Two Healthcare Worlds Colliding: Peer Review and Human Resource Issues in the Employed Physician Universe

Patrick D. Souter, Esquire
Looper Reed & McGraw PC
Dallas, TX

Market forces have necessitated the continued evolution of affiliations between hospitals and physicians. Whether it's the hospital and its management and staff, the physician or either party's advising attorney, one involved in these types of arrangements must be leery of how an attempt to comply with one area of the law may manifest in legal concerns developing in related areas. One affiliation witnessing a significant increase in prevalence is that of the hospital-employed physician who has medical staff privileges. Because of this affiliation, the laws affecting peer review and human resources may intersect in dealing with complaints involving the physician's performance. When these two worlds do collide, peer review privilege and immunity may be impacted by the investigation of the complaints or the termination of the physician's employment or the denial of privileges. The result of such an incident was recently addressed in *Ryskin v. Banner Health Inc.*[1]

Ryskin's Employment Relationship and Medical Staff Privileges

Ryskin is an obstetrician/gynecologist who was employed by Banner at the Sterling Regional MedCenter, where he maintained hospital privileges.[2] With the pending expiration of his privileges, he submitted his reappointment application.[3] At the same time the hospital was considering his reappointment, the continuation of Ryskin's employment was being re-evaluated as well.[4] During the later part of 2007, he was notified that two of his cases had been submitted to an external review. This review concluded there were concerns regarding the medical care and processes he used in the cases. The Medical Executive Committee (MEC) concluded that based upon the results of the external review as well as other concerns that had been raised, the Peer Review Committee should review the report as well as Ryskin's practice information.[5]

The hospital's Credentials Committee reviewed Ryskin's application and concluded his reapplication should be denied in its entirety. This recommendation was submitted to the MEC. Because Ryskin's employment was in the process of being evaluated, the MEC ultimately extended his privileges for an additional three-month period to allow the evaluation to continue.[6] On December 22, 2008, Ryskin was notified by the hospital's chief executive officer (CEO) that his employment agreement was terminated effective March 25, 2009, pursuant to a ninety-day termination notice. His privileges were extended to March 25, 2009, so that his employment and privileges would end on the same day.

Ryskin subsequently filed a lawsuit against Banner Health Inc, Michelle Joy, Shirley Nix, Thomas Soper, Joseph Bonelli, and John Ellief alleging wrongful discharge, intentional interference with a contract, intentional interference with prospective business relationships, and conspiracy to improperly terminate his employment arrangement.[7] As part of discovery in the litigation, Ryskin attempted to compel the defendants to produce documentation related to the activities of the hospital's MEC, Credentials Committee, and the Peer Review Committee. The hospital asserted the documentation requested was privileged under Colorado law.[8] Subsequently, the hospital filed a Motion for Summary Judgment for Qualified Immunity under the Health Care Quality Improvement Act (HCQIA)[9] and the Colorado Professional Review Act (CPRA).[10]

Ryskin's Motion to Compel to Obtain MEC and Credentials Committee Documents

The Colorado quality management laws provide a privilege as to disclosure of documents generated while collecting information for the evaluation and improvement of quality care to patients.[11] Once the claimant meets its burden to establish the privilege, the burden shifts to the challenging party to demonstrate the privilege should not be available.[12]

The court noted the defendants had met their burden of establishing a *prima facie* case of privilege. Ryskin countered that due to the actions of the defendants, the privilege would no longer apply. Specifically, Ryskin relied upon evidence that he was not afforded due process rights throughout the review process and that the defendants had produced some evidence that fell within the privilege, which effectively established waiver of the privilege. In response to Ryskin's arguments, the defendants countered the court should recognize "nuances between the grant of medical privileges by a licensed hospital and employment by an entity that operates a hospital."[13] The defendants contend that a physician does have due process rights if there had been an adverse recommendation related to the physician's privileges, but in this case there was no investigation or adverse recommendation.[14] Rather his employment was terminated pursuant to the terms of an employment agreement and his reappointment was denied due to failing to accurately answer a question on the reappointment application.

