

Defeating the Peer Review and Medical Committee Privileges

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I. Introduction

Hospitals and health care professionals in medical malpractice lawsuits attempt to hide valuable evidence from the plaintiff by asserting the peer review and medical committee privileges. These statutory privileges, while broad, do not apply to many of the records maintained by a hospital. The purpose of this paper is to outline the scope of the peer review and medical committee privileges, explain the rules of civil procedure governing these privileges and offer ways to defeat these claims of privilege.

II. Scope of the Peer Review and Medical Committee Privileges

The medical committee privilege is found in the Texas Health & Safety Code (“HSC”). According to HSC §161.032(a), “The records and proceedings of a medical committee are confidential and not subject to court subpoena.” “Medical committee” is defined at HSC §161.031 and includes any committee, including a joint committee, of a hospital, medical organization, university medical school or health science center, a health maintenance organization licensed under Chapter 843 of the Insurance Code, an extended care facility, and a hospital district or hospital authority. The medical committee privilege applies whether the committee is appointed ad hoc to conduct a specific investigation, or established under state or federal law or rule or under the bylaws or rules of the organization or institution.²

The medical peer review committee privilege is found in the Texas Occupations Code (“TOC”). According to TOC §151.002(8), a medical peer review committee is a

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² TEX. HEALTH & SAFETY CODE ANN. §161.031(b) (Vernon 1992).

committee, the governing board or medical staff of a health care entity that (1) operates under written bylaws approved by the policy making body or the governing board of a health care entity; and (2) is authorized to evaluate the quality of medical and health care services or the competence of physicians. Employees and agents of the medical peer review committee, including assistants, investigators, intervenors and attorneys are included in the definition as part of the peer review committee.³

The actual medical peer review committee privilege is found at TOC §160.007(a). According to that section, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged. Records or determinations of or communications to a medical peer review committee are not subject to subpoena or discovery.

At first glance, these privileges appear extremely broad in scope and to a certain extent they are. However, utilizing the rules of procedure and having a firm grasp of the case law interpreting these statutes will go a long way in helping to defeat the claim of privilege.

III. Texas Rules of Civil Procedure Concerning Assertion of Privilege

The first step in defeating the medical committee and peer review privileges is to understand the governing rules of civil procedure. This section will outline those rules and provide strategies to use the rules of procedure to help defeat the claims of medical committee and peer review privilege.

Texas Rules of Civil Procedure Rule 193.3 provides the correct mechanism to assert a privilege. Rule 193.3 states that a party who claims that information or material is privileged (*i.e.*, the Defendant) must state in the response that privileged information or

³ TEX. OCC. CODE ANN. §151.002(8)(A) (Vernon 1999).

material is being withheld, the request to which the information or material relates and the privilege or privileges asserted.⁴ After receiving a response that information or material has been withheld, Rule 193.3(b) places the burden on the party requesting the information (*i.e.*, the Plaintiff) to request that the withholding party create a privilege log identifying the information and material withheld without revealing the privileged information itself.⁵

The withholding party must, within fifteen days of service of the request for a privilege log, produce a privilege log that describes the information or material withheld and asserts a specific privilege for each item or group of items withheld.⁶ The description of the information or material withheld should provide to the requesting party enough information to assess the applicability of the privilege.⁷ The description should include the document number, author or source, recipient, persons receiving copies, date, document title, document type, number of pages and any other relevant information.⁸

Texas Rules of Civil Procedure Rule 193.2(f) instructs that a party should not object to a request for written discovery on the grounds that it calls for the production of material or information that is privileged. Rather, according to Rule 193.2(f), the party should comply with Rule 193.3, which is the correct rule for asserting privilege. 193.2(f) provides that a party who objects to production of privileged material or information does not waive the privilege but must comply with 193.3 when the error is pointed out.⁹

⁴ *In re Shipmon*, 68 S.W.3d 815, 822 (Tex. App.—Amarillo 2001, orig. proceeding); *In re Monsanto Co.*, 998 S.W.2d 917, 924 (Tex. App.—Waco 1999, orig. proceeding).

⁵ *In re Monsanto Co.*, 998 S.W.2d at 924.

⁶ *Spohn Hosp. v. Mayer*, 72 S.W.3d 52, 62 (Tex. App.—Corpus Christi 2001), *rev'd on other grounds*, 104 S.W.3d 878 (Tex. 2003).

