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ClientAlert

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New Mexico Supreme Court Upholds Punitive Damages Against Hospital for ROIA Violations

A recent New Mexico Supreme Court decision demonstrates that hospitals may be subject to punitive damages if they impose adverse employment consequences on a physician based on his participation in the Peer Review process. The Court found that protecting peer review integrity under ROIA was best accomplished by allowing for a private right of action for physicians.

On February 19, 2015, the Supreme Court of New Mexico issued its ruling on *Yedidag v. Roswell Clinic Corp* in which the Court found that a hospital could be held liable for using content from confidential peer reviews as a purpose for terminating a physician's employment. Dr. Emre Yedidag was an employee-physician for Roswell Clinic Corp. and Roswell Hospital Corp. (the "Hospital"). During a peer review of another Hospital employee-physician, Dr. Yedidag questioned the other physician on whether he was being forthcoming concerning his role in a patient's death. Based on this exchange, the Hospital's administration, terminated Dr. Yedidag's employment for unprofessional conduct. Dr. Yedidag then filed a complaint against the Hospital for utilizing confidential peer review information to justify his termination.

In upholding the Court of Appeals ruling, the Court in *Yedidag* held that (1) the New Mexico Review Organization Immunity Act ("ROIA") creates a private cause of action for breaches of peer review confidentiality when such disclosures do not further any of the listed purposes of ROIA, (2) ROIA is the basis for an implied promise that physician-reviewers will not suffer adverse employment consequences from participation in peer reviews because contractual agreements incorporate mandatory state law, and (3) the evidence was sufficient for a jury determination of punitive damages due to the fact that a jury could conclude that the Hospital's actions were, at minimum, wanton.

The New Mexico Review Organization Immunity Act

The New Mexico Review Organization Immunity Act ("ROIA") regulates hospital peer review committees, which gather and review information concerning the care and treatment of patients for eight purposes. The listed purposes are: (1) evaluating and improving the quality of health care services rendered in the area or by a health care provider; (2) reducing morbidity or mortality; (3) obtaining and disseminating statistics and information relative to the treatment and prevention of diseases, illnesses and injuries; (4) developing and publishing guidelines showing the norms of health care services in the area or by health care providers; (5) developing and publishing guidelines designed to keep within reasonable bounds the cost of health care services; (6) reviewing the nature, quality or cost of health care services provided to enrollees of health maintenance organizations and nonprofit health care plans; (7) acting as a professional standards review organization pursuant to 42 U.S.C., Section 1320c-1, et seq.; or (8) determining whether a health care provider shall be granted authority to provide health care services using the health care provider's facilities or whether a health care provider's privileges should be limited, suspended or revoked.[i]

To promote objectivity and candor in the peer review process, ROIA grants qualified immunity to both peer reviewers and individuals who provide information to review organizations. ROIA states that "[n]o person providing information to a review organization shall be subject to any action for damages or other relief . . . unless such information is false and the person providing such information knew or had reason to believe such information was false."[ii] It further provides that peer reviewers shall not be liable "for damages or other relief in any action brought by . . . persons whose activities have been or are being scrutinized or reviewed by a review organization . . . unless the performance of such duty, function or activity was done with malice toward the person affected thereby."[iii]

ROIA also protects the confidentiality of peer review records.[iv] Section 41-9-5(A) provides that all data and information acquired by a review organization in the exercise of its duties and functions *shall be held in confidence* and shall not be disclosed to anyone except to the extent necessary to carry out one or more of the purposes of the review organization or in a judicial appeal from the action of the review organization.

Not only is medical information discussed during peer reviews confidential, but the conduct of the peer reviewers is as well.

Yedidag held that not only is medical information discussed during peer reviews confidential, but the conduct of the peer reviewers is as well. ROIA does not distinguish information from conduct. The confidentiality provision of ROIA precludes the disclosure of "what transpired" during the peer review meeting unless (1) disclosure would further the purposes of either peer review or judicial review of peer review actions, or (2) the medical board subpoenas individuals on what transpired during a peer review.[v] The court held that conduct is something that transpires at peer reviews.

