UNDER (PEER) PRESSURE: A BREAKDOWN OF MINNESOTA'S PEER REVIEW STATUTE

By Ryan Paukert

Minnesota's statutes governing peer review for health care entities are embodied in Minnesota Statute § 145.61 through § 145.66. "To encourage robust peer review, all states and the federal government have enacted statutes that protect peer review participants through immunity, privilege, confidentiality, or some combination of the three." *Larson v. Wasemiller*, 738 N.W.2d 300, 314 (Minn. 2007) (Anderson, J. concurring). On multiple occasions, the Minnesota Supreme Court has held "the statutes providing for confidentiality and immunity for peer review organizations and persons involved in the peer review process reflect a legislative intent both to improve the quality of health care by providing for confidentiality of review organization information and to encourage self-monitoring in the medical profession." *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 383 (Minn. 1999). What follows is a review of the key provisions of the Peer Review statute and some questions frequently raised regarding the statute's applicability.

WHAT IS A REVIEW ORGANIZATION UNDER THE STATUTE?

Before the Peer Review Statute will apply, it must first be determined whether the entity which received information regarding the provider in question is, in fact, a review organization. If the entity does not meet the statutory definition of "review organization," the information at issue will not benefit from the protections of the Peer Review Statute.

The statutory definition of a "review organization" is lengthy, encompassing many possible qualifying entities. "'Review organization' means … a committee whose membership is limited to professionals, administrative staff, and consumer directors … which is established by one or more of the following: a hospital, a clinic, a nursing home, an ambulance service or first responder service … to gather and review information relating to the care and treatment of patients for the purposes of: (a) *evaluating and improving the quality of health care*…" § 145.61 (emphasis added). "The definition of 'review organization' includes committees established by health care organizations for the purpose of reviewing a professional's staff privileges." *In re Fairview-Univ. Med. Ctr.*, 590 N.W.2d 150, 153 (Minn. Ct. App. 1999). "A 'review organization' under the Minnesota statute at issue ... is defined as a 'committee whose membership is limited to professionals and administrative staff ... and which is established by a hospital ... to gather and review information relating to the care and treatment of patients for the purposes of ... (b) (r)educing morbidity or mortality; ... The definition specifically includes, but is not limited to, organizations 'established pursuant to' the federal act." *Warrick v. Giron*, 290 N.W.2d 166, 170 (Minn. 1980)

Generally speaking, to be considered a "review organization" for purposes of the peer review statute, the purpose of the review *must* be to improve patient care. "The peer review privilege is designed to facilitate the frank exchange of information among professionals without fear of reprisals in civil lawsuits. The goal is the improvement of patient care." *Konrady v. Oesterling*, 149 F.R.D. 592, 595 (D. Minn. 1993). In *Konrady* the court discussed whether a hospital's Internal Review Board ("IRB") was considered a review organization for purposes of the Peer Review Statute. An IRB is defined in a federal scheme as "any board, committee, or other group formally designated by an institution to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving

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human subjects. *The primary purpose of such review is to assure the protection of the rights and welfare of the human subjects…*" *Id.* (citing 21 C.F.R. § 56.102(g)). In concluding IRBs are not "review organizations," the Court cited two primary reasons: 1) the purposes of the IRBs differ from those described in the Peer Review statute; and 2) the element of confidentiality underlying the statutory privilege is absent. *Id.* "Unlike a true peer review committee, an IRB is charged with management and oversight of research involving human subjects. Rather than conduct 'peer review,' an IRB conducts 'process review' not enumerated by the Minnesota statute." *Id.* at 596. As demonstrated in *Konrady*, attorneys should determine whether the information regarding the health care provider was collected by a true "review organization" before attempting to assert Peer Review protections.

DISCOVERABILITY OF DATA AND INFORMATION OBTAINED BY REVIEW ORGANIZATIONS

Review organization material is essentially divided into two different categories based on §§ 145.64 and 145.65, with two different degrees of confidentiality. The first category comprises data and information acquired by a review organization as well as the proceedings and records of a review organization. The second category entails guidelines established by a review organization.

