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Litigating the suspension of physician clinical privileges: The intersection of The Illinois Medical Studies Act and the rule of "at issue" waiver

By John J. D'Attomo and Fatema Zanzi

The Illinois Medical Studies Act[1] ("MSA") seeks to achieve two principal objectives: (1) to ensure that members of the medical profession engage in effective peer review to improve the quality of health care, and (2) to encourage candid and voluntary studies and programs to improve hospital conditions, patient care, and reduce the rates of death and disease.[2] To promote these objectives, the MSA creates a statutory privilege covering a broad range of information and documents used in the course of internal quality control and medical study. The MSA broadly states that such information, documents, and data are "strictly confidential" and "shall not be admissible as evidence, nor discoverable in any action of any kind in any court or before any tribunal, board, agency or person."[3]

I. The Scope of the MSA

Numerous decisions from the Illinois Appellate Court have addressed the categories of information, documents and data protected by the MSA. Broadly stated, the MSA "protects against disclosure of the mechanisms of the peer-review process."[4] The "mechanisms" of the peer review process include the information gathering process and the deliberations leading to the ultimate decision rendered by the peer-review committee.[5] The MSA does not protect information generated before the peer review process begins, or information generated after the peer-review process ends.[6] Consistent with this rule, the ultimate decision or ultimate actions taken by a peer review committee and/or hospital after the peer review process has concluded are not protected under the MSA.[7] However, the recommendations and internal conclusions of a peer review committee "that may or may not lead to" the ultimate decision or ultimate actions are privileged.[8]

At least two federal courts have concluded that the MSA does not preclude the use of peer review material where the peer review process is itself at issue.

In one recent case, the Illinois Appellate Court held that certain medical journal articles were privileged under the MSA.[9] The journal articles were not created, generated or prepared by the peer review committee. However, the evidence showed that the journal articles were assembled at the committee's request, were used as a resource in conducting the peer review, and focused on a particular issue under review.[10] Based on this evidence, the court ruled that the medical journal articles were privileged under the MSA because they revealed the peer review committee's internal workings, including its information gathering and deliberations.[11]

Nonetheless, courts have recognized that "not every piece of information" acquired by a peer-review committee is protected.[12] A document created "in the ordinary course of the hospital's medical business," or for purposes of rendering legal opinions or to weigh potential liability risk, or for later corrective action by the hospital staff is not privileged even though such document was later used by a peer review committee.[13]

As these cases illustrate, court decisions addressing the MSA typically involve an analysis of whether particular documents, data or information fall within the scope of the MSA. Where a physician challenges a hospital's summary suspension of his or her clinical privileges, the issue may arise whether documents, data or information admittedly protected by the MSA may be used by the hospital to defend against the physician's claim that he or she did not present an immediate danger to others. Research has revealed no reported Illinois decision directly addressing this issue.

II. The "rule of non-review"

Illinois courts generally follow the "rule of non-review" in litigation challenging the suspension or termination of a physician's clinical privileges.[14] Under the "rule of non-review," a private hospital's decision to suspend or terminate a physician's privileges is

subject to judicial review only to determine whether the decision complied with the medical staff bylaws of the hospital.[15] Assuming the "rule of non-review" is strictly applied, the presentation of evidence at trial is limited to evidence bearing on the hospital's technical compliance with the medical staff bylaws; evidence concerning the physician's clinical competence or professional conduct is not admissible.

The application of the "rule of non-review" is complicated in the context of a summary suspension, however, because the determination of whether the summary suspension complied with the hospital's medical staff bylaws may arguably implicate the question of whether the physician presented an "immediate danger" to others.[16] The determination of whether the physician presented an "immediate danger" may, in turn, require consideration of the physician's clinical competence and/or professional conduct which is generally excluded under the "rule of non-review." This article assumes a physician challenges the hospital's summary suspension decision by asserting that he or she did not present an "immediate danger" and the hospital is forced to defend its summary suspension decision.

The MSA contains an exception allowing physicians to access and use MSA material when challenging adverse credentialing decisions.[17] This exception is intended to protect the due process rights of physicians in connection with adverse decisions concerning their privileges and services.[18] The MSA does not contain a similar exception allowing hospitals to use MSA material to defend against a physician's challenge to a summary suspension decision.

