GAMSS 1ST QUARTER 2017 MEETING

Wednesday, February 22, 2017

Legal Update: Review of Key Legal Decisions and Their Impact on Medical Services Professionals

Michael R. Callahan
Katten Muchin Rosenman LLP
Chicago
+1.312.902.5634
michael.callahan@kattenlaw.com

Katten
Katten Muchin Rosenman LLP

Texas Supreme Court Blocks Production of Medical Peer Review Committee Reports (In re Christus Santa Rosa Health Sys., No. 14-1077 (Tex. May 27, 2016)

- Background
  - Physician who was a defendant in a medical malpractice case had argued that he was forced to end the surgery in question because a piece of equipment was not available for diagnostic purposes.
  - A medical peer review committee convened after the surgery but did not recommend that any disciplinary action be taken.
  - Texas law makes medical peer review records privileged and not subject to discovery unless a committee took action that could result in discipline. Under these circumstances, the physician is entitled to a written copy of the recommendation and the final decision.
  - Physician sought to compel discovery of the peer review records and the hospital objected.
  - Trial court ordered the records to be produced although under a protective order. The Hospital appealed.

Katten
Katten Muchin Rosenman LLP

Texas Supreme Court Blocks Production of Medical Peer Review Committee Records (In re Christus Santa Rosa Health Sys., No. 14-1077 (Tex. May 27, 2016) (con't)

- Decision
  - Supreme Court held that the trial court erred by failing to conduct an in camera review to determine whether the committee took any action that could have resulted in disciplinary action.
  - The Court rejected the physician's argument that if a committee could have taken action, even if it did not, then the records were discoverable.
  - Case was remanded to the trial court to determine whether the exception applied.
- Lessons Learned
  - You need to familiarize yourself with your peer review privilege statutes, state and federal, in order to know exactly what is and is not protected.
  - Do you know which records, minutes, reports, etc., which are being produced and placed in a physician's credentials and quality files, are protected and which are not?
  - Are the records being kept in the correct files?

Katten
Katten Muchin Rosenman LLP

Texas Supreme Court Blocks Production of Medical Peer Review Committee Records (In re Christus Santa Rosa Health Sys., No. 14-1077 (Tex. May 27, 2016) (con't)

- When was the last time you reviewed the files and are they complete?
- Do you give physicians access to their files?

Katten
Katten Muchin Rosenman LLP

U.S. Court in Colorado Says Peer Review Law Makes No Exception for Factual Information in Records (Blatchley v. Cunningham, No. 1:15-cv-00460-WHD-NYW (D.Colo. April 18, 2016)

- Background
  - Plaintiffs brought a personal injury action against the defendant hospital and others named in the compliant and as part of the discovery they sought “any and all information regarding plaintiff... created by or for any professional review, peer review or quality control or management from defendant”.
  - The hospital objected and sought a protective order arguing that the information sought was privileged and not subject to discovery pursuant to Colorado law.
  - Although the plaintiffs acknowledged that the hospitals Trauma Executive Peer Review Committee was a professional review committee under the law, the documents at issue contained factual information, therefore the plaintiff argued that the document did not qualify as protected “records” under state law.

Katten
Katten Muchin Rosenman LLP

U.S. Court in Colorado Says Peer Review Law Makes No Exception for Factual Information in Records (Blatchley v. Cunningham, No. 1:15-cv-00460-WHD-NYW (D.Colo. April 18, 2016) (con't)

- Decision
  - The court rejected the plaintiff's arguments holding that: "nothing within the law and it's interpreting case law suggests that (1) a distinction is made between facts and deliberation under the [law's] shield against discovery or (2) that facts were discoverable from records generated as part of the peer review process."
  - The court further noted that "the facts considered by the peer review committee appear inextricably intertwined with the investigation by and deliberation of the committee."
- Lessons Learned
  - Although facts taken from a medical record or other source are not generally protected, the inclusion of facts an otherwise confidential peer review record does not therefore make the record subject to discovery or admissibility into evidence.

Katten
Katten Muchin Rosenman LLP

U.S. Court in Colorado Says Peer Review Law Makes No Exception for Factual Information in Records (Blatchley v. Cunningham, No. 1:15-cv-00460-WHD-NYW (D.Colo. April 18, 2016) (con't)

- Many statutes require that protected peer review proceedings be conducted by a recognized peer review committee or personnel.
- It is therefore important to identify these committees and participating individuals as part of a peer review policy as well as to incorporate the definitions of "peer review" and "peer review committee" in your organizational documents which track the language set forth in state and/or federal law.

Katten
Katten Muchin Rosenman LLP

U.S. Court in Vermont Denies Discovery of Joint Commission Documents in Wrongful Death Action (Russo vs. The Brattleboro Retreat, No.5:15-cv-55 (D.Dt. January 25, 2016)

- Background
  - A wrongful death action was filed as a result of a suicide by a young woman at a mental health treatment facility.
  - The administrator representing the Plaintiff moved to compel production of records between the facility and The Joint Commission arguing that the Vermont Medical Peer Review Statute did not specifically identify TJC documents as protected records.
  - The Plaintiff further argued that TJC was not one of the four enumerated entities that qualify as a Peer Review Committee such as an HMO, hospital, health care provider or other identify entities.
  - In addition, the Plaintiff contended that the materials requested were discoverable because they were not part of a formal Peer Review process, but instead constituted conversations in documents arising in the course of ordinary business operations."

Katten
Katten Muchin Rosenman LLP

U.S. Court in Vermont Denies Discovery of Joint Commission Documents in Wrongful Death Action (Russo vs. The Brattleboro Retreat, No.5:15-cv-55 (D.Dt. January 25, 2016)

- Decision
  - The District Court noted that Vermont Courts have found that TJC is a "Peer Review Committee" under the statute, focusing on the type of work done.
  - The Court further stated that investigations conducted by TJC "are precisely the sorts of formal Peer Review processes contemplated by the [state] statute" and are "very different from a mere conversation between staff about quality control."
  - After an in-camera review, the court further stated that none of the records at issue were "originals source" materials that otherwise would be discoverable and the fact that this information was shared by and between the facility and TJC did not amount to a waiver of the protections because the communications were between Peer Review participants and were not otherwise disclosed to an adversary or to the general public.
- Lessons Learned
  - It is just as important to know about case law interpretation of relevant peer review statutes because the court's analyses further impact the statute and its interpretation which will affect internal peer review policies and bylaws.