⁷ *In re Monsanto Co.*, 998 S.W.2d at 925 n.8.

⁸ *Id.* at 925.

⁹ *In re Univ. of Tex. Health Ctr.*, 33 S.W.3d 822, 826 (Tex. 2000).

Defense attorneys know these rules and use them to their advantage. The defendant usually objects to a request for production on the grounds that the information requested is protected by the medical committee and peer review privileges instead of correctly asserting a privilege and stating that information or material is being withheld. Do not let the defendant get away with this error. After receiving an incorrect objection, write to defense counsel requesting that the defendant supplement its discovery to comply with Rule 193.3 and produce a privilege log in accordance with Rule 193.3(b). Rule 193.4 states that the withholding party **must** comply with Rule 193.3 when the error is pointed out. Further, the withholding party **must** produce a privilege log within fifteen days of service of a request for a privilege log. If defense counsel chooses to ignore your requests and does not produce the privilege log within the specified time, there is a good argument that the defendant has waived the privileges by not complying with the appropriate rules of civil procedure.

It is imperative for the party seeking discovery to request and secure a hearing on the assertion of privilege. While the rules provide that either party can request a hearing on the assertion of privilege, the burden of requesting a hearing falls on the party seeking discovery.¹⁰ If neither party requests a hearing on the assertion of privilege (and the defendant never will), then the party seeking discovery waives the requested discovery.¹¹

The good news is that the withholding party bears the burden to produce evidence necessary to support the privilege.¹² That evidence can be either by affidavit or by live testimony. If the party resisting discovery intends to rely on affidavits to support the

¹⁰ TEX. R. CIV. P. 193.4(a).

¹¹ *McKinney v. Nat'l Un. Fire In. Co.*, 772 S.W.2d 72, 75 (Tex. 1989).

¹² TEX. R. CIV. P. 193.4(a); *Arlington Mem'l Hosp. Found. v. Barton*, 952 S.W.2d 927, 929 (Tex. App.—Ft. Worth, 1997, orig. proceeding) (“The party asserting the privilege has the obligation to prove, by competent evidence, that the privilege applies to the information sought.”).

privilege, the affidavits must be served at least seven days before the hearing.¹³ Global allegations asserted in an affidavit that the information is privileged are insufficient.¹⁴ Rather, the affidavit “must necessarily be descriptive enough to be persuasive, but not so descriptive as to provide the very information sought by the opposing party, should the affidavit fall into such party’s hands.”¹⁵

Barnes v. Whittington, a 1988 Texas Supreme Court decision, illustrates the procedural pitfalls that the withholding party can encounter when trying to meet its burden of proof.¹⁶ In *Barnes*, a defendant hospital included two affidavits in sealed envelopes it submitted to the court for in camera inspection.¹⁷ The hospital did not file the affidavits with the district clerk or serve the plaintiff as required by the rules of procedure.¹⁸ Further, the affidavits themselves merely stated that the documents were privileged.¹⁹ The Court refused to consider the affidavits on the grounds that the defendant failed to follow the rules of civil procedure.²⁰ Concerning the global allegations contained in the affidavit, the Court held, “[N]o evidence was presented by the mere global allegations that the documents come within the privilege. Affidavits . . . must contain something more than a global reiteration of facts ascertainable from the face of the documents themselves.”²¹

¹³ TEX. R. CIV. P. 193.4; See *In re Monsanto Co.*, 998 S.W.2d at 924.

¹⁴ *Barnes v. Whittington*, 751 S.W.2d 493, 495 (Tex. 1988).

¹⁵ *Arlington Mem'l Hosp. Found.*, 952 S.W.2d at 929 (internal citation omitted).

¹⁶ 751 S.W.2d 493 (Tex. 1988).

¹⁷ *Id.* at 495.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* For an example of an affidavit that makes a prima facie case that documents are entitled to the claimed privilege, see *In re Osteopathic Medical Centers of Texas*, 16 S.W.3d 881, 884 (Tex. App.—Ft. Worth, 2000, orig. proceeding) (holding sufficient an affidavit made with personal knowledge of the affiant, stating that hospital peer review committee evaluates cases involving patient care at the hospital, explaining that pursuant to hospital policy incident reports are prepared following an unusual occurrence to

Understanding the procedural traps and using the rules of procedure to your advantage is the first step in defeating the medical committee and peer review privileges.