The Rationale Underlying ROIA Protections

The Court in *Yedidag* spends a significant amount of time discussing the importance and rationale

of the protections provided in ROIA, and cites numerous articles analyzing these protections. According to Paul L. Scibetta in *Restructuring Hospital-Physician Relations: Patient Care Quality Depends on the Health of Hospital Peer Review,* "[t]he most serious obstacle to effective peer review is the potential fear felt by the reviewer that participation in an adverse recommendation will lead to a lawsuit against him or her personally."[vi] In addition, Mr. Scibetta stated that "the prospect of having to defend even a meritless claim can chill the willingness of many to recommend the action necessary to improve hospital quality."[vii] Physician-reviewers are vulnerable to retaliation from their peers because physicians are interdependent on one another within hospitals; the "professional and financial success of each physician depends upon his or her colleagues."[viii]

One way of overcoming these barriers is to ensure that the peer review process is kept confidential.[ix] "[C]onfidentiality promotes the candid, free flow of information between physicians who are part of the peer review committee."[x] As noted in *Ardisana v. Nw. Cmty. Hosp., Inc.*, "absent a confidentiality provision, physicians might be reluctant to engage in strict peer review due to a number of apprehensions: loss of referrals, respect, and friends, possible retaliations, vulnerability to tort actions, and fear of malpractice actions in which the records of the peer-review proceedings might be used."[xi] The Court in *Yedidag* agreed that employee-physician reviewers who provide negative reviews of their colleagues foreseeably risk retaliation from their employers because such reviews harm their employers' financial interests.

Private Causes of Action Under ROIA

The Hospital, in disputing the existence of

"Absent a confidentiality provision, physicians might be reluctant to engage in strict peer review due to a number of apprehensions: loss of referrals, respect, and friends, possible retaliations, and vulnerability to tort actions."

a private cause of action, argued that as the Legislature failed to specifically provide for a civil cause of action, there is an inference that it did not intend to create one. The Court dismissed this argument by noting that pursuant to *National Trust*, the omission of an express cause of action by a legislature does not necessarily prohibit an implied cause of action.[xii]

Next, the Court then held that without a private cause of action, the minimal criminal penalty provided in ROIA would not adequately guarantee peer review confidentiality. Upholding peer review integrity under ROIA was determined to be best accomplished with an implied civil cause of action due to the fact that otherwise such violations would not necessarily be prosecuted by the State. As such, *Yedidag* holds that a private cause of action exists under ROIA.

Hospitals' Dual Regulatory System

In dismissing the Hospital's argument that the Court's holding would have the effect of completely immunizing physician-reviewer conduct in peer reviews, "no matter how egregious," the Court pointed out that the argument ignores the existence of a dual regulatory structure within hospitals.

Hospitals have a dual regulatory system whereby its employee-physicians are held accountable to both medical staff bylaws and employee-physician contracts. The Joint Commission on the Accreditation of Health Care Organizations (the "Joint Commission"), requires that a "medical staff must create medical staff by-laws that describe the organizational structure of the medical staff and the rules for its self-governance" and "require[s] accredited organizations to create a code of conduct that defines acceptable and unacceptable behaviors, and to establish a formal process for managing unacceptable behavior."

Unprofessional peer reviewers face multiple avenues of discipline that regulate disruptive conduct, albeit not by hospital administrators. While inappropriate behavior during a peer review is still confidential under ROIA, the statute enables medical staff to utilize such information to discipline reviewers. The Court also pointed out that the chair of a peer review committee can intervene at any time to stop inappropriate behavior. Particularly egregious behavior could trigger the termination of a physician's privileges. At most hospitals, the loss of such privileges terminates the employment of its physician-employees. As such, the Court held that the Hospital's argument that egregious conduct would be immunized lacks merit because it ignores the authority of the medical staff who have their own rules concerning peer reviews.

ROIA Protections Are Implied In Physician Agreements

Yedidag also holds that because ROIA states that information concerning peer review can only be utilized for the purposes listed in the statute, the usage of peer review information to justify adverse employment consequences is prohibited. As Section 41-9-5 is a mandatory rule of law, it is incorporated into physician-reviewer employment contracts.

By its plain language, Section 41-9-5 is a mandatory rule of law. Section 41-9-5(A) states that "[n]o person . . . *shall* disclose what transpired at a meeting of a review organization" except for the purposes listed in the statute. The ROIA regulatory scheme, which aims to promote peer review integrity by promoting candor and objectivity, also strongly suggests that Section 41-9-5 is a mandatory rule.[xiii] A mandatory rule of law, by definition, precludes parties from contractually avoiding application of the rule.[xiv]

The *Yedidag* Court held that allowing entities to contract around the confidentiality provision would undermine the entire regulatory scheme because the confidentiality of an entire group can be destroyed by one individual. As such, the Court held that hospitals are prohibited from using confidential peer review information in making its personnel decisions.

