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## A Privilege That is Good For Your Health

### *The Federal Quality Assurance Privilege*

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Healthcare is one of the most highly regulated industries in this country. The desire to continually assess and improve the quality of care in healthcare facilities is paramount to the public interest.

Candid self-critical analysis is a recognized and effective tool to improve the quality of care. It is important enough that specific laws have been passed to encourage such candid analysis without fear of having this useful process turned against the healthcare provider in litigation.

Two principal discovery privileges applicable in the healthcare setting are the federal quality assurance privilege, which applies to nursing homes, and the state peer review privilege, which applies to hospitals. Though their titles suggest similarities, these privileges differ significantly, most palpably in their application and scope.

The federal quality assurance privilege is a broad privilege protecting all documents and reports created by or at the behest of a nursing home's quality assurance committee. The state peer review privilege, on the other hand, has been narrowly construed and only protects a hospital's quality of care-related documents in very limited instances. Perhaps not unexpectedly, attorneys and judges alike regularly confuse the two privileges in light of their apparent similarities. However, it is crucial that these two privileges are not confused, as the scope of each varies significantly.

This article explores the parameters of both privileges, highlights their many differences and explains why a broad reading of both privileges is critical to improving the quality of healthcare in our community.

#### **Quality Assurance & Peer Review Defined**

Quality assurance refers to a healthcare provider's self-review process for the purpose of improving patient or resident safety and care. In the context of a nursing facility, quality assessment and as-

urance committees (QA committees) provide a point of accountability for ensuring both quality of care and quality of life.

All nursing homes that receive funding from Medicaid or Medicare are required by federal law to have a QA committee. The committee itself generally consists of the facility's director of nursing, a physician and other employees of the facility.

The purpose of a QA committee is to assess and ensure quality within a nursing facility. More specifically, the committee identifies and develops strategies to improve care and correct any existing deficiencies in the quality of care. Duties of the QA committee also include reviewing areas of clinical concern and determining methods to mitigate such concerns.

For example, if there is an outbreak of infection in a nursing home, the QA committee will meet to determine the cause of the infection, create a plan to eradicate it and establish ways in which the facility can prevent infection in the future.

In contrast, peer review is a system in which doctors and healthcare providers review the past performance and credentials of other doctors and healthcare providers. Peer review can be used to review the quality and necessity of care provided to a specific patient. It can also be used to determine whether a healthcare provider is qualified to practice in a particular field. Peer review can even include suspending or revoking a healthcare provider's privileges to practice in a certain facility.

Should a physician's qualifications or actions be called into question, the peer review committee will review the action at issue and recommend appropriate measures. For instance, if something unexpected occurs after a patient's surgery, the peer review committee may look into the doctor's actions and determine whether they met the applicable standard of care.

If they did not, the peer review committee may recommend that the doctor attend a continuing education seminar or even suspend the doctor's practice privileges.

#### **Source of Each Privilege**

The privilege applying to hospital peer review committees is a creation of state law and thus can vary widely state-by-state. In Kentucky, the source of the peer review privilege can be found in KRS 311.377 which provides, "at all times in performing a designated professional review function, the proceedings, records, opinions, conclusions and recommendations of any committee, board, commission, medical staff, professional standards review organization or other entity...shall be confidential and privileged and shall not be subject to discovery, subpoena or introduction into evidence."

Conversely, the discovery privilege which applies to nursing home QA committees is a creation of the U.S. Congress. To support the improvement of nursing home resident care, Congress amended the federal quality assurance requirements to provide that a state **cannot** require disclosure of a QA committee's records unless the disclosure is related to the committee's compliance with the requirements of the federal law.

More specifically, 42 U.S.C. 1396r states that "a nursing facility must maintain a quality assessment and assurance committee...[and] [a] State or Secretary **may not require disclosure of the records of such committee** except insofar as such disclosure is related to the compliance of such committee with the requirements of this subparagraph." (emphasis added)

#### **Application of the Privileges**

The federal quality assurance privilege applies to quality of care-related documents created by QA committees in nursing homes and skilled nursing facilities.

Congress enacted two identical statutes establishing the quality assurance privilege in long term care facilities, 42 U.S.C. 1396r and 42 U.S.C. 1395i-3; one statute applies to nursing homes and the other applies to skilled nursing facilities. The differences between the two types of facilities are negligible for the purposes of this article.

On the other hand, the state peer review privilege applies only to hospitals and other similar health services organizations. This distinction is important to keep in mind as legal practitioners have the tendency to confuse the two privileges.

### **Scope of Each Privilege**

When interpreting the scope of the federal quality assurance privilege, courts have overwhelmingly agreed that **all documents made by or at the behest of the QA committee are protected from disclosure**. As such, not only are the QA committee's conclusions, reports, minutes and communications not discoverable, but neither are any reports that the QA committee requests to be completed on its behalf or for its review.