IV. Records Kept in the Regular Course of Business Are Not Privileged

If a record is kept in the regular course of business, then the medical committee privilege and the peer review privilege are not applicable.²² This is a statutory exception found at HSC §161.032(f). While the exception is found in the HSC, which defines the medical committee privilege, HSC §161.032(f) makes clear that the exception applies to both the medical committee privilege and the peer review privilege.²³

An excellent case illustrating the regular course of business exception is the Second District Court of Appeals decision *In re Osteopathic Medical Center of Texas*.²⁴ The case involved a slip and fall accident at a physical therapy rehabilitation center.²⁵ The plaintiff requested any and all accident reports in the possession of the center regarding the accident in question and any and all documents or notes in the possession of the center regarding any investigation of the accident in question.²⁶ The center objected to disclosure claiming medical peer review committee privilege and filed an affidavit from the chairman of the medical peer review committee to support its assertion of privilege.²⁷

facilitate the peer review process, and stating that such reports are not part of the regular course of business of the hospital).

²² TEX. HEALTH & SAFETY CODE ANN. §161.032(f) states, “This section [medical committee privilege] and Subchapter A, Chapter 160, Occupations Code [peer review privilege], do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.”

²³ *Id.*

²⁴ 16 S.W.3d 881 (Tex. App—Ft. Worth, 2000, orig. proceeding).

²⁵ *Id.* at 883.

²⁶ *Id.*

²⁷ *Id.*

At the hearing, the center produced two documents for the court to review in camera. The first document was a Patient Quality Event Tracking Report and the second was a Security Services Incident Report.²⁸ The trial court ordered the center to produce both documents, and in response, the center filed a writ of mandamus challenging the trial court's ruling.²⁹

Both of the documents were pre-printed forms from the center and were completed shortly after the plaintiff's fall.³⁰ The Patient Quality Event Tracking Report showed the time and location of the fall, the patient's pre-occurrence condition, the nature of the occurrence, the post-occurrence treatment, witnesses to the occurrence and a description of the fall.³¹ The pre-printed form stated specifically, "FOR USE BY THE QUALITY ASSURANCE COMMITTEE," and "Do Not Copy," and "Privileged and Confidential," and "Not Part of [the patient's] Medical Record."³² The Security Services Incident Report was created by someone in the security department and contained a hand-written statement concerning the fall and indicated that security was contacted."³³

The court held that the Patient Quality Event Tracking Report was protected by the peer review privilege.³⁴ The factors cited by the court in support of its ruling included the fact that the report was made exclusively for the quality assurance committee and that the report was prepared to provide information to facilitate the

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 884.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 886.

committee's peer review function of evaluating the quality of healthcare and medical services at the center.³⁵

On the other hand, the Security Services Incident Report was not privileged.³⁶ Persuasive to the court was the fact that the document was prepared by the security department as a regular part of its business.³⁷ According to the court, records made or maintained in the regular course of business means "records kept in connection with the treatment of a hospital's individual patients as well as the business and administrative files and papers apart from committee deliberations."³⁸ Hence, non-committee records, including security records, administrative records and business records are not protected by the peer review or committee privilege, even if reviewed by or in the possession of a hospital committee.

While peer review and other medical committees routinely keep their records in the same manner as other hospital records, the mere fact that these records are maintained in the same manner as other hospital records does not mean that they are made in the regular course of business for purposes of defining the regular course of business exception.³⁹ The Texas Supreme Court has held that such an interpretation would destroy the statutory privileges completely.⁴⁰

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*; See also *Mem'l Hosp.—The Woodlands v. McCown*, 927 S.W.2d 1, 10 (Tex. 1996) (orig. proceeding); *Texarkana Mem'l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977) (orig. proceeding).

³⁹ *Texarkana Mem'l Hosp., Inc.*, 551 S.W.2d at 34 (holding that construing the regular course of business exception in such a broad manner would be "self-defeating.")

⁴⁰ *Mem'l Hosp.—The Woodlands*, 927 S.W.2d at 9–10.

