occurrence summary, the appellate court affirmed the determination that privilege was inapplicable. *Id.* The courts’ decision highlights the responsibility of the party asserting privilege to establish its entitlement. In addition to statements within the contested documents referring to identifying issues of liability and risks of litigation, the court noted internal inconsistencies in the supporting affidavits, a failure to explain the inconsistencies, and the absence of evidence demonstrating that the documents were created during the peer-review process, in support of its finding that the documents were not privileged.

**Recommendations and Results Neither Confidential Nor Privileged**

The credentialing and peer-review process itself has been afforded protection under the Medical Studies Act; however, the Act does not protect all documents considered by a credentialing committee from disclosure. The Illinois Supreme Court in *Richter v. Diamond*, 108 Ill. 2d 265, 483 N.E.2d 1256 (Ill. 1985), held that the dates, nature, and extent of restrictions on a physician’s staff privileges are not protected from disclosure. The court reasoned that the privilege afforded the peer review process itself does not extend to restrictions imposed as a result of that process. *Id.* at 269.

Illinois courts have consistently adopted this position, declining to extend the statutory privilege to documents reviewed in the credentialing, reappointment, and disciplinary process, where such documents preceded or were the nonprivileged results or conclusions of the peer-review process. *Chicago Trust*, 298 Ill. App. 3d 396; *See also Green v. Lake Forest Hosp.*, 335 Ill. App. 3d 134, 138, 781 N.E.2d 658 (2d Dist. 2002). The scope of the privilege does not extend to documents existing independently of the credentialing process, and such documents do not become privileged merely by possession or consideration by a peer-review committee. *May v. Wood River Township Hosp.*, 257 Ill. App. 3d 679, 629 N.E.2d 170 (5th Dist. 1994). However, the 1994 Amendment explicitly added letters
of reference and third party confidential assessments to the scope of the Act’s protection. *Stricklin v. Becan*, 293 Ill. App. 3d 886, 890, 689 N.E.2d 328 (4th Dist. 1997). Thus, to the extent that a letter “constitutes a ‘letter of reference’ or ‘third-party confidential assessment’” of a physician’s competence and is relied on by a credentialing committee, it may be privileged from disclosure. *Id.* Consequently, the court may order production of the remaining unprivileged portion of the document, after the privileged information is redacted. *Id.*

Recently, the First District declined to broaden the scope of nonprivileged ‘results’ to include internal committee ‘conclusions or final recommendations’ as determined by the lower court. *Ardisana*, 342 Ill. App. 3d 741. Rather, the appellate court held, the explicit language of the Act and case law support a narrower interpretation and ‘results’ include only ‘ultimate decisions made or actions taken by’ a hospital or peer-review committee. *Id.* at 747. Accordingly, the court ruled that the requested surgical department quality review and general surgery conference documents, generated for consideration by the committee, were privileged in their entirety. *Id.*

Although the court recognized that the Act does not protect documents created before or after the peer-review process, the hospital’s failure to provide starting and ending dates was not fatal to its privilege claim. *Id.* at 748. In so holding, the appellate court noted that the burden of proof may be satisfied in two ways. A party may submit documents for *in camera* review or submit affidavits containing facts establishing applicability of the privilege. *Id.* Upon review of the documents *in camera*, the court ruled the hospital’s burden of proof was satisfied, notwithstanding the absence of dates or timeliness of their submission. Additionally, the court found a letter from the anesthesia department director to the anesthesiologist, requesting information for use by the review committee was, by its terms, privileged, despite the fact it was directed to a person outside the committee. *Id.* at 749.

**Peer Review Is Not the Only Purpose of the Act**

In *Doe v. Illinois Masonic Medical Center*, 297 Ill. App. 3d 240, 696 N.E.2d 707 (1st Dist. 1998), the First District extended protection under the Act to a hospital’s Institutional Review Board, which it held constituted a “committee[ ] of [a] licensed or accredited hospital[ ]” as contemplated by the Act. *Id.* at 243. The First District looked to the Supreme Court decision of *Niven v. Siquiera*, 109 Ill. 2d 357, 487 N.E.2d 937 (Ill. 1985), which set forth that “the purpose of the Act is to encourage candid and voluntary studies and programs used to improve hospital conditions and patient care or to reduce the rates of death and disease.” Notwithstanding the court’s declaration that the purpose of the Act was not to facilitate prosecution of medical malpractice cases, the court reasoned that the privileged documents pertaining to the genetic testing procedures and protocols, including those approved by the IRB, would not affect successful prosecution of the plaintiff’s malpractice claim.

**Disclosure of Privileged Information:**

**Waiver and Liability. 8-2102**

In 1987, the Act was amended to provide that disclosure of privileged information, regardless of whether it is proper, does not affect a waiver of “confidentiality, nondisclosure-ability, or nonadmissibility.” 735 ILCS 5/8-2102 (2004). However, the Act imposes criminal liability for disclosure of privileged information. 735 ILCS 5/8-2105 (2004). Nevertheless, producing documents pursuant to a court order does not constitute an unauthorized disclosure invoking criminal penalties. *Menoski v. Shih*, 242 Ill. App. 3d 117, 612 N.E.2d 834 (2d Dist. 1993).

**Conclusion**

The increasingly narrow scope of the Medical Studies Act will make hospital efforts to engage in quality improvement review and studies without creating discoverable information more challenging.
To benefit from the protection of the Act, hospitals must adopt and enforce by-laws and regulations outlining the appropriate procedures for peer-review and medical studies. Merely labeling documents ‘privileged’ or ‘confidential’ will not suffice. Hospitals must methodically ensure that information is expressly “initiated, created or generated” by, or at the request of, a protected quality assurance committee. While the privilege, when applicable, cannot be waived, even by subsequent disclosure, the information must be generated exclusively for peer-review to invoke statutory protection. Additionally, since neither final recommendations or conclusions of the committee, nor pre or post-deliberative information are protected, the commencement and termination of the peer-review process must be well documented.

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