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Medical Malpractice

Privilege and the Patient Safety Act

The discoverability of a hospital's self-critical, peer-review and internal investigation documents

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Recently, New Jersey's Appellate Division declined to rule on whether internal hospital peer-review records were subject to discovery in a medical malpractice case. *Applegrad v. Bentolila*, No. A-3747-09T2, 2011 N.J.Super. LEXIS 18 (App. Div. Jan 5, 2011). The discovery dispute was remanded to the trial court to augment the record and to address arguments and legal authority that were not initially presented.

Nevertheless, in making its decision, the court in *Applegrad* provided important guidance to attorneys seeking the disclosure, or protection, of internal hospital peer-review records that may be privileged under the Patient Safety Act (PSA), N.J.S.A. 26:2H-12.23 to -12.25, or other statutes, regulations and New Jersey case law.

In *Applegrad*, the underlying dispute arose out of injuries allegedly sustained by the infant plaintiff in May 2007 during a vaginal delivery at Valley Hospital. During discovery, the plaintiffs served a notice to produce upon the hospital, and the hospital's response indicated that several documents were withheld on the grounds that their contents were privileged as part of "peer review" or other confidential assessments undertaken at the hospital following the birth of the infant plaintiff.

Valley Hospital identified those items as: an occurrence report; a post-incident analysis by the director of patient safety; a request for quality assurance from the department of risk management; a mother/baby quality assurance/performance improvement review; a department of OB/GYN quality assurance response; and a "utilization review committee, quality assessment and improvement subcommittee of the department of OB/GYN." The plaintiffs moved to compel the production of the above items, and the trial judge ordered that they be produced for in camera review, indicating that such an examination was prescribed by *Christy v. Salem*, 366 N.J. Super. 535 (App. Div. 2004).

In *Christy*, the plaintiff filed a medical malpractice claim after becoming paralyzed during treatment at a hospital. As in *Applegrad*, the court in *Christy* had to determine whether or not to grant the plaintiff's motion to compel discovery of documents that the hospital claimed were privileged internal investigative reports. The *Christy* court held that a case-by-case balancing approach was required to determine the confidentiality of internal investigation materials.

This analysis focused on the public interest concerns that arose from the disclosure of self-critical "evaluative and deliberative materials," as opposed to disclosure of purely factual material. The court held that the report at issue was privileged because it contained opinions that would be obtainable from medical experts, and factual findings that were within the province of the jury. But any "purely factual material" in the report was subject to disclosure, as was any material describing an unresolved issue that contained information that might lead to the discovery of admissible information.

After the in camera review, the trial judge in *Applegrad* made an initial decision allowing disclosure of two of the items. The judge then allowed an ex parte hearing for defense counsel, wherein counsel for the hospital argued, for the first time, that the above items were privileged under the PSA. The trial judge, persuaded by the PSA argument, entered an order denying plaintiff's motion to compel in its entirety. After some additional procedural maneuvering, the judge made an oral ruling confirming his denial of disclosure, in which he characterized the PSA as "a legislative overruling" of *Christy*. The appeal followed.

The appellate court discussed the PSA, which was first effective October

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24, 2004. The court focused upon N.J.S.A. 26:2H-12.25(g), quoting, in relevant part, the following language pertaining to confidentiality:

> Any documents, materials or information *developed by a health care facility as part of a process of self-critical analysis conducted pursuant to subsection b. of this section* concerning preventable events, near-misses and adverse events, including serious preventable adverse events, and *any document or oral statement that constitutes the disclosure provided to a patient or the patient's family member or guardian pursuant to subsection d.* of this section shall *not be . . . subject to discovery or admissible* as evidence *or otherwise disclosed* in any civil, criminal or administrative action or proceeding[.] (Emphasis added.)

The court highlighted that subsection (k) of the PSA provides, the above notwithstanding, that nothing in the act should be construed to increase or decrease the discoverability, in accordance with *Christy*, of "any documents, materials or information if obtained from any source or context other than those specified within the act."

