Keeping Your Key Documents Protected

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Agenda

• Overview of the Privilege
• Warm up Questions
• Sources of the Privilege
  – Federal Statute
  – State Statutes (TN, AL, MS, AR, KY, LA, GA)
• Exceptions
  – “Original source” exception
  – “Regular course of business” exception
• Interpretation in State Courts
• Revisit Warm up Questions
• Steps to Help Keep Your Information Protected
• Questions?
Overview of the Privilege

- Quality assurance (QA) is a healthcare facility’s self-review process for the purpose of improving patient or resident safety and care.

- The QA privilege protects self-review activities from release to others outside those involved in the communication.
Importance of the Privilege

• Without complete confidentiality of deliberations and assessment, people are not especially motivated to engage in continuous quality improvements.
• Openly discussing problems that exist in a health care facility invites lawsuits or citations from regulators.
### Warm up Questions - Poll

What information is protected by the QA privilege?

<table>
<thead>
<tr>
<th>Incident reports</th>
<th>Yes</th>
<th>No</th>
<th>Depends</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facility’s investigative notes</td>
<td>Yes</td>
<td>No</td>
<td>Depends</td>
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<td>QA Committee's investigative reports</td>
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<td>Quality assurance investigation carried out by third party</td>
<td>Yes</td>
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<td>Compilations, studies or comparisons of statistical data derived from records created by or at Committee’s request</td>
<td>Yes</td>
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<tr>
<td>Knowledge a QA Committee member brings to the Committee</td>
<td>Yes</td>
<td>No</td>
<td>Depends</td>
</tr>
<tr>
<td>Knowledge a QA Committee member acquires from Committee</td>
<td>Yes</td>
<td>No</td>
<td>Depends</td>
</tr>
<tr>
<td>Are your facility’s incident reports reviewed by a valid QA Committee?</td>
<td>Yes</td>
<td>No</td>
<td>Depends</td>
</tr>
</tbody>
</table>
Poll

Are your facility’s incident reports reviewed by a valid QA Committee?

☐ Yes
☐ No
☐ I don’t know
Sources of the Privilege

- Federal Statute
- State Statutes
Federal Statute

Quality assessment and assurance

• “[A] nursing facility must maintain a quality assessment and assurance committee ... [and] [a] State or Secretary may not require disclosure of the records of such committee except insofar as such disclosure is related to the compliance of such committee with the requirements of this [statute].”

Watch out ALFs!
State Statutes

- Some states have passed statutes strengthening the QA privilege.
- In general, the deliberations, evaluations, documents reviewed, and documents created by such a committee are safe (with some exceptions) from subpoena and discovery by plaintiffs’ lawyers.
Typical State Definition
Tenn. Code § 68-11-272

• “Records of a Quality Improvement Committee (QIC) and testimony or statements by a healthcare organization's officers, directors, trustees, healthcare providers, administrative staff, employees or other committee members or attendees relating to activities of the QIC shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena or admission into evidence in any judicial or administrative proceeding.”

• “Any person who supplies information, testifies or makes statements as part of a QIC may not be required to provide information as to the information, testimony or statements provided to or made before such a committee or opinions formed by such person as a result of committee participation.”
Similar State Definitions

• Alabama, Arkansas and Louisiana have similar statutes protecting quality assurance information in the context of a nursing care facility.
Ala. Code § 22-21-8

• "All accreditation, quality assurance credentialing and similar materials shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care professional or institution arising out of matters which are the subject of evaluation and review for accreditation, quality assurance and similar functions, purposes, or activities."

• "No person involved in preparation, evaluation or review of accreditation, quality assurance or similar materials shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the course of preparation, evaluation, or review of such materials or as to any finding, recommendation, evaluation, opinion, or other action of such accreditation, quality assurance or similar function or other person involved therein."
AR ST § 20–10–2204

• "The proceedings of, and records that are created by or for the committee of a long-term care facility are not subject to discovery or introduction into evidence in a civil action against a provider of professional health services arising out of the matters that are subject to evaluation and review by the committee.”
La. R.S. 13:3715.3

- "All records, notes, data, studies, analyses, exhibits, and proceedings of ... nursing home association peer review committee ... shall be confidential wherever located and shall be used by such committee and the members thereof only in the exercise of the proper functions of the committee and shall not be available for discovery or court subpoena regardless of where located ...."
Related State Definitions

• Mississippi, Kentucky and Georgia do not have statutes pertaining directly to quality assurance in the context of a nursing facility.