Katten
Katten Muchin Rosenman LLP

U.S. Court in Vermont Denies Discovery of Joint Commission Documents in Wrongful Death Action (Russo vs. The Brattleboro Retreat, No.5:15-cv-55 (D.Dt. January 25, 2016)

- Lessons Learned (cont.)
  - In many states, the disclosure to unrelated third parties, whether purposeful or unintentional, can result in a waiver of the privilege protections. It is very important for you to understand when the privilege is protected and when it is not when discussing and sharing this information internally or to third parties participating in the peer review process.

Katten
Katten Muchin Rosenman LLP

West Virginia Supreme Court Holds Physician's Applications for Staff Privilege Not Discoverable (West Virginia ex rel. Wheeling Hospital, Inc. vs. Wilson, No.15-0558 (W.Va. February 9, 2016)

- Background
  - Plaintiff sued a physician alleging that she was injured by a surgeon who performed a procedure. She sued the hospital and the physician for medical malpractice, lack of conformed consent, and negligent credentialing.
  - Plaintiff brought a motion to compel discovery of certain records including the physician's credentialing files.
  - The trial court ordered that the documents be produced and the hospital appealed.

Katten
Katten Muchin Rosenman LLP

West Virginia Supreme Court Holds Physician's Applications for Staff Privilege Not Discoverable (West Virginia ex rel. Wheeling Hospital, Inc. vs. Wilson, No.15-0558 (W.Va. February 9, 2016)

- Decision
  - Supreme Court noted that the State's Peer Review statute did not provide very precise guidelines in terms of what documents were and were not discoverable.
  - In attempting to create a bright line test, the court said that when determining whether the privilege applies, a court must consider both the origin of the document and its specific use. The privilege would only apply if the documents are exclusively created for or by a Peer Review Committee and are used solely by that committee.
  - If they are not created exclusively by or for a review organization, originated outside the Peer Review process, or used outside the peer review process the documents are not privileged.
  - The court determined that the physician's applications for staff privileges and other documents used by the Peer Review Committee for quality control or for determining the costs of healthcare related to various patient outcomes were created exclusively for or by the Credentials Committee and used solely in performing its function of ensuring quality health care.

Katten
Katten Muchin Rosenman LLP

West Virginia Supreme Court Holds Physician's Applications for Staff Privilege Not Discoverable (West Virginia ex rel. Wheeling Hospital, Inc. vs. Wilson, No.15-0558 (W.Va. February 9, 2016)

- Decision (con't)
  - In terms of other requested documents, the case was remanded to the trial court for the hospital to identify the origin and use of documents which it claimed were privileged and identified in the hospitals privilege log.
- Lessons Learned
  - As a general rule, courts take the position that most documents are discoverable.
  - Consequently, they tend to strictly and technically apply the letter of the law by requiring strict compliance with both the statute and applicable case law.
  - Although protected Peer Review documents are not discoverable, peer review policies, bylaws and applicable rules and regulations are discoverable. Therefore, it is important that the language in these documents track the statutory language and any case law interpretation in terms of what documents are or are not protected.

Katten
Katten Muchin Rosenman LLP

West Virginia Supreme Court Holds Physician's Applications for Staff Privilege Not Discoverable (West Virginia ex rel. Wheeling Hospital, Inc. vs. Wilson, No.15-0558 (W.Va. February 9, 2016)

- Lessons Learned (con't.)
  - Hospitals are typically required to provide a privilege log which identifies the documents and the reasons why they are privileged as part of the discovery process. This explanation again needs to track to the statute and case law interpretation when asserting protections so as to avoid expensive discovery litigation.

Katten
Katten Muchin Rosenman LLP

Texas Supreme Court Holds Certain Peer Review Records Discoverable in Action Alleging Anti-Competitive Conduct (In re Memorial Hermann Hospital System, No. 14-0171 (Tex. May 22, 2015)

- Background
  - Plaintiff is a physician who brought a lawsuit against the hospital and related parties for business disparagement, defamation, tortious interference with prospective business relations and improper restraint of trade under state antitrust laws.
  - Plaintiff contended that the hospital engaged in a campaign to damage his reputation after he began moving some of his robotic heart surgery procedures to a competing hospital that had recently opened in the area. He further alleged that the volume of surgeries and the number of referrals he received from cardiologists in the area dropped off dramatically.
  - In response to the Plaintiff's discovery request, the hospital asserted that certain of the documents were privileged and not subject to discovery under the state's medical Peer Review Committee Privilege. The trial court held that the privileged did not apply because there was an exception if the plaintiff's claims were based on an "anticompetitive action".
  - The trial court held that this exception applied and the hospital appealed.

Katten
Katten Muchin Rosenman LLP

Texas Supreme Court Holds Certain Peer Review Records Discoverable in Action Alleging Anti-Competitive Conduct (In re Memorial Hermann Hospital System, No. 14-0171 (Tex. May 22, 2015) (con't)

- Decision
  - In interpreting the statutory language, the Supreme Court stated that "anticompetitive action" is broader than "antitrust action" and that a plaintiff must state or allege a cause of action that requires proof of anticompetitive effects, which would include tortious interference with prospective business relations and was not limited to a claim of improper restraint of trade under state antitrust laws.
  - Consequently, the court found relevant documents relating to mortality rates, physician volume and referrals, but that other documents which were not related to anticompetitive action were not subject to discovery.
- Lessons Learned
  - Plaintiffs will make whatever allocations they can to take advantage of any privilege exceptions or arguments that the hospital failed to strictly comply with the letter of the law and case law interpretation of relevant statutes.
  - Actions or conduct that take place outside of the "Peer Review process" are not likely to be protected, hence the importance of strictly adhering to Peer Review Policies and procedures which comply with the law.

Katten
Katten Muchin Rosenman LLP

Texas Supreme Court Holds Certain Peer Review Records Discoverable in Action Alleging Anti-Competitive Conduct (In re Memorial Hermann Hospital System, No. 14-0171 (Tex. May 22, 2015) (con't)

- Lessons Learned (con't)
  - Although defense attorneys will typically interpret the privilege protections very broadly the privilege arguments need to avoid making questionable arguments which find no support in the law.