Punitive Damages

As a result of their findings against the Hospital, the jury awarded both compensatory and punitive damages to Dr. Yedidag. In New Mexico, punitive damages are awarded when a party intentionally or knowingly commits wrongs or when a defendant is utterly indifferent to the plaintiff's rights, even if the defendant lacked actual knowledge that his or her conduct would violate those rights.[xv] The Hospital argued that punitive damages were not justified due to the fact that it could not have known that it violated ROIA when it terminated Dr. Yedidag's employment because (1) the issue of whether the confidentiality provision protected Dr. Yedidag's conduct was a matter of first impression for New Mexico courts, and (2) the Hospital had consulted with attorneys concerning whether terminating Dr. Yedidag was permissible under the circumstances.

Upholding the award of punitive damages, the

Court held that the facts indicated that the Hospital should have been on notice to the possibility that its termination of Dr. Yedidag violated ROIA and were utterly indifferent to the consequences. The court believed that the foreseeable consequence of disrupting peer review candor should have warned the Hospital that it needed to thoroughly scrutinize the legality of its actions.

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Despite its claim to have consulted with counsel on the issue, the Hospital did not offer any documentation of reliance on counsel. A defendant who was attentive to others' rights would have obtained documentation supporting its reliance on an erroneous interpretation of law.[xvi] The Court stated that the Hospital should have relied on documented conduct outside of the peer review meeting to justify terminating his employment, thereby avoiding potential ROIA violations.

The Court deemed that a jury could find that the Hospital had other unstated reasons for terminating the physician, such as discouraging other physicians from candidly reviewing the Hospital's employee physicians in front of competitors. The jury could also have reasonably found that the Hospital terminated Dr. Yedidag's employment in an attempt to protect its business by trying to suppress potentially candid peer reviews that would reflect poorly on its employee-physicians.[xvii]

The Court found that this inference became stronger when it considered that Dr. Yedidag's termination "bewildered" Dr. Yedidag's fellow peer-reviewers. The Court believed that is possible that the shock value of Dr. Yedidag's termination could discourage other doctors from providing candid peer reviews. In sum, the Court held that a jury could find that the Hospital's termination of Dr. Yedidag's employment was reckless or wanton, and any attempts the Hospital made to deliberately undermine peer review candor could constitute intentional acts.

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i. NMSA 1978, § 41-9-2(E)
ii. NMSA 1978, § 41-9-3
iii. NMSA 1978, § 41-9-4
iv. *See Sw. Cmty. Health Servs. V. Smith*, 1988-NMSC-035, ¶ 10 ("Section 41-9-5 precludes any party from using for purposes of civil litigation the confidential records of peer review proceedings").
v. NMSA 1978, Section 41-9-5
vi. 51 U. Pitt. L. Rev. 1025, 1033 (1990)
vii. *Id*. at 1034.
viii. *Id*.
ix. See Brendan A. Sorg, Comment, *Is Meaningful Peer Review Headed Back to Florida?*, 46 Akron L. Rev. 799, 805-07 (2013).
x. Alissa Marie Bassler, Comment, Federal Law Should Keep Pace with States and Recognize A Medical Peer Review Privilege, 39 Idaho L. Rev. 689, 690 (2003).
xi. *See Ardisana v. Nw. Cmty. Hosp., Inc*., 7957 N.E.2d 964, 969 (Ill. App. Ct. 2003)
xii. *See National Trust,* 1994-NMCA-057, ¶¶ 6, 14-15
xiii. *See Sw. Cmty. Health Servs*., 1988-NMSC-035, ¶ 7
xiv. Ian Ayres, Responses, *Valuing Modern Contract Scholarship*, 112 Yale L.J. 881, 885-86 (2003)
xv. *See Kennedy v. Dexter Consol*. Sch., 2000-NMSC-025, ¶ 32, 129 N.M. 436, 10 P.3d 115.
xvi. *See Scalise v. Nat'l Util. Serv.*, Inc., 120 F.2d 938, 941-42 (5th Cir. 1941)
xvii. *See Terzano v. Wayne Cnty.*, 549 N.W.2d 606, 611 (Mich. Ct. App. 1996)