Oregon's Statutory Peer Review Privilege for Health Care Providers: What It Is and How to Not Waive It

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Where would you rather undergo coronary bypass surgery? At a hospital where mistakes and concerns that occurred during prior surgeries of other hospital patients are analyzed to develop and implement surgical policies that can help avoid similar future mistakes and obtain better patient results? Or at a hospital where surgical mistakes and concerns are regretted, but not analyzed as part of an ongoing program of quality improvement? The answer, of course, is obvious, and formed the Oregon legislature's rationale for enacting the state's medical "peer review" privilege statute, ORS 41.675, in 1963.

Oregon's medical peer review privilege statute provides protections to encourage medical service providers to engage in a robust peer review process.[2] The protections of ORS 41.675 apply in the context of "peer review bodies" of entities such as hospitals, emergency service providers, medical staff committees of the Department of Corrections, and certain health care facilities such as skilled nursing facilities.[3] The statutory privilege does not apply to assisted living or other residential care facilities.[4]

Under ORS 41.675, "data" provided to a "peer review body" is privileged and not admissible in evidence in any judicial, administrative, arbitration, or mediation proceeding.[5] The statute broadly defines "data" as "all oral communications or written reports to a peer review body, and all notes or records created by or at the direction of a peer review body, including the communications, reports, notes or records created in the course of an investigation undertaken at the direction of a peer review body."[6]

In construing Oregon's peer review statute, courts have explained that even though Oregon courts follow the federal view that evidentiary privileges should be strictly construed, courts have noted the broad language of the peer review privilege statute.[7] In *Dodele v. Conmed, Inc.*,[8] the plaintiff alleged that the defendants failed to provide proper medical treatment to a county jail prisoner. The plaintiff filed a motion to compel production of two letters related to the medical treatment. The defendants claimed the letters contained "data" provided to a peer review body and so fell under Oregon's peer review statute. The first letter, from the Oregon State Hospital to one of the defendants, raised concerns about the procedures and protocols for transporting patients from the jail to the hospital. The second letter, from another defendant, was a direct response to those concerns. It addressed the procedures and protocols and discussed how they may be improved in the future. The court agreed with the defendants, finding that because the letters were "written to and from a medical provider, for the purpose of bona fide peer review," they were subject to the privilege.[9]

As explained in a 2014 United States District Court of Oregon decision, the peer review statute's protections are not unlimited. In *Roberts v. Legacy Meridian Park Hosp., Inc.*,[10] a neurological surgeon alleged that his clinical privileges were restricted because of racial animosity and for anticompetitive reasons. The defendants denied the surgeon's allegations and asserted there were legitimate reasons for the actions taken regarding the surgeon's surgical privileges. The surgeon moved to compel discovery of ten years' worth of medical peer review investigations or analyses over the past ten years of the surgeon as well as of certain defendants who were also doctors.

Defendants argued that the materials were protected by the peer review privilege. The court rejected defendants' privilege argument for two reasons. First, the court explained that the Ninth Circuit does not recognize a federal peer review privilege and has expressly declined to create one. The court explained that because the defendants elected to

remove the matter from state court to federal court, the defendants "deliberately chose a federal forum to litigate this suit." Thus, the federal common law of privilege applied, and no federal peer review privilege was applicable to the defendants.[11] Second, even assuming that Oregon's statutory peer review statute applied, the court explained that the statute includes an express exception that states the peer review data is not privileged in "proceedings in which a health care practitioner contests the denial, restriction or termination of clinical privileges by a health care facility or the denial, restriction or termination of membership in a professional society or any other health care group."[12] The court found that discovery sought by the plaintiff surgeon fell squarely within the statute's exception and ordered the defendants to produce the peer review materials subject to a protective order.

Oregon's medical peer review statute also provides that a person serving on, or communicating information to, any peer review body or a person conducting a peer review investigation may not be examined as to any communication to or from that peer review body or person. Further, service or participation in a peer review body is not subject to an action for civil damages for affirmative actions taken or statements made in good faith.[13] However, a person whose participation in peer review proceedings is in bad faith is not protected by the statute.[14]

Because the peer review/quality assurance privilege is such a valuable tool to improve patient and resident safety and care, attorneys should work closely with their Oregon health care facility clients to make sure appropriate steps are taken to ensure the privilege is understood, properly used, and not inadvertently waived. There are numerous practical steps that can be taken to help to preserve the peer review privilege. First, documents kept in the normal course of business (i.e., medical records of patients and residents, policy manuals, and records required to be kept by applicable law) are generally not peer review documents and are not covered by the privilege.[15] Accordingly, peer review policies and procedures should be developed and implemented to keep data created in the normal course of business separate from legitimate peer review data.[16]

Peer review policies and practices should also ensure that the peer review body actually performs its bona fide peer review function when sensitive peer review data is being created. Generally, this means that the purpose of the data should be to improve quality of care, and the data should contain peer review analysis, not just a recitation of facts.