Katten
Katten Muchin Rosenman LLP

U.S. Court in Illinois Finds Peer Review Privilege Does Not Extend to the Medical Record "Audit Trail" (Hall vs. Flannery, No. 3:13-cv-914-SMY-DGW (S.D.Ill. May 1, 2015)

- Background
  - Patient brought a medical malpractice action against a number of defendants including the hospital and sought the audit trail and other metadata associated with a patient's medical record to support a theory that the patient's medical records were improperly altered by the defendants.
  - As part of this request the Plaintiff sought information that would reveal the date, time, the name of the person who accessed the record, the user ID, and what information they specifically viewed.
  - The hospital contended that the Illinois and Missouri Peer Review Privilege statutes protect the requested information from discovery as did the attorney client work product doctrine.
  - The hospital argued that the audit trail would reveal the names of Peer Review Committee members who viewed the medical record as well as to actions taken by the hospital risk management personnel in anticipation of litigation.

Katten
Katten Muchin Rosenman LLP

U.S. Court in Illinois Finds Peer Review Privilege Does Not Extend to the Medical Record "Audit Trail" (Hall vs. Flannery, No. 3:13-cv-914-SMY-DGW (S.D.Ill. May 1, 2015) (con't)

- Decision
  - The court held that neither the Illinois nor the Missouri Peer Review Privilege statutes applied because the medical record itself is entirely discoverable in a malpractice action. Any information including the audit trail or metadata that are a part of these records are discoverable and are not protected under either Peer Review statute. The court further observed that a peer review committee does not generate this data which is created by the hospital "in the ordinary course of business".
  - Finally, the court rejected the hospitals argument that the attorney work-product doctrine applied because the privilege only applies to mental impressions, conclusions, opinions, are legal theories regarding anticipated litigation which has no connection with a medical record audit trail.
- Lessons Learned
  - Don't make ridiculous arguments.

Katten
Katten Muchin Rosenman LLP

Michigan Supreme Court says Peer Review Privilege Protects Objective Facts in Incidents Report (Krusac vs. Covenant Medical Center, Inc. No. 149270) Mich. April 21, 2015)

- Background
  - Case involved a medical malpractice action brought by the estate of a former patient who died shortly after falling off the operating room table following heart surgery. Subsequent to the patient's death one of the nurses who was present during the procedure filled out an incident report consistent with hospital policy.
  - The Estate requested that the hospital produce the objective facts contained in the incident report for purposes of cross-examining hospital staff. The hospital objected arguing that the State's Peer Review Privilege statute made this information non-discoverable.
  - After reviewing the report, the trial court ordered that the plaintiff produce the first page of the incident report which only included the objective facts based on a Michigan Appellate Court decision that had held that the conclusions of an incident report are protected but not objective facts which should have been documented in the medical record are not.

Katten
Katten Muchin Rosenman LLP

Michigan Supreme Court says Peer Review Privilege Protects Objective Facts in Incidents Report (Krusac vs. Covenant Medical Center, Inc. No. 149270) Mich. April 21, 2015) (con't)

- Decision
  - The Supreme Court reversed stating that the statute did not include an exception for the discovery of objective facts. Rather, the privilege applies to "records, data, and knowledge" which, according to the court, all contained facts.
  - Although the Appellate Court was concerned that extending the privilege to objective facts in an incident report "would grant risk managers the power to unilaterally insulate from discovery first-hand observations that the risk manager would prefer remain concealed", the Supreme Court noted that the protections only apply to information collected by Peer Review Committees specifically "for the purpose of reducing mobility and mortality and improving the care provided in the hospital for patients".
- Lessons Learned
  - Keep in mind that all information included in the patient's medical record and electronic medical record are not protected under state or federal privilege laws. Therefore, it is extremely important that these records not be expanded to include thoughts, impressions, and initial analyses as to the cause of a patient's injury.

Katten
Katten Muchin Rosenman LLP

Michigan Supreme Court says Peer Review Privilege Protects Objective Facts in Incidents Report (Krusac vs. Covenant Medical Center, Inc. No. 149270) Mich. April 21, 2015) (con't)

- Lessons Learned (con't)
  - If the hospital is protecting a patient safety organization ("PSO"), HHS has taken the position under the Patient's Safety Act that information such as state mandated adverse incident reports as well as information which the hospital is obligated to collect and maintain pursuant to state or federal law can not be protected under the Patient's Safety Act, however, this information might be protected under state law.
  - Keep in mind that a plaintiff will be able to take the deposition of eyewitnesses to an event who will then be obligated to disclose the facts surrounding the adverse event.

Katten
Katten Muchin Rosenman LLP

North Carolina Supreme Court Refuses to Shield Hospitals Documents from Discovery in Negligence Action (Hammond vs. Saini, No. 492PA13 (N.C. December 19, 2014)

- Background
  - Case involved the plaintiff who had surgery to remove a possible basal cell carcinoma from her face suffered first and second degree burns caused by an operating room fire which left her with permanent injuries and scars.
  - Among the plaintiff's discovery requests was an attempt to get access to the records of the hospital's root cause and analysis team.
  - The hospital objected arguing that the State's Peer Review Statute applied because the team was a "medical review committee" under the statute and thus the documents were privileged.

Katten
Katten Muchin Rosenman LLP

North Carolina Supreme Court Refuses to Shield Hospitals Documents from Discovery in Negligence Action (Hammond vs. Saini, No. 492PA13 (N.C. December 19, 2014)

- Decision
  - The Supreme Court affirmed the trial courts decision to compel discovery of these documents, because the hospital did not sufficiently establish that the team documents were part of a medical review committee's protected peer review proceedings.
  - As part of the court's findings, it stated that the defendants cursory affidavit did not explain any "of the formal organizational processes that led to the adoption of the RCA Policy and the creation of the RCA Team and identified none of the departments or personnel involved."
- Lessons Learned
  - In order to properly assert protections under state or federal law, it is imperative that a hospital demonstrate compliance or support for their argument through the submission of any relevant policies, procedures, bylaws and other documents rather than make conclusory claims which do not comply with legal requirements.