On July 9, 2010, the court granted Ryskin's motion to compel. In its findings, the court disagreed that there was no investigation in light of the review and follow-up on Ryskin's alleged substandard clinical treatment and failure to follow hospital policies. The court noted that by not granting the full term for privileges but rather a three-month renewal, this constituted a limitation on privileges and was in fact an adverse decision.[15] In addition, while the defendants admitted producing documents to be covered

under the privilege, albeit inadvertently, the court held that their conduct was "inconsistent with maintaining the confidential nature" of those documents that had been produced.[16] Finally, the court noted that Ryskin was not seeking the documents as it related to both Committees' findings but rather to investigate the motive of the Committees' actions.[17]

The Defendants' Motion for Summary Judgment for Qualified Immunity Under HCQIA Standards

HCQIA provides for qualified immunity from damages actions for hospitals, doctors, and others that participate in professional review proceedings, provided the standards for such professional review actions are satisfied.[18] These standards are met if the professional review action is taken:

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain the facts and after meeting the requirement of paragraph (3).[19]

These standards are presumed to be met for the purpose of establishing the immunity. The burden is upon the person challenging the professional review action to prove that one of these four requirements were not satisfied so that the professional review body is no longer afforded immunity from damages under HCQIA.[20]

Ryskin asserted the defendants failed in meeting their obligations to be shielded from liability as it related to the Peer Review process, the Credentials Committee recommending Ryskin not be reappointed, and the MEC reappointing and renewing Ryskin's privileges for three months rather than the customary two-year appointment period. In analyzing the actions taken in these three instances, the court reviewed if these were professional review *activities* versus professional review *actions* under HCQIA.[21]

In its analysis of the Peer Review process, the court held Ryskin had shown no evidence to demonstrate a question of fact that the investigation of Ryskin constituted a professional review action rather than just an activity. Therefore, the court granted the defendants' motion for qualified immunity under HCQIA as it related solely to the activities of the Peer Review Committee. The defendants provided evidence the activities were fact-finding in nature and the subsequent consideration of what was found through such investigation. The stated reason for the denial of Ryskin's reappointment was his incorrect answer to a question on the reappointment application.[22] There was no ultimate action shown from these activities.

As for the Credentials Committee's recommendation on reappointment, the defendants asserted the Credentials Committee's purpose was to gather information and make recommendations to the MEC for appointment and reappointment.[23] Ryskin provided evidence that Defendant Nix, in serving on the Credentials Committee, failed to provide adequate notice of the process or for Ryskin to participate in the process.[24] While it was determined the Credentials Committee was a professional review body, Ryskin had provided sufficient evidence that the second, third, and fourth standards of 42 U.S.C. § 11112(a) had not been met and the court denied defendants' motion as it relates to HCQIA.

As to the third action regarding the MEC granting Ryskin reappointment and privileges for a three-month period rather than the customary two-year period, the court held this was a professional review action. The court then considered if Ryskin provided any evidence to show if there was a question of fact whether the four standards in 42 U.S.C. § 11112(a) had been met. Ryskin asserted that he was notified of the reappointment decision nearly two weeks after it was made and four days after Banner had approved the decision, and the Defendants did not controvert this evidence. Therefore, the court denied Defendants' motion since Defendants Nix, Soper, Bonelli, Elliff, Joy, and Banner failed to meet the third and fourth standards of 42 U.S.C. § 11112(a).[25]

The Defendants' Motion for Summary Judgment for Qualified Immunity Under CPRA Standards

CPRA also provides for a qualified immunity to participants in professional review actions so as to comply with HCQIA.[26] It is similar to HCQIA except that the CPRA does not presume that a professional review action is taken for the purpose of assuring quality and patient safety like HCQIA does.[27] The court notes the CPRA contains two parts, the first of which allows for immunity from suit under Colorado law[28] and the second as to immunity from damages under HCQIA.[29] In the defendants' motion, they pled facts utilizing HCQIA presumption as to quality and patient safety. They did not plead any facts to prove these two purposes as required under CPRA because it does not incorporate these presumptions. Without meeting this pleading burden, the court found that under Part 2 of CPRA, Defendants Nix, Soper, Elliff, Joy, and Banner are granted qualified immunity as it relates to the peer review process but not on the Credentialing Committee recommendations and the MEC actions as to reappointment.[30]