• However, these states have relevant statutes protecting peer-review committee information in hospital settings.
Miss. Code Ann. § 41-63-23

• "... the proceedings and records of any medical or dental review committee shall be confidential and shall not be subject to discovery or introduction into evidence in any civil action arising out of the matters which are the subject of evaluation and review by such committee."

• "No person who was in attendance at a meeting of such committee shall be permitted or required to testify in any civil action regarding any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions or other actions of the committee or its members."
KRS 311.377

• “...the proceedings, records, opinions, conclusions, and recommendations of any committee, board, commission, medical staff ... shall be confidential and privileged and shall not be subject to discovery”
Ga. Code § 31-7-143

• "The proceedings and records of medical review committees shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by such committee; and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions, or other actions of such committee or any members thereof."
Main Exceptions - Unprotected Documents

1. Information, documents or records otherwise available from original sources

2. Records made in the regular course of business by a health care facility.
"Original Source" Exception

• “Any information, documents or records, which are not produced for use by a quality improvement committee or which are not produced by persons acting on behalf of a quality improvement committee, and are otherwise available from original sources, shall not be construed as immune from discovery or use in any judicial or administrative proceeding merely because such information, documents or records were presented during proceedings of such committee.”

• Example: Employee provides written statement of unusual event to the QA committee and keeps a copy for his personal records.
  – that document COULD BE discoverable from the employee
  – that document IS NOT discoverable from the committee

(See Stratienko v. Chattanooga-Hamilton County Hospital Authority, 226 S.W.3d 280 (Tenn. 2007))
Poll

Do your nurses include factual information in the incident report about the event that they did not include in the nurse’s notes? (Example: Blood pressure, family notification, neuro checks, etc.)

☐ Yes
☐ No
"Regular Course of Business" Exception

• Generally, any documents that are widely distributed to employees and health care providers within a facility and which are intended to govern prospective conduct, are documents produced in the “ordinary course” of business.
"Regular Course of Business" Exception

- Examples of non-privileged documents:
  - Medical records of residents
  - Policy manuals
  - Treatment protocols
  - Records or reports required to be kept by applicable law or regulation that are not created by or for the committee
  - Facility’s operating budgets
  - Documents that are simultaneously maintained by the quality assurance committee and another committee not engaging in protected activity, like Human Resources
Poll

Do you have employees write out written statements regarding events?
☐ Yes
☐ No

Do you take steps to make sure these statements are privileged?
☐ Yes
☐ No
State Interpretations Trends

• Although confidentiality of a health care provider's quality assurance materials (and the resulting privilege against discovery in litigation) is statutorily guaranteed, the scope of the protection and manner of asserting it have been limited by the courts.
Tennessee
Upholding the Privilege

• Recent TN law expands protection to include “reports, incident reports, statements, minutes memoranda, charts statistics, evaluations, critiques, test results, corrective actions, disciplinary actions, and any and all other documentation generated by or in connection with a [quality assurance committee].”

(Tennessee Patient Safety and Quality Improvement Act of 2011)
Alabama

Upholding the Privilege

Information Sought: Plaintiffs requested all incident reports or complaints involving certain patients at a nursing home facility.

Holding:

• The AL Supreme Court held incident reports or complaints were not discoverable if they were not kept in the ordinary course of business or were made part of the patients’ medical files.

• Notably, the court applied the QA privilege to the incident reports even though the facility evidently had no QA committee. It was enough that the facility asserted that the reports were created for QA purposes and not kept in residents files.

• *Ex parte Fairfield Nursing & Rehab. Ctr., 22 So. 3d 445 ( Ala. 2009)*
Mississippi
Narrowing the Privilege

• **Holding:** The peer review privilege applies to any medical review committee formed or created with the sole purpose and function of peer review to promote quality assurance. The privilege should not apply to committees where peer review of quality assurance is a peripheral function. *Claypool v. Mladineo, 724 So.2d 373, 387 (1998).*

• **Consequences:** The party wishing to apply the privilege must prove that the particular committee in question comes within the purview of the statute.
Mississippi
Narrowing the Privilege

• **Protected:**
  – testimony or evidence presented during the committee’s deliberations.
  – incident reports (under proper circumstances)
  – decisions reached by a peer review committee