Katten
Katten Muchin Rosenman LLP

North Carolina Supreme Court Refuses to Shield Hospitals Documents from Discovery in Negligence Action (Hammond vs. Saini, No. 492PA13 (N.C. December 19, 2014) (con't)

- Lessons Learned (con't)
  - It is also critical for the hospital to identify the committees, individuals, and activities which it contends are medical review committees or other protected activities under state or federal law.
  - The affidavit which should be included with these supporting materials also needs to be very specific as to the hospital's organizational process so as to better educate judges who have very little knowledge or experience concerning hospital quality and peer review operations.

Katten
Katten Muchin Rosenman LLP

U.S. Court in Kansas Finds No Due Process Violation in Hospital's Termination of Physician with Temporary Privileges (Winger v. Meade District Hospital, No. 13-1428-JTM (D. Kan. March 9, 2015)

- Background
  - Plaintiff is a physician who had temporary privileges pursuant to a physician employment agreement.
  - The agreement could be terminated for "failure of the physician to practice his profession at a standard that is consist with the standards of care required of physicians in the "community" or if through "default by the physician regarding the performance of any term, condition, provision, or requirement of this agreement."
  - Because the physicians treatment of two patients was alleged to be substandard the hospital sought a review of the cases by a third-party peer review organization. The physician did not participate in this review and instead sent the patient's confidential information to a different physician who determined that the care provided was appropriate.
  - Included in the Employment Agreement was a provision that made medical information, risk management, peer review, and related materials confidential and which could not be shared with unauthorized sources outside of the hospital.

Katten
Katten Muchin Rosenman LLP

U.S. Court in Kansas Finds No Due Process Violation in Hospital's Termination of Physician with Temporary Privileges (Winger v. Meade District Hospital, No. 13-1428-JTM (D. Kan. March 9, 2015) (con't)

- Background (con't)
  - The hospital risk management committee decided to terminate the physician's temporary privileges. As per the terms of the contract, he was not provided a hearing.
  - The physician sued claiming the violation of his constitutional rights to procedural due process decision.

Katten
Katten Muchin Rosenman LLP

U.S. Court in Kansas Finds No Due Process Violation in Hospital's Termination of Physician with Temporary Privileges (Winger v. Meade District Hospital, No. 13-1428-JTM (D. Kan. March 9, 2015)) (cont'd)

- Decision
  - The court rejected the plaintiff's citation to certain portions of the bylaws which identified various procedural and other rights accorded to physicians because the bylaws specifically stated that temporary privilege could be revoked without any procedural rights.
  - The court further determined that the physician had breached his employment agreement on several grounds, such as loosing privileges, failing to cooperate in a risk assessment investigation and in making an unauthorized disclosure of confidential information and therefore termination was justified.
  - The court also found that the hospital was immune from liability under HCQIA because the physician had not demonstrated that the reports made to the state licensing board were false and that the hospital knew it was false.
- Lessons Learned
  - Physician employment contracts should be very specific about right, duties, and obligations and whether or not the physician is entitled to hearing and appeal rights pursuant to the bylaws.

Katten
Katten Muchin Rosenman LLP

U.S. Court in Kansas Finds No Due Process Violation in Hospital's Termination of Physician with Temporary Privileges (con't)

- Lessons Learned
  - Most physicians who are terminated waive their hearing rights and consequently, terminations are not usually reported to the Data Bank.
  - Most hospital and medical staff do not give hearing rights to physicians whose temporary privileges are denied or terminated. You should consider giving hearing rights if the hospital decides that the termination is reportable to the Data Bank or to the state in order to access the immunity protections under HCQIA.

Katten
Katten Muchin Rosenman LLP

Third Circuit Affirms Hospital's Win in Dispute Over Privileges Denial (Pal vs. Jersey City Medical Center Nos. 14-3710 & 14-4605 (3D Cir. July 15, 2016)

- Background
  - Plaintiff is a physician who was formerly employed by the University of Medicine and Dentistry of New Jersey ("UMDNJ") where she served as a resident in the cardiothoracic surgery program at Robert Wood Johnson Hospital ("RWJ").
  - When the Plaintiff found out that RWJ was not going to renew her contract she resigned. She believed the decision was based on an effort to retaliate due to her complaints that certain staff discriminated against her the basis of gender and national origin.
  - The plaintiff then attempted to obtain privileges at Jersey City Medical Center ("JCMC") but was denied based on "negative references." JCMC filed a Data Bank report based on its decision to deny.
  - Plaintiff filed a lawsuit in state court against UMDNJ and several RWJ physicians for discrimination and retaliation and was awarded $1.6 Million by a jury even though she was unable to prove up her retaliation claim.
  - The District Court ultimately either dismissed or granted the defendants summary on all of the physician's claims.

Katten
Katten Muchin Rosenman LLP

Third Circuit Affirms Hospital's Win in Dispute Over Privileges Denial (Pal vs. Jersey City Medical Center Nos. 14-3710 & 14-4605 (3D Cir. July 15, 2016)

- Decision
  - The plaintiff's first allegation that she was deprived of a positive reference and recommendation when she applied to JCMC was rejected because the court found that there was no legal authority or constitutional right to receive a positive reference or recommendation.
  - The court also held that HCQIA barred state law claims for monetary damages and further that the plaintiff failed to rebut the presumption that the professional review action taken did not meet the standard of immunity under HCQIA.
- Lessons Learned
  - If a hospital determines that a physician's application should be denied because of its concern that the physician will or may have an adverse impact on patient care if granted clinical privileges, and there is a sufficient documentary evidence to support that determination then the hospital obligated to report that physician to the Data Bank.

Katten
Katten Muchin Rosenman LLP

Third Circuit Affirms Hospital's Win in Dispute Over Privileges Denial (Pal vs. Jersey City Medical Center Nos. 14-3710 & 14-4605 (3D Cir. July 15, 2016) (con't)

- Lessons Learned (con't)
  - If a physician withdrawals their application prior to a determination then the withdrawal of the physician is not reportable to the Data Bank.
  - Although not addressed by the court, as previously discussed, it is important that all communications and information relating to the pre-application and application process be treated as privileged and confidential under state and federal privilege laws, although not all information in a credentials file, particularly if available through public or other means, will be treated as privileged.