The peer review and medical committee privilege do not provide blanket protection for all hospital records. Discovery from alternate sources created in the regular course of business is permitted.⁴¹

V. Records Must be Created by or for a Committee in its Investigative or Deliberative Process to be Privileged

The Texas Supreme Court has held that the term “records and proceedings” found in the statutory language defining the peer review and medical committee privileges means documents generated by the committee in order to conduct open and thorough review.⁴² In *Jordan v. Court of Appeals for the Fourth Supreme Judicial District*, the Texas Supreme Court provided general rules to determine if a document is privileged. If a document was prepared by or at the direction of a committee for the purpose of investigation or review, then the document is protected by the peer review and medical committee privileges.⁴³ The privilege extends to minutes of committee meetings, correspondence between committee members relating to the deliberation process, and any final committee product such as recommendations and committee reports.⁴⁴ Documents

⁴¹ See *Irving Healthcare Sys. v. Brooks*, 927 S.W.2d 12, 18 (Tex. 1996) (orig. proceeding) (“The statute does not protect discovery from alternate sources. For example a medical peer review committee may have obtained and reviewed a copy of a letter from a physician, but that document is not thereby clothed with a privilege if its author or recipient share it with individuals or entities that do not come under the umbrella of article 4495b.”).

⁴² *Jordan v. Court of Appeals for Fourth Supreme Jud. Dist.*, 701 S.W.2d 644, 647–48 (Tex. 1985) (“Accordingly, we find that the statutory language, ‘records and proceedings’ means those documents that have been prepared by the committee in order to conduct an open and thorough review. In general, this privilege extends to documents that have been prepared by or at the direction of the committee for committee purposes. Documents which are gratuitously submitted to the committee or which have been committed without committee impetus and purpose are not protected.”).

⁴³ *Id.* See also *Barnes*, 751 S.W.2d at 495 (Tex. 1988) (“As discussed in *Jordan*, the statutory purpose behind a privilege for hospital committee records and proceedings protects the important, but limited, policy of encouraging uninhibited discussion of events that are the subject of committee action or review. The limited purpose of protecting uninhibited discussion leads us to conclude that the privilege extends only to information generated by the hospital committee in its investigation or review process.”)

⁴⁴ *Jordan*, 701 S.W.2d at 648.

that are gratuitously provided to a committee are not privileged.⁴⁵ Documents that have been created without committee impetus and purpose are not protected.⁴⁶

The first group of documents reviewed by the *Jordan* Court contained five papers from a hospital committee which had been established under its bylaws to investigate the quality of care provided in the pediatric intensive care unit (“PICU”).⁴⁷ A preamble and schedule of on-site visit to the PICU, a preliminary report of a visit to the PICU and a final report of a visit to the PICU were privileged because they were clearly created by the committee for investigative purposes.⁴⁸ On the other hand, the hospital could not show that a memorandum and letter in the possession of the committee were created by or for the committee in its investigative or deliberative capacity.⁴⁹ Therefore, those documents were discoverable.⁵⁰

The second group of documents contained two documents that were created by a committee established under hospital bylaws to investigate causes of death in the PICU. The third group of documents contained the minutes or summary of minutes from the PICU committee. All of those documents were privileged.⁵¹

The fourth group of documents contained minutes of an ad hoc committee of a defendant hospital district and a memorandum announcing the committee’s initial meeting and requesting certain persons to investigate and report findings to the

⁴⁵ *Id.*

⁴⁶ *Id.* Another set of documents that are not protected by the peer review and medical committee privileges are bylaws, rules and regulations of a hospital. See *Brownwood Reg’l Hosp. v. Eleventh Court of Appeals*, 927 S.W.2d 24, 27 (Tex. 1996).

⁴⁷ *Jordan*, 701 S.W.2d at 648.

⁴⁸ *Id.*

⁴⁹ *Id.* Remember that the burden of proof is on the party resisting discovery to produce competent evidence showing that the documents are privileged. TEX. R. CIV. P. 193.4(a).

⁵⁰ *Jordan*, 701 S.W.2d at 648.

⁵¹ *Id.*

committee.⁵² It appears that the documents would have been privileged had a privilege for these documents been asserted; however, the hospital district did not assert a privilege and therefore, the documents were discoverable.⁵³

The fifth and last group of documents contained thirteen documents. Two of the documents were “Notes to the File” written by a physician. The notes appeared to be for the physician’s personal use and not for committee purposes; therefore, the notes were not privileged.⁵⁴ The next document in this group was a memorandum from one physician to another physician requesting that the physician report any unexplained complications in the PICU. The memorandum did not reflect whether the request was by a committee, and the hospital, therefore, could not meet its burden of proving that the memorandum was privileged.⁵⁵ The next four documents in this group were documents from a physician to another physician regarding various patients treated in the PICU. Again, it could not be shown from a review of the documents that they were created by or for a hospital committee.⁵⁶ Similarly, the last six documents in the group could not be shown to be created by a committee for committee purposes.⁵⁷