In the absence of a statutory amendment or clarification from the Illinois Appellate Court, hospitals can argue that the rule of "at issue" waiver allows hospitals to use MSA material in this circumstance.[19] This argument is supported by at least two federal court decisions and Illinois cases applying the rule of "at issue" waiver in the context of other legal privileges.

III. "At issue" waiver and the "shield and sword" analogy

Under the Illinois Hospital Licensing Act, a hospital may summarily suspend a physician's clinical privileges where the physician's continued practice constitutes an immediate danger to the public, including patients, visitors, and hospital employees and staff.[20] Where a physician challenges the summary suspension contending he or she was not an immediate danger to the public, the hospital may seek to introduce MSA material to rebut the physician's claim. This issue may arise in a "fair hearing" proceeding before a committee of the hospital's medical staff or in formal litigation proceedings.

For example, the hospital may seek to counter the physician's claim that his or her continued practice was not an immediate danger to the public by introducing the findings of an external peer review organization, or the hospital's own internal peer review committee, to show that the physician's practice presented an immediate danger to the public. The hospital may argue that the physician has waived any right to assert the MSA privilege by intentionally placing such material "at issue" by virtue of his or her claim. In the context of the attorney-client privilege, one court has noted that "at issue" waiver occurs "where a party voluntarily injects either a factual or legal issue into the case, the truthful resolution of which requires an examination of the confidential communications."[21]

The hospital's waiver argument may be even more compelling where the physician affirmatively contends that peer review material demonstrates that his or her continued practice was not an immediate danger to the public. In this circumstance, the hospital would argue that the physician has placed the materials considered by the peer reviewers, as well as the peer review process itself, squarely "at issue" thereby waiving any claim of privilege. However, where the physician believes that the MSA material will be prejudicial to his or her claim, the physician may argue that the express terms of the MSA preclude any use of MSA material "in any action of any kind in any court or before any tribunal, board, agency or person."

In the context of other legal privileges, courts have recognized that a litigant cannot use a privilege as both "a shield and a sword." That is, a party cannot intentionally place certain documents, information or communications "at issue" in the litigation and then assert that the material is privileged and cannot be used by the opposing party. This concept of "at issue" waiver is rooted in judicial decisions and general notions of due process. As one court observed in the context of the Fifth Amendment privilege:

> [W]e do not believe [the plaintiffs] should be permitted to use the Fifth Amendment privilege as both a shield of protection and a sword of attack. Plaintiffs have forced defendants into court. It would be unjust to allow them to prosecute their cause of action and, at the same time, refuse to answer questions, the answers to which may substantially aid defendants or even establish a complete defense.[22]

A hospital defending against a physician's claim that his or her continued practice was not an immediate danger to the public may raise this same "shield and a sword" analogy in the context of the MSA privilege. The hospital can argue that the MSA privilege has been waived because the physician has placed peer review material "at issue" in the case. The hospital might additionally argue that the hospital is the "holder" of the privilege and that it may simply elect to waive the MSA privilege and thereby use otherwise protected MSA material.[23] However, the hospital's attempt to waive the privilege may not be effective.[24]

IV. Federal court decisions addressing the MSA and "at issue" waiver

At least two federal courts have concluded that the MSA does not preclude the use of peer review material where the peer review process is itself at issue.[25] In *Memorial Hospital for McHenry County v. Shadur*, a physician brought suit alleging that various physicians at Memorial Hospital conspired to exclude him from the hospital medical staff in violation of the antitrust laws. The physician specifically alleged that a disciplinary proceeding before the hospital board of directors was a sham and really a means of implementing the alleged conspiracy. To establish this fact, the plaintiff requested documents concerning similar hospital disciplinary proceedings against other physicians. The district court ordered the documents disclosed.