Katten
Katten Muchin Rosenman LLP

Maine High Court Says Physicians Immune from Defamation Action (Strong vs. Brakeley, No. 15-260) Me April 21, 2016)

- Background
  - Plaintiff is physician who attempted to obtain privileges at a hospital which contracted with a third-party to collect credentialing information on behalf of the hospital.
  - The company sent a questionnaires to two physicians who made negative statements about the plaintiff. The plaintiff sued alleging that the statements led to the denial of his application and further contended that he was defamed and that they tortiously interfered with his business relationship.
  - Trial court ruled that the defendant had absolute immunity under state statute and therefore granted summary judgment.

Katten
Katten Muchin Rosenman LLP

Maine High Court Says Physicians Immune from Defamation Action (Strong vs. Brakeley, No. 15-260) Me April 21, 2016) (con't)

- Decision
  - The plain language of the state's statute grants immunity to the physicians as a matter of law. Furthermore, the court determined that the defendants were "assisting" a "board, authority/committee in carrying out" its duties under the law.
  - Court rejected the plaintiff's argument that the company didn't qualify as a board, authority, or committee under the statute because it viewed the company as a "professional competence committee" and that the contractor assisted in "performing professional competence review activities."
  - Finally, the court also refused to accept the plaintiff's argument that the immunity statute did not apply if the physicians were acting with malice because this statute in question provided an absolute rather than a qualified immunity.
- Lessons Learned
  - It is important to understand whether the immunity provisions in your state are absolute or are qualified. Typically, they are qualified.
  - In addition, the state privilege statute should apply to these third-party reviews and comments although the protections apparently were not asserted in this particular case.

Katten
Katten Muchin Rosenman LLP

Maine High Court Says Physicians Immune from Defamation Action (Strong vs. Brakeley, No. 15-260) Me April 21, 2016) (con't)

- Lessons Learned (con't)
  - If the physician can not get access to the alleged defamatory information or other claim because of a privilege statute, then they have no evidence to support the claim. Consequently, most of these state cases are dismissed on a motion to dismiss rather than necessarily proceeding through discovery and eventual dismissal on a summary judgment motion.

Katten
Katten Muchin Rosenman LLP

Kentucky Appeals Court Reverses Grant of HCQIA Immunity to Hospital (Reid vs. Kentuckyone Health, Inc. No. 2015-CA-000092-MR (Ky. Ct. App. March 18, 2016)

- Background
  - Plaintiff was a physician who had been a member of a hospital's medical staff for over 40 years. He received a letter from the Surgery Quality Committee that all of his cases would be subject to a focus review for a period of six months.
  - The MEC also voted to cancel his surgical and endoscopy privileges and that he could not perform any further surgical procedures unless he was accompanied by an actively practicing and board certified general surgeon or endoscopist.
  - At the completion of the six month case review it was determined that there were no quality concerns. He was granted a conditional reappointment for six months as long as he met certain conditions.
  - The physician did not exercise privileges during this six month period and his medical staff membership eventually lapsed.
  - The plaintiff filed suit in state court raising several claims. Hospital argued that it was immune under HCQIA. The trial court agreed and the plaintiff's claims were dismissed.

Katten
Katten Muchin Rosenman LLP

Kentucky Appeals Court Reverses Grant of HCQIA Immunity to Hospital (Reid vs. Kentuckyone Health, Inc. No. 2015-CA-000092-MR (Ky. Ct. App. March 18, 2016)

- Decision
  - The question before the court was whether the hospital's conduct to cancel privileges and refusal to allow him to practice without another physician being present was a professional review action under HCQIA as opposed to a professional review activity.
  - The HCQIA immunities only apply to a professional review body if a professional review action meets standards which include adequate notice and hearing procedures are afforded to the physician and that the procedures are fair under the circumstances.
  - The court determined that the restrictions imposed "fits squarely within the HCQIA's definitions of 'adversely affecting' and 'clinical privileges.' As such, the hospital's conduct constituted a professional review action rather than simply professional review activities as the trial court found."
  - Because the trial court never considered whether the hospital's conduct was a professional review action versus a professional review activity the case was remanded back to the trial court for further proceedings.

Katten
Katten Muchin Rosenman LLP

Kentucky Appeals Court Reverses Grant of HCQIA Immunity to Hospital (Reid vs. Kentuckyone Health, Inc. No. 2015-CA-000092-MR (Ky. Ct. App. March 18, 2016)

- Lessons Learned
  - A hospital's decision to involuntarily cancel or restrict clinical privileges or to improve mandatory proctoring which lasts for more than 30 days and prevents a physician from exercising privileges are both reportable events and should have triggered notice and hearing rights under the bylaws.
  - You should review your medical staff bylaws to determine whether any of the actions that you take which adversely affect privileges should be considered a professional review action and therefore should comply with HCQIA standards including notice and hearing rights.

Katten
Katten Muchin Rosenman LLP

Alaska Supreme Court Holds Peer Review Participants Immune from Physician's Lawsuit (Brandner vs. Bateman, No. S-155137010 (Alaska May 15, 2015

- Background
  - Plaintiff was a physician who was required by the Arkansas State Medical Board to submit to psychiatric and medical evaluations to determine his ability to practice medicine safely.
  - The physician completed the evaluations and was found fit to practice but did not disclose the evaluations to hospital despite a bylaw requirement to require such reports.
  - Because the bylaw provision further stated that a violation of the reporting requirement results in termination, the hospital terminated the physician's privileges after it became aware of the Board's order. The physician was given a hearing as per the bylaws and argued that the Board's order did not trigger the reporting requirement.
  - The hearing committee determined that because his license would have been automatically suspended if he failed to complete the requested evaluations that a report was required.

Katten
Katten Muchin Rosenman LLP

Alaska Supreme Court Holds Peer Review Participants Immune from Physician's Lawsuit (Brandner vs. Bateman, No. S-155137010 (Alaska May 15, 2015

- Background (con't)
  - The physician brought several state causes of action against the hospital and several individual physicians. Physicians argued that they were immune from liability under HCQIA and under state law. The trial court did not address HCQIA but agreed with the immunity argument under state law.