As for the first category, § 145.64 states "…information, documents or records otherwise available from original sources shall not be immune from discovery or use in any civil action merely because they were presented during proceedings of a review organization, nor shall any person who testified before a review organization or who is a member of it be prevented from testifying as to matters within the person's knowledge, *but a witness cannot be asked about the witness' testimony before a review organization or opinions formed by the witness as a result of its hearings*." (emphasis added).

While the information provided to a review organization is not "immune" from discovery, the statute does provide limitations on how that information may be obtained. As noted above, a party may not ask questions at depositions which attempt to pry into the peer review process. In *Utech v. Bynum*, the plaintiff sought to depose a hospital's corporate designee regarding "quality assurance documents related to the policies, procedures or guidelines monitoring physicians, nurses, or other health care professionals" (third topic), and all documents "generated or utilized by [SCMC's] quality assurance division/department regarding the monitoring, performance or qualifications of physicians, nurses, or other health care professionals" (fifth topic). No. CIV. 07-4712DWFRLE, 2008 WL 6582594, at *2 (D. Minn. Nov. 14, 2008). In denying the plaintiff's motion to compel on the third and fifth topics, the court noted these topics "seek records relating to SCMC's peer review process" and "directed the Plaintiff to refrain from any inquiry into SCMC's peer review process, during the course of the Rule 30(b)(6) deposition." *Id.*

However, in *Shellum v. Fairview Health Services*, the plaintiff argued that the Peer Review statute barred the introduction of records of medical review organizations, which the Minnesota Court of Appeals rejected. No. A18-1516, 2019 WL 2262246, at *5 (Minn. Ct. App. May 28, 2019). "While the [Peer Review] statute bars the introduction of records of review organizations and prevents witnesses from testifying about their testimony to review organizations, it does not bar the use of, 'Information, *documents or records otherwise available from original sources*.'" *Id.* (emphasis added).

This principle was further clarified by the Court in *In re Fairview-University Medical Center*, where a party argued the peer review privilege only covered "documents generated by a review organization and not documents acquired by a review organization." 590 N.W.2d 150, 154 (Minn. Ct. App. 1999). However, the court noted the "otherwise available" sentence of § 145.64 simply points out that documents available from other sources remain discoverable from those original sources. *Id.* The court held the "confidentiality provision encompasses all documents contained in review organization files, including documents a review organization obtains from other sources." *Id.* at 155.

Further, courts have explained that even though information provided to review boards may be discoverable from original sources, the information is still not discoverable when requested in the context of these reviews as this would defeat the purpose of the statute. "Despite the explicit language privileging the hospital documents, Dr. Woodburn argues that because the documents are available from an 'original source' (Dr. Natale) they are discoverable. But allowing discovery, when the documents are available from a person who reported to the committee, would defeat the purpose of this provision; such documents would almost always be available from the person who provided the evidence." *Woodburn v. St. Paul Pathology, P.A.*, No. C7-93-125, 1993 WL 267495, at *6 (Minn. Ct. App. July 20, 1993).

DISCOVERABILITY OF GUIDELINES AND POLICIES FROM REVIEW ORGANIZATIONS

As for the second category of material, § 145.65 states "No guideline established by a review organization shall be admissible in evidence in any proceeding brought by or against a professional by a person to whom such professional has rendered professional services." This statute is designed to "serve the strong public interest in *improving the quality of health care*" by protecting guidelines developed by certain health care review organizations. *Kalish v. Mount Sinai Hosp.*, 270 N.W.2d 783, 785 (Minn.1978) (emphasis added). It was enacted in the "belief … that health care will be fostered if review committees can carry on discussions

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without the threat of malpractice and defamation actions," and therefore "encourages the medical profession to police its own activities with minimum judicial interference." *DeYoe v. N. Mem'l Health Care*, No. C7–99–1837, 2000 WL 1051964, at *9 (Minn. Ct. App. Aug. 1, 2000). However, the Minnesota Supreme Court has held these guidelines are discoverable despite their inadmissibility. "Section 145.65 bars the admission of such guidelines into evidence, but is silent as to any privilege barring their discovery. This clearly implies that in making a separate and different provision for 'guidelines' under § 145.65 the legislature intended to allow their discovery." *Kalish v. Mount Sinai Hosp.*, 270 N.W.2d at 786.