Because not all members of a QA committee work on the floor of the nursing home, the QA committee regularly requests that staff members working on the floor, including the nurses, create reports for review and analysis by the QA committee. The federal quality assurance privilege applies to all documents created pursuant to such requests because they are prepared at the direction of the QA committee.

Furthermore, the federal quality assurance privilege has been held to apply in both federal and state courts, and in both civil and criminal proceedings. As Congress intended, the federal privilege sweeps broadly in order to promote its very important purpose of ensuring quality of care through self-review without the fear of legal reprisal. In contrast, Kentucky's peer review privilege, unlike the federal quality assurance privilege, applies in very limited circumstances.

In 1998, the Kentucky Supreme Court held that the peer review privilege is limited to suits against peer review entities. The court explained that the privilege is applicable only when a committee or its members is being sued by a disgruntled colleague for comments made or actions taken during a peer review meeting. Thus, if an angry former staff member is suing her previous employer's peer review committee for defamation, any relevant documents generated by that peer review committee are not discoverable.

Although courts have interpreted the peer review privilege narrowly, the statute granting the privilege, KRS 311.377, states without limitation that the proceedings, records, opinions, conclusions and recommendations of the peer review committee "shall not be subject to discovery, subpoena or introduction into evidence."

The statute does not on its face limit the application of the peer review privilege to proceedings against the peer review committee itself; however, Kentucky courts continue to apply the privilege to much more limited contexts than the quality assurance privilege.

### **Why the Privileges are Important**

Discussing a problem is a fundamental step to fixing that problem. In that vein, the federal quality assurance privilege is crucial to maintaining and improving resident care because it enhances the objectivity of the review process and ensures that QA committees can candidly and objectively analyze the quality of health services rendered in their facilities.

Because the information generated by a QA committee is protected by privilege, QA committees can be probative, and if necessary, critical of certain clinical practices. Without opportunities for candid discussion, there is a disincentive to probe and constantly assess clinical performance for fear that by doing so, the provider is creating evidence against itself should it become a defendant in a civil lawsuit.

The public good is better served by encouraging analysis and improvement

in clinical processes than by allowing plaintiffs to discover the self-critical analysis. An open dialogue is a prerequisite to making improvements in any field, and a nursing home is no exception.

Furthermore, the QA committee has the very important purpose of affecting the current status of quality of care within a nursing home. This differs from the hospital peer review function of reviewing past actions to better prepare for future situations. Because QA committees affect presently-existing situations and current resident care issues, the need for unfettered dialogue is even more compelling and may explain why the federal quality assurance privilege is broader in scope than the state peer review privilege.

The confidentiality afforded to QA committees under federal law is not only beneficial, but it is also necessary. For healthcare providers, the fear of litigation due to disclosure of data can be a serious barrier to accurate reporting. Moreover, juries have indicated a willingness to punish healthcare providers whose performance is less than perfect.

It is clear that without the quality assurance privilege, much of the objective reporting by committee members would cease altogether for fear of later having their own words used against them in a lawsuit. For this reason, Congress intended the federal quality assurance privilege to provide nursing facilities with much-needed opportunities to deal with quality concerns in a confidential manner. The privilege is therefore crucial to supporting a continuing culture of quality improvement.

It is for the same reasons that the peer review privilege afforded to hospitals under KRS 311.377 should be read more broadly. If physicians anticipate that their peer review reports will be used against the facility where they practice or against a colleague with whom they practice, communications in peer review meetings will diminish significantly.

Fear of litigation can cause—and likely has caused—peer review committees to stop all meaningful evaluation of the actions or credentials of a colleague. Peer review committees may report only superficial or minimal information in an attempt to avoid creating fodder for malpractice suits.

As one physician commented, "I'm afraid if I say something constructive... it could be taken out of context by a plaintiff[s] attorney, so I'm not going to render any opinion...this is clearly a step backward as to what's best for patients."

### **A Broad Reading of the Privileges is Crucial to Improving Resident & Patient Care**

It is in the best interest of nursing home residents and hospital patients for healthcare facilities to conduct open and candid reviews of the quality of care. In contrast to the narrow interpretation of Kentucky's peer review privilege, federal courts have applied the federal quality assurance privilege broadly and have held that all documents generated by or at the direction of a QA committee are not discoverable.

Courts have overwhelmingly agreed that the federal quality assurance privilege must be applied in a way which facilitates open and objective self-review without fear of legal reprisal. To abrogate this privilege would be to deprive nursing homes of valuable opportunities to improve resident quality of care and quality of life.

Both the federal quality assurance privilege and the state peer review privilege are meant to promote candid dialogue and problem-solving opportunities in healthcare facilities. As such, they should be acknowledged as priceless tools for improving healthcare in our community.

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