Katten
Katten Muchin Rosenman LLP

Alaska Supreme Court Holds Peer Review Participants Immune from Physician's Lawsuit (Brandner vs. Bateman, No. S-155137010 (Alaska May 15, 2015

- Decision
  - On appeal, the Supreme Court held that Alaska law grants immunity to witnesses providing information to Peer Review Organizations that are not knowingly false and further immunizes participants in Peer Review proceedings as long as they make reasonable efforts to ascertain facts upon which the recommendations were based, acted in the reasonable belief that their recommendations were warranted by the facts and their actions were not motivated by malice.
  - The court also ruled that the physicians were not required to find that the physician posed a risk to patients in order to trigger termination under the hospital policy and furthermore, there was no evidence to suggest that the decision to terminate was motivated by malice.

Katten
Katten Muchin Rosenman LLP

Alaska Supreme Court Holds Peer Review Participants Immune from Physician's Lawsuit (Brandner vs. Bateman, No. S-155137010 (Alaska May 15, 2015

- Lessons Learned
  - It is important to understand which actions are reportable to the Data Bank and which actions are reportable to a state licensing board or other related agency.
  - It is important that your bylaws and rules and regulations are very clear in terms of physician reporting requirements to the hospital. Most bylaws contain the following reporting requirements:
    - Loss or any restrictions on a medical license
    - Medicare/Medicaid Sanctions
    - Reduction in professional liability coverage below required limits
    - Imposition of any disciplinary action taken at another hospital facility which restricts privileges
    - Conviction of a felony

Katten
Katten Muchin Rosenman LLP

U.S. Court in Pennsylvania Upholds Secretary's Refusal to Remove Data Bank Report (Cerciello vs. Sebelius, No. 13-3249) E.D.Pa. March 31, 2016

- Background
  - Physician sued the American Academy of Orthopedic Surgeons and the American Association of Orthopedic Surgeons after it reported to the Data Bank a two year suspension of his membership.
  - The suspension as based on an expert report that the Plaintiff had submitted in the malpractice action in which he gave an opinion that the treating physician should have performed immediate surgery on a patient's shoulder injury.
  - The treating physician brought a complaint with the AAOS in which he alleged that the plaintiff had violated certain mandatory standards of professionalism.
  - After conducting its investigation the AAOS determined that five such standards were in fact violated and consequently suspended membership and then reported him to the Data Bank.
  - The physician sued Secretary of HHS when she denied the plaintiff's request to remove the Data Bank report the refusal was based on the limited agency authority to only review whether the action was reportable and whether the report was accurate.

Katten
Katten Muchin Rosenman LLP

U.S. Court in Pennsylvania Upholds Secretary's Refusal to Remove Data Bank Report (Cerciello vs. Sebelius, No. 13-3249) E.D.Pa. March 31, 2016

- Decision
  - The court determined that the AAOS as a professional society, had a mandatory obligation under HCQIA to report to the Data Bank professional review actions that adversely affected a physician's membership.
  - The court further rejected the physician's argument that the Data Bank shouldn't be used to sanction a physician who testifies against another physician because it was not based on competency and further that his suspension did not have any adverse affect on patient care.
  - Because the AAOS found that the expert report showed that the plaintiff lacked knowledge of the proper standard of care that could cause harm to future patients that his conduct could affect the welfare or health of patients. Moreover, the mandatory standards of AAOS determined thought that he violated involved physician competence.
  - The court also noted that the plaintiff refused multiple opportunities to respond to the charges and inquiries by the AAOS.

Katten
Katten Muchin Rosenman LLP

U.S. Court in Pennsylvania Upholds Secretary's Refusal to Remove Data Bank Report (Cerciello vs. Sebelius, No. 13-3249) E.D.Pa. March 31, 2016

- Lessons Learned
  - It is important that you keep current with the NPDB Guidebook and all reporting requirements including the requirement to report a mandatory proctoring obligation which lasts more than 30 days and prohibits the physician from exercising privileges unless the proctor is physically present.

Katten
Katten Muchin Rosenman LLP

Washington Appeals Court Says Hospital Properly Terminated Physician (Shibley vs. King County Public Hospital District No. 4,72855-5-1 (Wash. Ct. App. May 23, 2016

- Background
  - Plaintiff is a physician who was employed as a hospitalist but was terminated after an investigation found to have documented the history and physical examination without actually examining the patient. The hospital conducted an investigation and ultimately terminated him after a hearing.
  - The plaintiff signed a severance agreement releasing the hospital unconditionally from any and all claims stemming from his employment or termination. Subsequent to the termination the hospital filed a Data Bank report.
  - The plaintiff brought ten separate causes of action against the hospital and two individuals physicians arguing that the hospital failed to follow procedures before taking action against him and further that they defrauded and defamed him in the Data Bank report.
  - The trial court dismissed on summary judgement based on a finding that the hospital made a reasonable attempt to obtain the facts before taking action against the plaintiff.

Katten
Katten Muchin Rosenman LLP

Washington Appeals Court Says Hospital Properly Terminated Physician (Shibley vs. King County Public Hospital District No. 4,72855-5-1 (Wash. Ct. App. May 23, 2016

- Decision
  - The Appellate Court affirmed the dismissal based on the trial court's reasoning. Further found that the Data Bank report was accurate and therefore could not be defamatory and further that the hospital was immune from civil damages regarding the Data Bank report.
  - Finally, the court determined that the severance agreement which the plaintiff signed pre-empted his employment, retaliation, and termination-related causes of action.
- Lessons Learned
  - It is important that when considering disciplinary action that the hospital comply with the bylaws, peer review, and other policies so as to demonstrate that the hospital made a reasonable effort to get access to the facts before considering action which will trigger hearing rights and potential litigation.

