NORTH CAROLINA COURT OF APPEALS CONFIRMS PEER REVIEW PRIVILEGE

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Health Care Alert

Recently, the North Carolina Court of Appeals confirmed the state's statutory peer review privilege by holding that documents produced or considered by a hospital's Medical Review Committee ("MRC") were protected from discovery by the peer review privilege in N.C. Gen. Stat. § 131E-95. *In Estate of Ray v. Forgy*, COA 15-236 (February 16, 2016).

During discovery in a medical malpractice case, plaintiffs requested documents regarding the defendant doctor's medical staff re-credentialing and correspondence between the National Practitioner Data Bank and the hospital defendants. After receiving the discovery requests, the hospital defendants moved for an *in camera* review of the documents and provided affidavits from the Director of Medical Staff Services ("Medical Staff Director") of one hospital and the corporate designee for another hospital. Each affidavit included "Sealed Exhibit 1" containing documents that hospital defendants asserted were privileged, confidential, and protected from discovery pursuant to the peer review privilege in N.C. Gen. Stat. § 131E-95 and other North Carolina statutes.

Hospital defendants served their discovery responses, including a privilege log with a description of the documents in Sealed Exhibit 1. The Medical Staff Director then produced another affidavit testifying that Sealed Exhibit 1 contained documents produced or considered by the MRC. The trial court ordered the hospital defendants to produce half of the documents in Sealed Exhibit 1. Hospital defendants appealed, arguing that the documents were protected by Section 131E-95's peer review privilege.

Relying on a similar medical malpractice case, *Hammond v. Saini*, 229 N.C. App. 359, 748 S.E. 2d 585 (2013), plaintiffs argued that defendants failed to demonstrate that the documents complied with the requirements in N.C. Gen. Stat. § 131E-95. Rejecting plaintiffs arguments, the Court of Appeals reversed the trial court's order and held that the hospital defendants were not required to produce the peer review privileged documents. The court distinguished this case from *Hammond*, finding that the hospital defendants provided:

> (1) affidavits establishing that the MRC met the definition of “medical review committee” in N.C. Gen. Stat. § 131E-76(5); (2) hospital bylaws, demonstrating that the MRC was formed and operated for the purpose provided in N.C. Gen. Stat. § 131E-76(5); and (3) a detailed privilege log of the documents which included a description of each document, its author or source, the date of the document and its recipient; and (4) testimony from the Medical Staff Director, demonstrating that each document fell into one of the protected categories and had been produced or considered by the MRC.

These items were critical to the court's analysis because, unlike *Hammond*, they clearly demonstrated each document's conformity with N.C. Gen. Stat. § 131E-95.

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The court's opinion reconfirms that documents produced by or considered by a hospital medical review committee are protected by the peer review privilege so long as they demonstrate conformity with each of the statutory requirements under N.C. Gen. Stat. § 131E-95. To maximize the chances of the privilege applying, one should include in the trial court record explicit documentation, including a privilege log with the document's description, date of creation, author, recipient and whether it was produced by the medical review committee, considered by the medical review committee or part of the peer review proceeding.

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