• **Unprotected:**
  – names of individuals who were present at the meeting (including experts)
  – list of documents received by the committee
  – person cannot be asked what he said in a peer review committee proceeding, but he can be asked questions in discovery or on a witness stand that would elicit the same information given to the committee.
Arkansas
Narrowing the Privilege

• Discoverable information:
  – Incident and accident reports
  – A facility’s operating budgets
  – Records of the QA committee’s meeting dates

• Also, a member or a person who testifies before a QA committee shall not be prevented from testifying as to matters within his or her knowledge, as long as that knowledge was not obtained through participation in the committee
Kentucky
Narrowing the Privilege

• KY Supreme Court held that the peer review privilege is limited to suits against peer review entities

• The privilege is applicable only when a committee or its members is being sued and does not extend to medical malpractice actions

• *Sisters of Charity Health Sys. v. Raikes, 984 S.W.2d 464 (1998)*
Information Sought: Studies conducted by facility regarding nosocomial infection rates per admission

Holding: Privilege statutes were intended to protect the policy making, remedial, and self-critical analyses of quality assurance committees but not to protect information directly relevant to malpractice claims. When a plaintiff seeks information relevant to his case that is not information regarding action taken by a committee’s exchange of honest self-critical study but merely factual accountings of otherwise discoverable facts, such information is not protected

*(Smith v. Lincoln General Hosp., 605 So. 2d 1347 (La. 1992))*
Georgia
Narrowing the Privilege

Information Sought: hospital's peer review files, including physician credentialing files

Holding: “privileges for medical review committee ... proceedings and records do not extend to physician credentialing information, unless it involves the evaluation of the quality and efficiency of actual medical services.”

## Revisiting Warm-Up Questions

What information is protected by the QA privilege?

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<th>Depends</th>
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<tr>
<td>Incident reports</td>
<td>Depends</td>
<td>Incident reports are protected from discovery only if they are created at the request of the QA committee and are kept separately from the facility’s general files.</td>
</tr>
<tr>
<td>Investigative notes</td>
<td>Depends</td>
<td>Same as incident reports</td>
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<td>Yes</td>
<td>QA investigations carried out a third party is protected if done at the request of the QA committee</td>
</tr>
<tr>
<td>Compilations, studies or comparisons of statistical data derived from records created by or at committee’s request</td>
<td>Yes</td>
<td>Protected if generated by or at the request of a <em>bona fide</em> QA committee.</td>
</tr>
<tr>
<td>Knowledge a QA committee member brings to the committee</td>
<td>No</td>
<td>Discovery immunity does not apply testimony as to facts acquired independently from the quality improvement efforts of the committee</td>
</tr>
<tr>
<td>Knowledge a QA committee member gains from committee</td>
<td>Yes</td>
<td></td>
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Tricky Documents

- Skin Committee Minutes
- Weight Committee Minutes
- Safety Committee Minutes
- Written employee reprimands or investigations.
- Written statements by employees taken in the course of an investigation.
- Reports to a supervisor, like Regional Nurse or RDO
- Emails!
Poll

Does your facility allow employees to send e-mails to one another re: events with residents?

☐ Yes
☐ No
Keeping Your Information Protected

1) Closely examine your state’s quality assurance statutes to determine the exact nature of the information that is protected.
Keeping Your Information Protected

2) Have a Policy and Procedure
Keeping Your Information Protected

3) Ensure that the Committee is engaging in its quality assurance function when any sensitive information is being created.
   - Remember protected documents’ purpose is to improve the quality of care rendered at a nursing facility.
   - Simply reporting facts, describing the facility, or memorializing care given to a resident will not suffice.
   - Protected documents typically contain analysis. Ex: Census data and payroll data contain only facts, but by comparing them, one can come up with a conclusion as to whether there are enough staff members to care for the resident population.
Keeping Your Information Protected

4) Put QA language on the document itself.
Keeping Your Information Protected

5) Make sure that materials reviewed/generated by the committee are not disseminated outside the committee.
   - Reports, deliberations and documentation reviewed by the quality assurance committee should be segregated and properly labeled.
Keeping Your Information Protected

- If an outside consultant is being retained, be sure to have documentation indicating the quality assurance committee’s directive to create document.

- Otherwise, information not obtained at the behest of the committee is subject to discovery.
Questions???