As for policies, they receive similar treatment under the Peer Review statute. In *Damgaard v. Avera Health*, the plaintiff argued she could "elicit evidence at trial regarding the challenged policies because they 'inform' or are the 'building blocks' for the relevant standard of care." 108 F. Supp. 3d 689, 699 (D. Minn. 2015). While the court acknowledged that the challenged policies were *discoverable*, "discoverability and admissibility, of course, are entirely separate issues, with the former far broader than the latter," concluding the Peer Review statute "makes clear the policies in question may not be inquired into at trial." *Id.* at 699-700.

CAN A PRIVATE CAUSE OF ACTION BE BROUGHT FOR VIOLATING THE PEER REVIEW STATUTE?

The Peer Review statute makes it unlawful to "disclose what transpired at a meeting of a review organization except to the extent necessary to carry out one or more of the purposes of a review organization." § 145.64. Subsequently, § 145.66 states the penalty for prohibited disclosures: "[a]ny disclosure other than that authorized by section 145.64, of data and information acquired by a review committee or of what transpired at a review meeting, is a misdemeanor."

In *Sherr v. HealthEast Care System*, a neurosurgeon brought a private cause of action for a breach of peer review confidentiality. In dismissing the Plaintiff's claim under the Peer Review statute, the court noted that "the Minnesota Supreme Court has repeatedly refused to recognize a private cause of action under statutes that explicitly impose criminal or civil penalties but are silent regarding a private cause of action." 262 F. Supp. 3d 869, 880 (D. Minn. 2017) (citing *Graphic Commc'ns Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp.*, 850 N.W.2d 682, 691 (Minn. 2014); *Becker v. Mayo Found.*, 737 N.W.2d 200, 208-09 (Minn. 2007); *Larson v. Dunn*, 460 N.W.2d 39, 47 n.4 (Minn. 1990)).

The plaintiff attempted to argue that the Peer Review statute supports a civil cause of action if the "unauthorized disclosure is motivated by malice," based on § 145.63, subd. 1, which provides immunity to peer review participants unless their performance of the duty, function or activity was motivated by malice." *Id.* However, the Court clarified that "the immunity provision detailed in Minn. Stat. § 145.63 does not address unauthorized disclosures of peer review information. Rather, confidentiality of peer review information and the penalty for breaching such confidentiality are explicitly governed by Minn. Stat. §§ 145.64 and 145.66, respectively." *Id.*

Therefore, as the plain language of the statute imposes a criminal penalty for breach of peer review confidentiality, but not a civil one, no private cause of action exists for a violation of § 145.64.

DOES MINNESOTA'S PEER REVIEW STATUTE CREATE A CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING?

The Court in *Larson v. Wasemiller* discussed whether Minnesota's Peer Review statute creates a cause of action for negligent credentialing. 738 N.W.2d 300, 303-04 (Minn. 2007). The portion of the statute at issue was § 145.63, subd. 1, which states in relevant part, "*No review organization and no person shall be liable for damages* or other relief in any action by reason of the performance of the review organization or person of any duty, function, or activity as a review organization or a member of a review committee or by reason of any recommendation or action of the review committee *when the person acts in the reasonable belief that the action or recommendation is warranted by facts known to the person or the review organization after reasonable efforts to ascertain the facts upon which the review organization's action or recommendation is made*…" (emphasis added).

The Court first noted that "[a]lthough stated in the negative, the language of [Minn. Stat. 145.63, subd. 1] implies that a review organization shall be liable for granting privileges where the grant is not reasonably based on the facts that were known or that could have been known by reasonable efforts." *Larson*, 738 N.W.2d at 304. The Court found that "the immunity provision of the peer review statute contemplates the existence of a cause of action for negligent credentialing" or "there would be no need for the legislature to address the standard of care applicable to such an action." *Id.* However, the Court ultimately determined there was no need to answer the question at that time since "at the very least, the statute does not negate or abrogate such a cause of action," leaving the Court "free to consider whether the action exists at common law," which it found in the affirmative. *Id.* at 304, 306.