As for Part 1 of CPRA, the immunity criteria depends upon the status of those who are claiming such status.[31] All the defendants filed the motion for summary judgment for qualified immunity. Banner is the governing board; Nix, Soper, Bonelli, Elliff, and Joy were participants not related to the governing board. It is undisputed that the Peer Review Committee, Credentials Committee, and the MEC are all professional review committees under CPRA.

In reviewing the Peer Review process, the court noted "a challenge to the peer review is only allowed after the hospital's governing board has made a final decision."[32] Because the Banner governing board made no decision as it related to Ryskin's peer review process, the issue was not ripe since Ryskin failed to exercise his administrative remedies. The court ruled Defendants Nix, Soper, Bonelli, Elliff, and Joy immune under CPRA for those claims arising from the peer review process.

As to the Credentialing Committee's recommendation to the MEC, its ultimate determination as to Ryskin's reappointment, the determination of the Banner governing board, and Ryskin's appeals of the actions, the court ruled these matters were ripe for determination. Ryskin has the obligation to demonstrate there are questions of fact as to whether the Defendants met the obligations of CPRA.[33] Nix was the only Defendant to serve on the Credentials Committee. Ryskin presented evidence he was not notified nor had an opportunity to meaningfully participate in the process. The court denied Nix's relief since there was some evidence that the Credentials Committee did not meet it obligations as it related to the recommendation by failing to notify Ryskin and allowing him to participate.[34]

Nix, Soper, Bonelli, and Elliff served on the MEC. The court assumed that while Joy had been involved in the MEC meeting, she was not a member of the Committee but rather a peer review participant. Ryskin pled sufficient facts to demonstrate a material question of fact the MEC failed to satisfy its obligations as to notice of the action to Ryskin and allowing him the ability to participate. Because Ryskin met his burden as to demonstrating a question of fact, Nix, Soper, Bonelli, and Elliff's relief was denied as it related to the MEC activities.[35] Ryskin provided evidence that Joy participated in the MEC meeting where the determination of his reappointment was made. There was also evidence presented that Joy failed to provide Ryskin notice of the determination until after it was made so as to not allow Ryskin the opportunity to participate in the process. Because the court concluded Joy's actions could be determined to not have been in good faith, Joy's relief was denied as well.[36]

Finally, Banner sought immunity as to Ryskin's claims of conspiracy. For a governing board and its members to receive immunity in this circumstance, all that must be shown is good faith.[37] Because Ryskin failed to provide any evidence as it related to Banner's actions, the court granted Banner's Motion for qualified immunity for that limited purpose.

Conclusion

As the Ryskin case demonstrates, when a peer review matter coincides with another legal matter pertaining to the same practitioner, it should not be assumed that privilege and immunity will necessarily result due to the peer review process. It is even more problematic when you have multiple committees or boards involved in the process or the same individuals are wearing multiple hats in the process. All of these tend to muddy the waters as to who is acting in what capacity and what laws govern the process. Therefore, when addressing situations like this, clearly document the responsibilities of the parties and what laws are impacted by those responsibilities.

1 *Ryskin v. Banner Health, Inc.*, No. 09-cv-1864. 2010 W.L. 4642871 (D. CO 2010).

2 *See Ryskin v. Banner Health, Inc.*, No. 09-cv-1864, 2010 W.L. 4818062 (D. CO 2010). Ryskin was originally employed pursuant to an employment agreement dated July 5, 2005. Banner renewed the agreement in 2007 for an additional two-year period until July 5, 2009. In November 2006, his hospital privileges were renewed for a two-year term ending November 21, 2008.