On appeal, the Seventh Circuit Court of Appeals observed that "[p]roceedings of this kind are admittedly privileged under the Illinois Medical Studies Act."[26] Nonetheless, the Seventh Circuit affirmed the order allowing discovery concerning the hospital disciplinary proceedings because the requested discovery was "relevant and possibly crucial evidence."[27] Specifically, the plaintiff needed

to present evidence from the disciplinary proceedings to show that other similarly situated physicians were not denied staff privileges.[28] The *Memorial Hospital* court distinguished the case before it from a medical malpractice case where the plaintiff can still prove his or her case without access to the peer review materials through expert testimony concerning the standard of care.

The court in *United States v. State of Illinois* likewise held that the MSA did not preclude the use of certain medical review committee materials. There, the United States brought suit under the Civil Rights of Institutionalized Persons Act and sought discovery concerning injuries occurring at the defendant's mental health facility and certain remedial steps taken in response. Specifically, the government sought discovery of certain reports, minutes and related information from the internal medical review committee of the mental health facility. The defendant resisted discovery arguing that the requested information could be gleaned from other institution records. While acknowledging this fact, the court stated, "[b]ut the very existence of quality assurance review committees, their evaluations, and their recommended action or inaction is important in deciding the ultimate issue in the case—whether the defendant was providing adequate medical care to residents."[29] The court further noted:

> Adequate medical care is not only measured by remedial steps after injury but also by evaluation and affirmative steps taken by quality assurance committees. Indeed, the Complaint itself charges that the Defendants have failed to maintain accurate review systems to ensure professional treatment. *The records of the quality assurance committees are the only way to evaluate these claims.*[30]

Although not involving the MSA, the United States Supreme Court has similarly held that peer review materials could be used in litigation where the proceedings before the peer review committee are at issue.[31] There, the Supreme Court ruled that the peer review privilege would not bar discovery of certain tenure review materials where the plaintiff alleged claims of discrimination in the university tenure review process. The Court held that "disclosure of peer review materials will be necessary in order for the [EEOC] to determine whether illegal discrimination has taken place."[32]

Similarly, the evaluation of whether a hospital properly concluded that a physician presented an immediate danger to the public may require consideration of internal and/or external peer review materials that were considered by the hospital in connection with the summary suspension. The hospital may argue that it considered various materials, including certain peer review reports and recommendations, when it concluded that allowing the physician to continue practicing at the hospital would present an immediate danger. As such, the hospital will argue that it must use the various peer review reports and recommendations to defend against the physician's claims. To preclude the hospital from using MSA material in this circumstance could effectively prevent the hospital from mounting a defense to the physician's claims.

V. Conclusion

Memorial Hospital and *State of Illinois* are both federal court decisions. Therefore, neither decision is controlling authority for the circuit courts in Illinois—the jurisdiction where most physician credentialing cases involving hospitals in Illinois are litigated. Nonetheless, these decisions coupled with Illinois case law recognizing the rule of "at issue" waiver in other contexts are persuasive authority for Illinois courts when confronting the intersection of the MSA and the rule of "at issue" waiver in the review of hospital medical staff credentialing and corrective action decisions. ■

John J. D'Attomo and Fatema Zanzi were trial counsel for Kewanee Hospital in the matter *Julio Ramos, M.D. v. Kewanee Hospital*, Case No. 08 CH 123 and No. 11 L 4, in the Circuit Court for the 14th Judicial Circuit, Illinois. Mr. D'Attomo is a litigator with Carlson Partners, Ltd. where he concentrates his practice on business and health care litigation matters. Ms. Zanzi is an associate with Drinker Biddle & Reath LLP where she counsels hospitals and health care organizations on a wide variety of regulatory and transactional matters, including medical staff matters. The views expressed herein are those of the authors and not necessarily their law firms or clients.