Peer review data should also be clearly labeled as such. For example, written reports to a peer review body, and all notes or records created by or at the direction of the peer review body, should be marked with words such as "Peer Review Document – Privileged and Not Subject to Disclosure." Once the peer review materials are properly segregated and identified, steps should be taken to make sure the materials are not disseminated or reviewed by persons outside the peer review committee.

Attorneys representing the parties should carefully analyze whether they should assert both state and federal claims and whether to remove an action to federal court. As noted by the *Roberts* court, federal common law of privilege applies where there are federal questions and pendent state law claims, and the "Ninth Circuit does not recognize a federal peer review privilege and has expressly declined to create one," whenever a peer review privilege may be at issue.

Additionally, attorneys who represent skilled nursing facilities ("SNFs") should work with the SNFs to also make sure they comply with the specific requirements of federal statutes that require such facilities to "maintain a quality assessment and assurance committee."[17] Under these regulations, the quality assurance committees must consist of the director of nursing services, a physician designated by the facility, and at least three other members of the facility's staff. Such committees must meet at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary and to develop and implement appropriate plans of action to correct identified quality deficiencies.

Oregon's medical peer review privilege statute offers medical service providers important protections in exchange for the providers engaging in bona fide activities that are covered by the privilege in order to improve medical care. While the statute contains broad language, it also contains specific limitations and applicable requirements. Accordingly, appropriate steps should be taken to establish and maintain the privilege.

Endnotes

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[2]*Straube v. Larson*, 287 Or. 357, 364, 600 P.2d 371, 376 (1979) (The privilege "is based not on confidentiality but on the need to encourage frank communication. It is not to preserve the privacy of the communication but to prevent the participants from incurring legal liability for what they say.").

[3]Skilled nursing facilities and nursing homes are also covered by a federal statutory quality assurance privilege. 42 U.S. Code § 1395i–3(b)(1)(B)(ii) ("A State or the Secretary may not require disclosure of the records of [a quality assessment and assurance] committee except insofar as such disclosure is related to the compliance of such committee with the requirements of [the statute]."); 42 U.S. Code § 1396r(b)(1)(B). Like Oregon's medical peer review privilege statute, the federal statutes do not apply to assisted living or other residential care facilities. 42 U.S. Code § 1395i–3(a); 42 U.S. Code § 1396r(a).

[4]*See* ORS 441.015(1); ORS 442.015(12)(b)(A) ("'Health care facility' does not mean… A residential facility licensed by the Department of Human Services or the Oregon Health Authority under ORS 443.415").

[5]ORS 41.675(3).

[6]ORS 41.675(2); *Roberts v. Legacy Meridian Park Hosp., Inc.*, 299 F.R.D. 669, 674 (D. Or. 2014) ("Or.Rev.Stat. § 41.675 affords broad protection to medical staff documents used or created in the peer review process.").

[7]*Dodele v. Conmed, Inc.*, No. 1:12-CV-00469-CL, 2014 WL 60361, at *3 (D. Or. Jan. 7, 2014) (citing *Straube v. Larson*, 287 Or. 357, 363, 600 P.2d 371, 375 (1979)).

[8]2014 WL 60361, at *1 (D. Or. Jan. 7, 2014).

[9]2014 WL 60361, at *3 (D. Or. Jan. 7, 2014).

[10]299 F.R.D. 669 (D. Or. 2014).

[11]299 F.R.D. at 672, citing *Agster v. Maricopa Cnty.*, 422 F.3d 836, 839–40 (9th Cir. 2005) (applying federal common law of privileges to a claim of medical peer review privilege over both federal question and pendent state law claims).

[12]ORS 41.675(6).

[13]ORS 41.675(4) and (5).

[14]*Ford v. Cascade Health Servs.*, No. 03-6256-TC, 2006 WL 1805954, at *15 (D. Or. 2006) (explaining that if a jury agreed with a plaintiff that defendants used the peer review process to unlawfully discriminate against the plaintiff, "the defendants' participation would not be in good faith, and immunity would not attach… [and so] application of the protection of ORS 41.675 is inappropriate"). See also *Patrick v. Burget*, 800 F.2d 1498, 1506 (9th Cir. 1986), *rev'd*, 486 U.S. 94, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988) ("Oregon also provides good faith immunity to the participants in the peer review process.").

[15]*Cornejo v. Mercy Hosp. & Med. Ctr.*, No. 12 C 1675, 2014 WL 4817806, at *2 (N.D. Ill. Sept. 15, 2014) ("Documents created in the ordinary course of business, to weigh potential liability risk, or for later corrective action by hospital staff are not privileged, even if they are later used by a committee in a peer-review process.").

[16]Similarly, documents and information "otherwise available from original sources" are not immune from discovery. *Doe v. UNUM Life Ins. Co. of Am.*, 891 F. Supp. 607, 609 (N.D. Ga. 1995).

[17]42 USC sec.1395i–3(b)(1)(B) and 42 USC sec.1396r(b)(1)(B).

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