



Changes in North Carolina's Peer Review Privilege: The Hospital Now Has the Burden to Establish the Confidentiality of Peer Review Documents

On June 15, 2010, the North Carolina Court of Appeals (the "Court") issued a clear warning to hospitals and doctors concerning the peer review privilege found in North Carolina General Statute § 131E-95. The Court held that the burden is on the hospital to demonstrate that a document fits squarely within the limited categories protected by the statutory privilege. In *Bryson v. Haywood Regional Medical Center et al.*, the Court upheld an order commanding Haywood to provide several documents directly related to the peer review process and quality assurance at the facility. The case arose after a physician complained of quality issues to the Hospital risk manager. The complaining doctor alleged that the Hospital then sought to have her fired by her employer. The Hospital objected to discovery of certain documents under the peer review privilege, but the trial judge ordered production and Haywood appealed.

The Court directed the Hospital to produce all documents ordered by the trial court, holding that Haywood had failed to carry its evidentiary burden to show the documents were protected under § 131E-95. These documents included: (1) an e-mail from risk management summarizing several instances of patient care and discussing potential quality concerns; (2) a request for review of these charts with a summary of the cases; (3) the relevant chart reviews; and (4) communications from MDReview, an external peer review organization. Haywood relied solely upon the documents themselves to support the privilege and did not offer affidavits or other evidence. The judges refused to accept "mere assertions" that the documents constitute peer review, finding no evidence that they fit into the categories of documents protected by §131E-95.

More specifically, the Court concluded that each document failed to support application of the peer review privilege standing alone. Each document failed to identify its authors and recipients, including whether they were members of a medical review committee, or state its purpose. No document "explicitly state[d] that it was generated by members of a medical review committee" or for such a committee's consideration. The opinion noted that there was "absolutely no evidence in the record" from which it could conclude these documents were privileged.

The documents from MDReview were not protected because the Hospital offered no *evidence* that the organization was an external peer review organization or that the reports were generated by a committee of such organization. Of note, these MDReview documents included the heading "THIS IS A CONFIDENTIAL PEER REVIEW DOCUMENT" and, in its body, stated that it was assisting with the Hospital's peer review needs and its report was prepared at the request of Haywood to provide an independent professional opinion of the care rendered. The Court held this was not sufficient to support the privilege.

The warning of *Bryson* is clear – a Hospital must take active steps to demonstrate that a document is privileged under § 131E-95. These documents should include information sufficient to demonstrate that they meet the substantive requirements of the peer review privilege. A hospital’s bylaws and policies should include careful and explicit references to all medical review committees under § 131E-76(5) involved in the peer review or quality assurance process. If and when these documents are sought through a motion to compel or other judicial process, a hospital cannot rely on the documents alone. It must be prepared to offer evidence in support of its claim of privilege through, for example, testimony, affidavits, meeting minutes, hospital bylaws and policies. When appropriate, the hospital can provide privileged documents and privileged evidentiary support to a judge for a private, *in camera* review.



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