1. 735 ILCS § 5/8-2101 et seq.
2. *Frigo v. Silver Cross Hospital and Medical Center*, 377 Ill.App.3d 43, 65, 876 N.E.2d 697, 717 (1st Dist. 2007).
3. 735 ILCS §§ 5/8-2101, 2102.
4. *Anderson v. Rush-Copley Medical Center, Inc.*, 385 Ill.App.3d 167, 174, 894 N.E.2d 827, 834 (2nd Dist. 2008).
5. Id.
6. Id.
7. Id. at 179, 894 N.E.2d 838.
8. Id.
9. Id. at 175, 894 N.E.2d 835 - 36.
10. Id.
11. Id.
12. Id. at 174, 894 N.E.2d 834.
13. *Silver Cross Hospital*, 377 Ill.App.3d 66, 876 N.E.2d 718.
14. *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill.2d 497, 506-07, 544 N.E.2d 733, 737-38 (1989). See also *Barrows v. Northwestern Memorial Hosp.*, 123 Ill.2d 49, 525 N.E.2d 50 (1988).
15. *Adkins*, 129 Ill.2d 506 - 07, 544 N.E.2d 737 - 38.
16. See 210 ILCS 85/10.4(b)(2).
17. 735 ILCS § 5/8-210 ("except that in any health maintenance organization proceeding to decide upon a physician's services or any hospital or ambulatory surgical treatment center proceeding to decide upon a physician's staff privileges, or in any judicial review of either, the claim of confidentiality shall not be invoked to deny such physician access to or use of data upon which such a decision was based.")
18. *Jenkins v. Wu*, 102 Ill.2d 468, 480-82, 468 N.E.2d 1162, 1168-69 (1984).
19. For an article reviewing the law generally regarding waiver of the peer review privilege see Mulholland & Zarone, Waiver of the Peer Review Privilege: A Survey of the Law, 49 S.D. L. Rev. 424 (2003).
20. 210 ILCS 85/10.4(b)(2)(C)(i).
21. See *Lama v. Preskill,* 353 Ill.App.3d 300, 305, 818 N.E.2d 443, 448 (2nd Dist. 2004) (citation omitted).
22. *Galante v. Steel City National Bank of Chicago*, 66 Ill.App.3d 476, 482, 384 N.E.2d 57, 62 (1st Dist. 1978).
23. See *Pritchard v. Swedish American Hospital*, 199 Ill.App.3d 990, 1000, 557 N.E.2d 988, 995 (2nd Dist. 1990) (noting that the MSA privilege belongs to the hospital and the members of the peer review committee).
24. The Illinois Appellate Court found that the MSA privilege cannot be waived in two cases where medical malpractice plaintiffs argued that hospitals had waived the privilege. See *Chicago Trust Company v. Cook County Hospital*, 298 Ill. App.3d 396, 405, 698 N.E.2d 641, 648 (1st Dist. 1998) (finding that disclosure of MSA material to persons outside the peer review committee could not waive the MSA privilege); *Zajac v. St. Mary of Nazareth Hospital Center*, 212 Ill.App.3d 779, 789, 571 N.E.2d 840, 846 (1st Dist. 1991) (rejecting the plaintiff's argument that the hospital had waived the MSA privilege by failing to object to certain MSA testimony during an evidence deposition, noting that the MSA privilege "cannot be waived"). Both cases involved claims that the hospital had impliedly waived the privilege by its conduct; neither case addressed whether an express waiver of the privilege by the hospital could be effective.

The Medical Studies Act specifically provides that "disclosure of any such information or data, whether proper, or improper, shall not waive or have any effect upon its confidentiality, nondis-

coverability, or nonadmissibility." 735 ILCS § 5/8-2102.

25. See *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981); *United States v. State of Illinois*, 148 F.R.D. 587 (N.D. Ill. 1993).

26. 664 F.2d 1060.

27. 664 F.2d 1063.

28. Id. See Fed. R. Evid. 501 (in federal court, federal common law governs privileges except that "state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." For a recent Illinois federal district court decision involving the MSA peer review privilege, see *Sevilla v. U.S.*, No. 10 C 8165, 2012 WL 1123913 (N.D. Ill., Apr. 4, 2012).

29. 148 F.R.D. 588.

30. Id. (emphasis supplied) (citation omitted).

31. See *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990). See also *Jaffee v. Redmond*, 518 U.S. 1 (1996).

32. 493 U.S. 193. See also *A.N. v. Kiley*, No. 86 C 9486, 1990 WL 37157 (N.D. Ill. March 20, 1990) (executive privilege was not applicable where the deliberative process was itself at issue and the documents sought were a record of that deliberative process).

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