Katten
Katten Muchin Rosenman LLP

Washington Fields Court Says Hospital Properly Terminated Physician (Shibley vs. King County Public Hospital District No. 4,72855-5-1 (Wash. Ct. App. May 23, 2016

- Lessons Learned (con't)
  - Trial courts typically do not interfere with a hospital and medical staff independent judgement in theses matters, but will expect that the hearing procedures be followed, that they be fair, and that they track the requirements of HCQIA in order to support dismissal and to grant immunity protections.
  - Data Bank reports must be factual but must be specific enough to advise third-parties as to the basis of the disciplinary action. The Data Bank does not have the authority to independently investigate. It only has the ability to make sure that Data Bank report is factual.
  - Keep in mind that physicians have the right to provide a response to any Data Bank report, whether based on disciplinary action or a malpractice settlement or judgement.
  - Consider getting a detailed settlement/severance agreement in place, where possible, and include as part of the settlement along with a negotiated Data Bank report.

Katten
Katten Muchin Rosenman LLP

Seventh Circuit Says Hospital Privileges Not Constitutionally Protected Property Interest (Babchuk vs. Indiana University Health, Inc. No. 15-1816) 7th Cir. January 11, 2015)

- Background
  - Plaintiff is a radiologist who had an exclusive services contract with the hospital.
  - He was summarily suspended after a peer review committee determined that a dictation regarding the results of an ultrasound on a patient who gave birth prematurely after discharge was delayed by eight days. It was further alleged that he requested that the reference to the ultrasound test be deleted from the medical record.
  - The EMC voted unanimously to make the suspension permanent and decision was upheld by an independent hearing committee. His contract was subsequently cancelled by the hospital.
  - The physician argued that the report of his suspension to the Indiana Medical Licensing Board and to the Data Bank "blemished" his medical license and deprived him of property.
  - The trial court granted summary judgement to the hospital and the physician appealed.

Katten
Katten Muchin Rosenman LLP

Seventh Circuit Says Hospital Privileges Not Constitutionally Protected Property Interest (Babchuk vs. Indiana University Health, Inc. No. 15-1816) 7th Cir. January 11, 2015)

- Decision
  - The Seventh Circuited noted that at no time did the physician ever present any evidence to support his conclusion that his career was hindered as a result of the state and Data Bank reports.
  - The court rejected his claim that the physician had a property interest in his medical staff membership and clinical privileges simply because the medical staff bylaws had established procedures for terminating a physician.
  - The courts stated that existence of such privileges did not mean that a physician is entitled to have continuous privileges which are “terminable at-will” and therefore “are not a constitutionally protected entitlement.”

Katten
Katten Muchin Rosenman LLP

Seventh Circuit Says Hospital Privileges Not Constitutionally Protected Property Interest (Babchuk vs. Indiana University Health, Inc. No. 15-1816) 7th Cir. January 11, 2015)

- Lessons Learned
  - Physicians generally speaking do not have a constitutional legal or other right to obtain membership and clinical privileges at a hospital.
  - For existing physicians, courts do not interfere in the independent judgement of a hospital and medical staff as long as the hearing procedures are followed, are fair, and are consistent with HCQIA requirements as well as any imposed by state law.
  - Hospitals can assert both HCQIA and state immunity protections when defending these kinds of disputes.
  - Moreover, the state/federal privilege protection statutes generally preclude a physician from introducing confidential peer review records to support a claim thereby resulting in a hospital's success at either the motion to dismiss or summary judgement stage of the proceedings.
  - Keep in mind that many physicians are bringing a lawsuit in federal court rather than state court because HCQIA immunity protections do not apply in discrimination claims, such race, sex, or religion and age, and further, the state privilege protections statutes will not be applied in federal court in order to preempt a federal claim.

Katten
Katten Muchin Rosenman LLP

North Carolina Appeals Court Dismisses Physician's Claims Against Medical Peer Review Evaluators (Shannon vs. Testen, No.COA 15-64) N.C. Ct. App. October 6, 2015)

- Background
  - Plaintiff is an ophthalmologist who had medical staff privileges at the hospital and was requested to undergo a comprehensive neuropsychiatric assessment as a result of two patient incidents.
  - Although a psychiatrist reported no problems the hospital referred him to the North Carolina Physicians Health Program. An assessment letter was prepared and sent to the hospital recommending that he obtain further and immediate professional evaluations.
  - The physician alleged that the letter contained factual errors and significant omissions regarding the two patients incidents.
  - Based on the letter, the physician's staff privileges were terminated.
  - The physician sued the two employees who evaluated him on behalf of the Physicians Health Program arguing that they were negligent in performing their evaluations and the program, and that their employer was also liable.
  - The trial court dismissed the complaint holding that the defendants were immune under state statute.

Katten
Katten Muchin Rosenman LLP

North Carolina Appeals Court Dismisses Physician's Claims Against Medical Peer Review Evaluators (Shannon vs. Testen, No.COA 15-64) N.C. Ct. App. October 6, 2015)

- Decision
  - The Appellate Court affirmed dismissal holding that in order to defeat an immunity claim the physician was required to argue and demonstrate that the defendants acted in bad faith. It rejected his argument that bad faith could be inferred from the allegations in the complaint. The court noted that the plaintiff did even make a conclusory allegation regarding bad faith conduct.
  - Because the physician apparently was not given any hearing rights, he argued that he had sufficiently claimed violation of statutory due process protections provided under HCQIA, but the court ruled that HCQIA does not provide a private right of action. HCQIA is an immunity protection statute; it does not impose a requirement to provide hearing rights as a matter of law.

Katten
Katten Muchin Rosenman LLP

North Carolina Appeals Court Dismisses Physician's Claims Against Medical Peer Review Evaluators (Shannon vs. Testen, No.COA 15-64) N.C. Ct. App. October 6, 2015)

- Lessons Learned
  - It is important that when utilizing third-party reviewers, whether they be private individuals, state agencies, or other third-parties, that you include this review activity as one of your protected peer review and patient safety activities under state and federal law.
  - Most plaintiffs will allege malice or bad faith conduct to avoid application of state or federal immunity protections. Although, they must ultimately prove that the parties acted in bad faith in order to ultimately prevail, this is a difficult standard to achieve.
  - You should include within your medical staff bylaws language that would allow or would require the physician to grant absolute immunity for all identified peer review activities. In states where bylaws are a contract, courts have upheld application of this absolute immunity bylaw provision even in a state where the immunity is qualified.

