

MEDICAL DEFENSE AND HEALTH LAW

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This article discusses recent Illinois Appellate Court decisions concerning the privilege established by the Illinois Medical Studies Act against discovery of information generated by hospital committees during the peer review process.

The Illinois Medical Studies Act Privilege After *Grosshuesch and Eid*

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Illinois hospitals and other medical facilities routinely conduct peer review and quality committee investigations and meetings relating to the care and treatment received by patients. These proceedings are conducted under the auspices of the Illinois Medical Studies Act (Act). In certain circumstances the Act may provide a privilege against the discovery of information generated by facility committees in a later lawsuit relating to the patient's care and treatment.

The Act specifically provides:

all information . . . reference or other third party confidential assessments of a health care practitioners professional competence or other data of . . . committees of licensed or accredited hospitals or their medical staffs, or their designees, used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care . . . *shall be privileged, strictly confidential* and shall be used only for . . . the evaluation and improvement of quality care.

735 ILCS 5/8-2101 (emphasis added). Section 8-2102 of the Act provides that "the information, records, reports, statements, notes, memoranda or other data, *shall not be admissible as evidence, nor discoverable* in any action of any kind any court or before any tribunal, board, agency or person." 735 ILCS 5/8-2102 (emphasis added).

Ensuring that the Act's privilege applies requires that the documents not have been created until the facility's committee is engaged in a peer review or quality process and authorizes an investigation into a **specific** patient or incident and meticulous record keeping. Two recent Illinois cases emphasize these points.

In *Grosshuesch v. Edward Hospital*, 2017 IL App (2d) 160972, the plaintiff had contacted the hospital's patient advocate regarding concerns the plaintiff had about her care and treatment. The plaintiff's concerns resulted in a referral to the medical staff quality committee (MSQC). The MSQC liaison consulted with two hospital staff physicians who performed a peer review before any member of the medical staff quality committee requested an investigation of the incident. The MSQC liaison entered her notes into an electronic database which the MSQC considered at its later meetings.

The plaintiff sought the liaison's notes in discovery. The hospital objected arguing that the Act protected the documents. The hospital submitted affidavits from its claims counsel which explained the hospital's peer review policy. The hospital argued that the information and conclusions in the liaison's notes resulting from the peer review investigation were consistent with the hospital's peer review policy, were completed for internal quality control, and were privileged. The hospital further argued that the MSQC, via its own policy, instructed the liaison to assist the committee by coordinating an investigation into the plaintiff's concerns for the purpose of quality

control and that the notes served an integral function of the peer review process.

In considering the Act's privilege from discovery, the trial court found that the hospital did not establish when the investigation into this *specific* plaintiff's concerns began or which member of the committee directed the investigation to begin. The trial court further found that the committee was not engaged in the peer review process for this specific occurrence at the time the notes were created, and thus, the notes were not privileged under the Act.

The appellate court agreed. The appellate court noted that documents generated specifically for the use of a peer review committee are protected under the Act. However, since the hospital's committee had not yet met and its designee had not been authorized to conduct an investigation into this "*specific incident*," the liaison's notes were not privileged under the Act. The court found no merit in the hospital's argument that the committee's policies, enacted years earlier and which directed the liaison to coordinate an investigation, were sufficient to shield the notes from discovery. The court concluded that the notes in question "were generated before any peer review committee or its designee authorized an investigation into a specific incident" and thus, the notes were not privileged.

The decision in *Grosshuesch* follows an earlier 2017 decision in *Eid v. Loyola Univ. Med. Ctr.*, 2017 IL App (1st) 143967. There, the Illinois Appellate Court considered whether information generated by a designee of the peer review committee for the use of the peer review committee in the

course of internal quality control was subject to the provisions of the Act. In *Eid*, the hospital had a medical care evaluation and analysis committee (MCEAC) which conducted peer reviews of hospital deaths for the purpose of reducing morbidity and mortality. The chairperson of the MCEAC was tasked with determining if an investigation of patient care was warranted and could direct an individual to assemble information for the MCEAC's use.

On the morning after the death of a patient, the risk manager contacted the chairperson of the MCEAC, who was also the hospital's chief medical officer, to inform him of the patient's death. The chairperson instructed the risk manager to investigate the death on the MCEAC's behalf from a quality perspective. The risk manager created 13 pages of documents during her investigation which the hospital claimed were privileged under the Act as they were created as part of an MCEAC investigation after the go ahead was given for the specific investigation.

Plaintiff sought production of the documents in discovery. In support of the Act's privilege, the hospital submitted affidavits from the committee chairperson/chief of staff and the risk manager, discussing in detail the steps which lead to the creation of the documents. The trial court found that the documents were privileged under the Act and the appellate court affirmed.

The appellate court first found that the affidavits showed that under the hospital bylaws the chairperson and the risk manager were designees of the MCEAC. The court

noted that the trial judge found that the hospital's bylaws specifically authorized the chief medical officer to begin a peer review investigation. In addition, the affidavits of the chairperson and risk manager established that the risk manager reported the information to another member of the MCEAC and that the matter was presented to the full board of the MCEAC. Since the documents were generated by the risk manager at the chairperson's directive pursuant to the chairperson's authority under the bylaws as a designee of the MCEAC, contributed to the MCEAC's deliberations, and were considered prior to the conclusion of the MCEAC's review, the documents were privileged under the Act.

The recent decisions in *Eid* and *Grosshuesch* stand for the principle that where a member of a peer review committee has the authority to authorize an investigation by a designee of the committee into a potential quality issue, any documents generated after an investigation of the specific incident has been ordered can be privileged. Establishing the Act's privilege, however, can be challenging; in court, the facility bears the burden of establishing the privilege. Thus, it is recommended that each facility review its bylaws to ensure:

1. The bylaws permit the committee, a member of the committee or the committee's designee, to conduct an investigation for purposes of internal quality control, medical study for the purpose of reducing morbidity or mortality, or improving patient care.

2. The bylaws contain a procedure for the committee or a member thereof such as the chair of the committee to authorize an investigation into a specific matter via procedures set forth in the bylaws.

Good record keeping by the facility regarding the quality committee is also recommended. The following steps should be taken as part of the record keeping associated with quality investigations and committee meetings:

1. The date and time that the committee authorized the investigation should be recorded. A facility should record the name and position of the individual who authorized the investigation in accordance with the bylaws and the name of the person ordered to conduct the investigation. If directives are provided at a committee meeting, the facility should record the date and time of the meeting, who is in attendance at the meeting and who has been authorized to undertake what steps as part of the investigation.
2. The facility or the individual conducting the investigation should record the date and time on all documents created as part of the investigation to easily establish that the documents were created after authorization occurred.
3. The information collected and documents created should be

provided to the committee for the committee's use and/or discussion at a subsequent meeting, noting in any minutes the work undertaken.

4. Committee minutes should clearly designate between the committee's results, ultimate decisions, recommendations and internal conclusions. Results of a committee which take the form of ultimate decisions made or actions taken are not privileged. Recommendations and internal conclusions of a committee should be privileged regardless of whether they are implemented.
5. Realize at the outset that documents created as part of the facility's ordinary course of medical business will not be privileged. Documents used for dual purposes such as quality assurance and risk management, such as incident or situation reports, which are not commenced after a directive from a hospital committee will not be privileged. In addition, materials later given to a peer review or quality committee will not become cloaked in the privilege.

These steps will assist in ensuring that the information necessary to establish the Act's privilege has been created and maintained.

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