3 *Id.* The reappointment and renewal of privileges is usually for a term of two years if the hospital has no problems or concerns with the physician.

4 *See Ryskin v. Banner Health, Inc.*, No. 09-cv-1864, 2010 W.L. 2742710 (D. CO 2010).

5 *See Ryskin*, 2010 W.L. at 4818062. The MEC also recommend Ryskin be made aware of these findings, which was done through a conversation Ryskin had with the Hospital's CEO.

6 *Id.* The reappointment period was from November 21, 2008, through February 21, 2009.

7 *Id.* Joy was the Hospital's CEO; Nix served on the MEC, Peer Review Committee, and Credentials Committee; Soper, Bonelli, and Eliff served on the MEC.

8 *See Ryskin*, 2010 W.L. at 2742710. The defendants contended that Colo. Rev.Stat. § 12-36.5-101 *et seq.,* and Colo.Rev.Stat. § 25-3-109 created a peer review privilege and quality management privilege, respectively.

9 42 U.S.C. § 11101 *et seq.*

10 Colo.Rev.Stat. § 12-36.5-101 *et seq.*

11 Colo.Rev.Stat. § 25-3-109.

12 *See Ryskin*, 2010 W.L. at 2742710 (*citing Hartmann v. Nordin*, 147 P.3d 43, 51 (Colo. 2006)).

13 *See Id. quoting Defendants' Response Brief.*

14 *Id.*

15 *Id.* The court noted by granting something less than a full term of privileges it was an indication there was either a recommendation for a denial or limitation of privileges or an actual denial or limitation of privileges.

16 *Id.*

17 *Id.* The court stated, "To shield the documents in this lawsuit would be to frustrate the search for the truth."

18 *See Ryskin,* 2010 W.L. at 4818062 (*quoting Brown v. Presbyterian Healthcare Servs*, 101 F.3d 1324, 1333 (10th. Cir. 1996)).

19 42 U.S.C. § 11112(a).

20 *Brown,* 101 F.3d at 1333 (*citing Islami v. Covenant Med. Ctr., Inc.,* 822 F.Supp. 1361, 1377-78 (N.D. Iowa 1992)).

21 *Ryskin*, 2010 WL 4642871. The court quoted the Third Circuit's explanation of the difference between these two as follows:

> The definition of 'professional review action' encompasses decisions or recommendations by peer review bodies that directly curtail a physician's clinical privileges or impose some lesser sanction that may eventually affect a physician's clinical privileges. 'Professional review actions' do not include a decision or recommendation to monitor the standard of care provided by the physician or fact-finding to ascertain whether a physician has provided adequate care. These are 'professional review activities.'

Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 634 (3d Cir.1996).

22 *Id.*

23 *Id.*

24 *Id.* In addition, the court noted a professional review action must be taken "after adequate notice and hearing procedures are afforded the physician involved or after such other procedures as are fair to the physician under the circumstances" *quoting* 42 U.S.C. § 1112(a)(3).

25 *Id.*

26 Colo.Rev.Stat. § 12-36.5-105(2010).

27 *Id.* (*citing North Colorado Med. Ctr., Inc. v. Nicholas*, 27 P.3d 828, 841 n. 7 (Colo. 2001) (en banc)).

28 Colo.Rev.Stat. § 12-36.5-105.

29 Colo.Rev.Stat. § 12-36.5-203.

30 *Id.*

31 *Id. citing North Colorado Med. Ctr., Inc.,* 27 P.3d at 841 (*citing* Colo.Rev. Stat. § 12-36.5-105)).

32 *Id. citing Crow v. Penrose-St. Francis Healthcare Sys.,* 169 P.3d 159, 166 (Colo. 2007).

33 *Id.* The court citing *North Colorado Med. Ctr., Inc.,* 27 P.3d at 843 stated Committee members are immune from suit if the member made a reasonable effort to obtain facts, acted with reasonable belief the action taken was warranted from the facts, and within the scope of the process the member acted in good faith.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id. citing North Colorado Med. Ctr., Inc.,* 27 P.3d at 843.