

Extending Peer Review to Nursing Homes

In the last five years, a boom has occurred in nursing home litigation. More cases than ever before are being filed and substantial verdicts are being reported throughout the United States. With this boom has come the realization that while nursing homes provide medical care similar to hospitals, and despite to being regulated significantly greater than hospitals, nursing homes have less protection of documents that might fall under a privilege than a hospital. This article will address why Indiana should extend the peer review statute or recognize the self-critical analysis privilege in the nursing home context.

Under Indiana law, in general, parties may obtain discovery of any nonprivileged matter relevant to subject matter involved in a pending action. Trial Rule 26(B). Indiana Code 34-6-2-99 defines "peer review committee" as a committee that is responsible for evaluating qualifications of professional healthcare providers, patient care rendered by professional healthcare providers, or the merits of a complaint against a professional healthcare provider that includes a determination or recommendation concerning the complaint and the complaint is based on the competence or professional conduct of the healthcare provider whose confidence or conduct effects or could effect adversely the health or welfare of a patient or patients.

Indiana Code 34-6-2-99(a)(2) contains criteria that a committee must meet in order to be recognized as a peer review committee. Under this criteria, the committee can be organized by the professional staff of a hospital, a nonprofit healthcare organization or another healthcare facility. At least 50% of the committee members must be individual professional healthcare providers.

Once an organization has met the definition of a peer review committee, the proceedings of that committee, including all communications and the records created by the committee, are confidential. See Indiana Code 34-30-15-1. Only the final action taken with regard to a professional healthcare provider may be disclosed but not the process leading up to that result. *Fridono v. Chuman*, 747 N.E.2d 610 (Ind.Ct.App. 2001).

The Indiana Court of Appeals has ruled that "the purpose of the peer review privilege is to foster an effective review of medical care." *Terre Haute Regional Hospital, Inc. v. Basden*, 524 N.E.2d 1306, 1311 (Ind.Ct.App. 1988). The citizens and healthcare providers placed such a premium on the process, that the Indiana legislature codified the process and privilege into sections noted above. The Indiana Court of Appeals has held that effect review of medical care is consistent with the statute construction. *Keskin v. Munster Medical Research Foundation*, 580 N.E.2d 354, 357 (Ind.Ct.App. 1991). Indiana courts "broadly interpret the scope of the peer review privilege" so long as the policy behind the rule is served. *Mulder v. VanKersen*, 637 N.E.2d 1335, 1338 (Ind.Ct.App. 1994).

Surprisingly, even though nursing homes are more regulated than hospitals and provide medical care in a similar fashion as hospitals, they are not afforded the peer review protection. Like hospitals, nursing homes review patient care on a regular basis either through care conferences with staff or attending physicians or by developing corrective action plans submitted to the State Department of Health, yet communications relating to that patient care cannot be protected later in a civil suit. As a result, while hospitals have a privilege which promotes candor and encourages physicians to engage in frank evaluations of the peers, nursing homes are not afforded this right.

As part of the substantial regulation that takes place, nursing homes are required after receiving a survey from the State Board of Health to issue a plan of correction, that is a means and method to correct any survey allegation for continued participation in Medicare and Medicaid programs and for the facility to keep its license. See 42 C.F.R. 483, et seq. Thus, even if the facility does not agree with the survey allegations, it is forced to come up with a plan of correction, with which may later be used against the facility in a civil lawsuit.

In addition, nursing homes are required to report "unusual occurrences" to the Department of Health which is essential self reporting alleged bad acts. 410 I.A.C. 16.2-3.1-13. Unusual occurrences have been broadly interpreted by the Department of Health to mean any allegation of abuse, neglect, mistreatment or injury of unknown origin. Even if the facility does not know what or how it happened, it must be reported.

While the creation of a plan of correction and the reporting of unusual occurrences makes good sense in protecting residents and encouraging a facility to take an aggressive approach in making corrections, by not having a peer review privilege available to it, facilities face the tough decision of candidly looking at a situation and making changes recognizing that it will be used against the facility in a subsequent civil trial. Needless to say, such a situation does not foster an effective review of medical care and runs contrary to the policy reason for having peer review. With more and more persons being in nursing homes and extended care facilities everyday, and with the increase of civil lawsuits against nursing homes, this situation will only worsen.

Absent extending the peer review privilege to nursing homes, the self critical analysis privilege should be applied where appropriate. While Indiana has not recognized this analysis, it makes sense to apply it absent a peer review statute for nursing homes. The self critical analysis privilege protects an organization's internal review process and its analytical reports generated regarding its policies, procedures and practices. *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992). A party seeking to assert the privilege must show the following:

1. The information must result from a self critical analysis undertaken by the party seeking protection.
2. The public must have a strong interest in persevering the free flow of the type of information sought.
3. The information must be a type whose flow would be curtailed if discovery were allowed.
4. The document must be prepared with the expectation that it will be kept confidential and has, in fact, been kept confidential.

While much has been written regarding the use of self critical analysis in the products liability arena, just as peer review privilege makes sense for hospitals, a self critical analysis privilege in the nursing home context is logical. If the requirements of the privilege are met in the nursing home context, it should be applied and the information discussed and created should be protected.

While this article only scratches the surface on peer review and self critical analysis privilege, to the practitioner and administrator who deal with nursing homes everyday, these issues must be addressed especially in light of the litigation boom that has taken place in this area and the growing number of facility closures. If we want our nursing homes like hospitals to be encouraged to have a free flow of information and frank discussions in improving the care provided to its residents, then these privileges need to be applied for the public good.