Katten
Katten Muchin Rosenman LLP

D.C. Court Finds Recommendation that Led to Rejection of Physician's Privileges Application Protected By Peer Review Statute (Oguntoye vs. Medstar Georgetown University Hospital, No. 2013 CA 5054 (D.C. Super. April 3, 2015)

- Background
  - Plaintiff is a physician who applied to a New York hospital for medical staff membership and clinical privileges.
  - As part of the process, another physician completed a recommendation form that apparently gave rise to certain concerns.
  - Based on this recommendation, the physician was informed that his application would not be approved and recommended that her application be withdrawn. If rejected, the decision would appear on New York data bases and therefore picked up in future application requests.
  - The plaintiff sued the physician who provided the recommendation as well as the hospital for defamation, invasion of privacy, tortious interference with prospective advantage, tortious inference with contract, and race discrimination under the D.C. Human Rights Act.
  - As part of the litigation, the plaintiff requested production of the application questionnaire as well as any notes, records, communications or other documents relating to the questionnaire or phone call between the hospital and the reviewer.

Katten
Katten Muchin Rosenman LLP

D.C. Court Finds Recommendation that Led to Rejection of Physician's Privileges Application Protected By Peer Review Statute (Oguntoye vs. Medstar Georgetown University Hospital, No. 2013 CA 5054 (D.C. Super. April 3, 2015)

- Decision
  - Trial court found that the D.C. Peer Review Act specifically prohibited the disclosure of the requested materials.
  - The court further rejected the plaintiff's arguments that the communications in question were wholly unrelated to the formal peer review process and further rejected the argument that the defendants had waived the privilege when it disclosed certain information during the discovery process.

Katten
Katten Muchin Rosenman LLP

D.C. Court Finds Recommendation that Led to Rejection of Physician's Privileges Application Protected By Peer Review Statute (Oguntoye vs. Medstar Georgetown University Hospital, No. 2013 CA 5054 (D.C. Super. April 3, 2015)

- Lessons Learned
  - It is important that you include within your definition of peer review including your peer review policies the pre-application and application process in communications.
  - Typically, physicians are not provided hearing rights upon denied pre-application or application form. I generally recommend that a hearing be provided if the decision to deny an application is otherwise reportable to the state or to the Data Bank.
  - By offering a hearing, even if not requested, the hospital would be entitled to HCQIA immunity protections, unless a federal discrimination claim was brought.

Katten
Katten Muchin Rosenman LLP

Speaker Bios

Michael R. Callahan, Partner - michael.callahan@kattenlaw.com

Michael R. Callahan assists hospital, health system and medical staff clients on a variety of health care legal issues related to accountable care organizations (ACOs), patient safety organizations (PSOs), health care antitrust issues, Health Insurance Portability and Accountability Act (HIPAA) and regulatory compliance, accreditation matters, general corporate transactions, medical staff credentialing and hospital/medical staff relations.

Michael's peers regard him as "one of the top guys […] for credentialing—he's got a wealth of experience" (Chambers USA). Additionally, his clients describe him as "always responsive and timely with assistance," and say he is "informed, professional and extremely helpful" and "would recommend him without reservation" (Chambers USA). Michael's clients also commend his versatility, and say "He is willing to put on the hat of an executive or entrepreneur while still giving legal advice," according to Chambers USA.

He is a frequent speaker on topics including ACOs, health care reform, PSOs, health care liability and peer review matters. He has presented around the country before organizations such as the American Health Lawyers Association, the American Medical Association, the American Hospital Association, the American Bar Association, the American College of Healthcare Executives, the National Association Medical Staff Services, the National Association for Healthcare Quality and the American Society for Healthcare Risk Management.

Michael was recently appointed as chair of the Medical Staff Credentialing and Peer Review Practice Group of the American Health Lawyers Association. He also was appointed as the public member representative on the board of directors of the National Association Medical Staff Services.

He was an adjunct professor in DePaul University's Master of Laws in Health Law Program, where he taught a course on managed care. After law school, he served as a law clerk to Justice Daniel P. Ward of the Illinois Supreme Court.

Katten
Katten Muchin Rosenman LLP

Katten Muchin Rosenman LLP Locations

AUSTIN
One Congress Plaza
111 Congress Avenue
Suite 1000
Austin, TX 78701-4073
+1.512.691.4000 tel
+1.512.691.4001 fax

CHARLOTTE
550 South Tryon Street
Suite 2900
Charlotte, NC 28202-4213
+1.704.444.2000 tel
+1.704.444.2050 fax

CHICAGO
525 West Monroe Street
Chicago, IL 60661-3693
+1.312.902.5200 tel
+1.312.902.1061 fax

HOUSTON
1301 McKinney Street
Suite 3000
Houston, TX 77010-3033
+1.713.270.3400 tel
+1.713.270.3401 fax

IRVING
545 East John Carpenter Freeway
Suite 300
Irving, TX 75062-3964
+1.972.587.4100 tel
+1.972.587.4109 fax

LONDON
Paternoster House
65 St Paul's Churchyard
London EC4M 8AB United Kingdom
+44.0.20.7776.7620 tel
+44.0.20.7776.7621 fax

LOS ANGELES – CENTURY CITY
2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012
+1.310.788.4400 tel
+1.310.788.4471 fax

LOS ANGELES – DOWNTOWN
515 South Flower Street
Suite 1000
Los Angeles, CA 90071-2212
+1.213.443.9000 tel
+1.213.443.9001 fax

NEW YORK
575 Madison Avenue
New York, NY 10022-2585
+1.212.940.8800 tel
+1.212.940.8776 fax

ORANGE COUNTY
100 Spectrum Center Drive
Suite 1050
Irvine, CA 92618-4960
+1.714.966.6819 tel
+1.714.966.6821 fax

SAN FRANCISCO BAY AREA
1999 Harrison Street
Suite 700
Oakland, CA 94612-4704
+1.415.293.5800 tel
+1.415.293.5801 fax

SHANGHAI
Suite 4906 Wheelock Square
1717 Nanjing Road West
Shanghai 200040 P.R. China
+86.21.6039.3222 tel
+86.21.6039.3223 fax

WASHINGTON, DC
2900 K Street NW
North Tower - Suite 200
Washington, DC 20007-5118
+1.202.625.3500 tel
+1.202.298.7570 fax

Katten
Katten Muchin Rosenman LLP
www.kattenlaw.com