THE PROVIDER DATA EXCEPTION

"As a general rule, all data and information discussed by a review organization is confidential and is subject to neither discovery nor subpoena." *Amaral v. Saint Cloud Hosp.*, 586 N.W.2d 141, 143 (Minn. Ct. App. 1998), *aff'd*, 598 N.W.2d 379 (Minn. 1999). The Peer Review confidentiality provision under § 145.64 "covers all data and information acquired

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by a review organization." *In re Fairview-Univ. Med. Ctr.*, 590 N.W.2d at 154.

However, the Provider Data Exception states that the restrictions of § 145.64, subd. 1, "shall not apply to professionals requesting or seeking through discovery, data, information, or records relating to their medical staff privileges, membership, or participation status. However, any data so disclosed in such proceedings shall not be admissible in any other judicial proceeding than those brought by the professional to challenge an action relating to the professional's medical staff privileges or participation status." 145.64, subd. 2. But this exception only grants providers access to this confidential information under particular circumstances.

In *Amaral*, two physicians sought information about themselves from their hospital's medical peer review organizations, but the hospital refused their requests stating the information was confidential and, further, it was only discoverable in a "court action challenging an adverse determination concerning the physicians' staff privileges or participation status." 598 N.W.2d at 381. While the physicians cited the Provider Data Exception in an attempt to obtain the information, the Minnesota Supreme Court affirmed the Court of Appeals and held they were not entitled to peer review materials upon request. "Access in the absence of a challenge to an action relating to staff privileges or participation status or discovery relevant to separate litigation would defeat the legislative intent of Minn. Stat. § 145.64, subd. 2 (1996)." *Amaral*, 586 N.W.2d at 144. The Minnesota Supreme Court concluded "the legislature did not intend for the provider data exception to grant professionals access to review organization information absent an adverse determination regarding their staff privileges or participation status." *Id.* at 388.

STATUTORY IMMUNITY OF PEER REVIEWERS

The Peer Review statute provides immunity to organizations and those involved in the peer review process from "damages or other relief in any action brought by a person or persons whose activities have been or are being scrutinized or reviewed by a review organization ... unless the performance of such duty, function or activity was motivated by malice toward the person affected thereby." § 145.63, subd. 1.

Whether this statutory immunity has been lost hinges on the presence of malice toward the provider in question. The Minnesota Supreme Court has defined malice in the context of statutory immunity as "nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991). "The question of whether a peer review inquiry was motivated by malice is an objective one, focused not on what the reviewers personally believed, but rather on *how the process was conducted*." *Sherr v. HealthEast Care Sys.*, 999 F.3d 589, 599 (eighth cir. 2021) (emphasis added) (citations omitted). Minnesota courts ascertain malice through deviations from the procedural guidelines in place by the particular review organization. "[I]n Minnesota, judicial review of peer-review actions is properly limited ... to only whether peer reviewers abided by their own established procedures. We will infer malice only if the peer reviewers did not follow those procedures." *Id.* (citation omitted).

In the case of *In re Peer Review Action*, the court found malice on the part of a hospital by looking at the totality of the circumstances and actions taken throughout the peer-review process. 749 N.W.2d 822, 828 (Minn. Ct. App. 2008). "The district court reached its conclusion of malice based on six findings: (1) Hospital's peer-review process began outside Hospital's normal channels; (2) Hospital began its investigation in contravention of the Hearing policy, which required that Hospital leadership meet with Physician to discuss his behavior before seeking discipline; (3) Hospital conducted the investigation in a manner contrary to the DAB policy, which required Hospital to give Physician an opportunity to correct his behavior before imposing discipline; (4) in charging Physician, Hospital cited incidents that were unfairly old; (5) Hospital treated Physician disparately as compared to other physicians subjected to discipline; and (6) Hospital improperly applied its power to punish Physician to 'make a public statement.'" *Id.* While the hospital argued that these findings were insufficient to show malice, the court concluded that "each of these procedural irregularities is significant and, taken together, they clearly demonstrate that Hospital intentionally, and repeatedly, violated its own established procedural safeguards." *Id.*

IN CONCLUSION

Minnesota's Peer Review statute was created with the purpose of improving health care by allowing medical providers to perform peer reviews without fear of defamation suits or other retaliatory actions. Being familiar with these provisions may provide significant benefits to attorneys and their health care clients throughout the course of discovery. Therefore, these essential provisions should remain at the forefront while responding to discovery requests and defending in depositions.