In summary, to be afforded protection under the peer review or medical committee privilege, records must be created by or for a committee as part of the committee’s investigative or deliberative process. If a document is gratuitously submitted to a committee without committee impetus and purpose, then the document is

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

not privileged. This is true even if the document serves as evidence in the committee's deliberations.⁵⁸

VI. Waiver

A last, but difficult, way to defeat the peer review and medical committee privilege is to demonstrate a waiver of the privilege. The rules for waiver are different depending on the privilege asserted.

The TOC requires a waiver of the peer review privilege to be executed in writing by the committee.⁵⁹ The party seeking discovery of information that is protected by the peer review privilege bears the burden of pleading and proving waiver of the privilege by the committee in writing.⁶⁰ For example, a hospital peer review committee did not waive peer review documents in the manner prescribed by the TOC by producing information in response to a discovery request by another plaintiff.⁶¹ Therefore, the plaintiff in a medical malpractice action will have a difficult time proving waiver if the defendant successfully asserts the peer review privilege.

On the other hand, if the only applicable privilege is the medical committee privilege established pursuant to the HSC, then waiver becomes a distinct possibility. If documents have been disclosed to third parties (including other non-committee hospital personnel or departments), then it is the burden of the party asserting privilege to show

⁵⁸ *Barnes*, 751 S.W.2d at 495–96 (“[P]resentation of evidence or opinion to a hospital committee during its deliberations does not thereby make that evidence or opinion privileged if offered or proved by means apart from the record of the committee.”) (internal quotation omitted).

⁵⁹ According to TEX. OCC. CODE ANN. §160.007(e), “The evidentiary privileges created by this subtitle may be invoked by a person or organization in a civil or administrative proceeding unless the person or organization secures a waiver of the privilege executed in writing by the chair, vice chair, or secretary of the affected medical peer review committee.”

⁶⁰ TEX. OCC. CODE ANN. §160.007(g) states, “A person seeking access to privileged information must plead and prove waiver of the privilege. A member, employee, or agent of a medical peer review committee who provides access to an otherwise privileged communication or record in cooperation with a law enforcement authority in a criminal investigation is not considered to have waived any privilege established under this subtitle.”

⁶¹ *In re Univ. of Texas Health Center at Tyler*, 33 S.W.3d 822, 827–28 (Tex. 2000).

that no waiver has occurred.⁶² In *Jordan*, a number of the documents at issue had been submitted to the Bexar County District Attorney in its investigation of a nurse. A grand jury came into possession of the documents. The Court held that the voluntary disclosure of the documents to the grand jury constituted a waiver because the party asserting the privilege could not prove that no waiver had occurred.⁶³ Additionally, the voluntary disclosure of a significant portion of privileged information constitutes a waiver as to the remaining portions.⁶⁴

VII. Conclusion

The peer review privilege and medical committee privilege were not designed to give the hospital blanket protection from discovery of each piece of sensitive information that is reviewed by a committee, but the defendant hospital will invariably try to hide valuable information by claiming these privileges. Remember and explain to the court that privileges are not favored in the law and the statutes that created them must be strictly construed.⁶⁵ Remember that the defendant that asserts privilege must prove the applicability of the privilege, but it is up to the plaintiff to make the defendant do this by requiring the defendant to produce a privilege log and obtaining a hearing on the assertion of privilege.

The interests of the defendant must be balanced against the right of the plaintiff to discover evidence. Hopefully, by utilizing the rules of civil procedure and understanding

⁶² *Jordan*, 701 S.W.2d at 649 (citing TEX. R. EVID. 511 which states, “A person whom these rules confer a privilege against disclosure waives the privilege if . . . the person voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged.”).

⁶³ *Id.*

⁶⁴ *Terrell State Hosp. v. Ashworth*, 794 S.W.2d 937, 940–41 (Tex. App.—Dallas 1990, orig. proceeding); TEX. R. EVID. 511

⁶⁵ *Trammel v. United States*, 445 U.S. 40, 50 (1980) (stating the fundamental principle that “the public . . . has a right to every man’s evidence.”).

the case law interpreting the medical committee and peer review privileges, the balancing act will weigh in favor of the plaintiff.