Again, the *Applegrad* court declined to resolve whether to read subsection (k) narrowly — where the factual/evaluative distinction in *Christy* would be inapplicable to all documents generated within a hospital pursuant to the PSA, thereby making those documents privileged — or whether to read subsection (k) to preserve the applicability of *Christy* and other legal authorities prior to the PSA, and permit the full or partial disclosure of information, if the information is also obtained in other discoverable sources not specified within the PSA. However, in declining, the court did lay out a roadmap for attorneys to follow to determine the discoverability of a hospital's self-critical, peer-review and/or internal investigation documents under the PSA.

The court laid out a two-fold analysis. First, the circumstances of the creation of the document must be considered to determine whether the document was created pursuant to the PSA focusing on: the purpose of the document; the identities of the creator and intended recipient of the document; the extent to which the document was disclosed to people not listed in the document; and whether it was a prompted by, or a response to, other documents. Presumably, the court will look at a totality of these considerations to determine whether the document was indeed created pursuant to the PSA and arguably entitled to complete protection from disclosure.

Second, the practitioner must analyze the administrative evaluative structures of the hospital itself relating to the PSA, as well as other statutes, regulations and accreditation requirements. This would include analyzing the makeup of the hospital's administration and self-evaluation processes existing both before and after the enactment of the PSA, and the existence of a director of patient safety as defined in the PSA, along with a consideration of that person's responsibilities relevant to the PSA. Also important is the relationship between the hospital's current self-evaluation functions or the functions of employees such as the patient safety director and self-critical assessment practices and procedures in place prior to the enactment of the PSA. If any of the above functions or structures were relevant to peer-review bodies or utilization review committees independent of the PSA, the case for complete PSA protection becomes weaker.

The *Applegrad* court directed counsel for the hospital to submit a certification to the trial court pursuant to R. 4:10-2(e)(1), establishing a basis for the documents' entitlement to full protection under the PSA, keeping the above considerations in mind. Therefore, a practitioner seeking complete PSA protection should submit a similar certification pursuant to R. 4:10-2(e)(1), incorporating the two-fold analysis above. Of course, a practitioner seeking disclosure of the documents should scrutinize any such certification by determining absence of the considerations in the above analysis.

Interestingly, legislative intervention may be necessary to assuage some of the procedural and constitutional problems referred to in *Applegrad*. In footnote 8 of its decision, the *Applegrad* court highlighted potential evidentiary and constitutional separation of power problems with the PSA's enhanced restrictions on admissibility. The PSA essentially expands restrictions on the admissibility of documents without following the statutory procedure for the creation or modification of evidentiary rules pursuant to the Evidence Act of 1960. See N.J.S.A. 2A:84A-33 to -44.

Under section 34 of the Evidence Act, rules of evidence are to be adopted at a judicial conference attended by delegates from all levels of the New Jersey Judiciary, the state bar, the Senate and General Assembly, the Attorney General's office, county prosecutors, state law schools and the public. In addition, the Supreme Court can adopt rules of evidence by submission of a joint resolution for adoption of the General Assembly and Senate and signature of the Governor pursuant to section 38 of the Evidence Act. Finally, any rule of evidence is subject to subsequent change by statute pursuant to section 37 of the Evidence Act, and as recognized by *N.J. State Bar Ass'n v. State*, 387 N.J. Super 24 (App.Div. 2006). These procedures were not used by the legislature when enacting N.J.S.A. 26:2H-12.25(g) of the PSA.

Therefore, attorneys hoping to rely on the above section should monitor future court decisions on the constitutionality of the PSA and any subsequent rulings made on the PSA's relation to *Christy*. In the meantime, practitioners hoping to invoke the protections of the PSA may look to the *Applegrad* court's analysis as a guide regarding the discoverability of a hospital's self-critical, peer-review and internal investigation documents. ■