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State Peer Review Protection May Not Apply to Malpractice Actions Brought in Other States

On November 25, 2009 the Supreme Court of Kentucky, in *Saleba v. Schrand*, found that Kentucky peer review law applies in a malpractice action properly brought in the state, even when the physician is an Ohio physician working at an Ohio hospital and the peer review takes place in Ohio. Although Ohio has a protective peer review statute, its protections do not extend to actions in other states.

Background

The Ohio Revised Code provides immunity to entities for the actions of an entity's peer review committee, as well as to individuals providing information within the peer review process when the individual is acting in good faith. Further, Ohio provides that "proceedings and records within the scope of a peer review committee of a health care entity shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care entity or health care provider." In Ohio, this protection from discovery includes discovery in malpractice actions.

The Kentucky Revised Statutes state that all proceedings and records of peer review functions are deemed confidential and privileged and "shall not be subject to discovery, subpoena, or introduction into evidence, in any civil action." However, in *Sisters of Charity Health Systems, Inc. v. Raikes*, the Kentucky

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Contacts:

[Scott A. Edelstein](#)
+1.202.626.6602

[John C. Erickson III](#)
+1.614.365.2790

[David W. Grauer](#)
+1.614.365.2786

[Kristin J. Harlow](#)
+1.614.365.2799

[John M. Kirsner](#)
+1.614.365.2722

[Kelly A. Leahy](#)
+1.614.365.2839

[Robert D. Nauman](#)
+1.614.365.2721

[Nicole J. Webb](#)
+1.513.361.1207

[John E. Wyand](#)
+1.202.626.6676

Supreme Court interpreted this statute narrowly, ruling that it applies only to actions specifically resulting from the peer review action. Therefore, in Kentucky, the peer review process is not protected from discovery in a medical malpractice action.

The *Saleba* Decision

In the case underlying *Saleba*, the plaintiff filed a medical malpractice suit against physicians and various entities for failing to properly diagnose cervical cancer, resulting in untimely death. The patient was a Kentucky resident and was treated by a physician in Kentucky who was licensed to practice medicine in Kentucky. However, a biological specimen of the patient was sent to a hospital in Cincinnati, Ohio, where it was examined by an Ohio physician, Dr. Karen Saleba. As one basis for the malpractice action, the plaintiff claimed that Dr. Saleba misinterpreted the specimen. The plaintiff sought peer review records in the discovery request, and Dr. Saleba contended that the documents were protected by Ohio's peer review statute.

The Kentucky Supreme Court, in a choice of law analysis involving privileged communications, looked to the Restatement (Second) of Conflict of Laws (1998), which states that "evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect." Under this analysis, even though the peer review took place in Ohio and clearly is most closely linked to Ohio, Kentucky's peer review privilege prevails. The court found no special reason to protect the peer review information.

Implications

Although Ohio provides significant peer review protection, providers in the state cannot rely on Ohio's protection when actions are brought in other states. Therefore, in instances when Ohio physicians provide services to out-of-state patients, health care providers should consider bolstering protection for peer review processes through attorney-client privilege.

For further information about peer review laws, please contact your principal Squire Sanders lawyer or one of the lawyers listed in this Alert.

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