The Discoverability of Physician Peer Review and Disciplinary Records Under State and Federal Law in Florida State and Federal Courts

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I. Introduction

A contentious discovery issue in litigation involving termination, revocation or suspension of a physician's clinical privileges to practice medicine at a hospital is whether the physician plaintiff is entitled to obtain peer review and disciplinary materials concerning other physicians in the course of such proceedings. The treatment of this issue depends entirely on whether the case is in state or federal court. In Florida state courts, the materials are immune from discovery pursuant to Fla. Stat. § 395.0193(8).[2]

This is not the case in federal court, however. Federal common law provides that no medical peer review discovery privilege applies in such discrimination or civil rights cases in federal court. The Eleventh Circuit Court of Appeals has specifically rejected the idea of any such medical peer review privilege in cases in federal court, no matter what the relevant state statute provides.

This can lead to bizarre results. For example, non-party physician disciplinary and peer review materials might be protected from disclosure in a Florida state court case involving Florida residents and asserting claims under the Florida Civil Rights Act ("FCRA"), which has the same elements as claims under Title VII to the Civil Rights Act of 1964 ("Title VII") or 42 U.S.C. § 1981 ("Section 1981"). Nevertheless, in an identical case filed in federal court and asserting federal claims, the same materials would not be protected from disclosure simply by virtue of the presence of diverse defendants or the assertion of federal civil rights claims by the plaintiff physician.

II. The Ability to Discover Physician Peer Review and Disciplinary Materials Under State Law In Florida

Florida state law provides physician peer review materials are immune from discovery in civil litigation:

> The investigations, proceedings, and records of the board, or agent thereof with whom there is a specific written contract for the purposes of this section, as described in this section shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of matters which are the subject of evaluation and review by such board, and no person who was in attendance at a meeting of such board or its agent shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such board or its agent or as to any findings, recommendations, evaluations, opinions, or other actions of such board or its agent or any members thereof.[3]

Section 395.0193, Florida Statutes, provides a similar protection with respect to hospital peer review committees.[4] This privilege has been strictly construed by Florida state courts, including the Florida Supreme Court.[5] The privilege has been strictly enforced, even though Florida courts have recognized that to do so impinges on the rights of some physician plaintiffs to discover information or documents that might be essential to prove their claims.[6] This statutory protection has even been upheld in cases involving the discovery of physician peer review records from non-parties.[7]

III. The Ability to Discover Physician Peer Review and Disciplinary Materials Under Federal Law in Florida

A. The Eleventh Circuit's Take on the Issue

In *Adkins v. Christie*, the Eleventh Circuit addressed the applicability of a state medical peer review privilege in civil rights cases in federal court and concluded the privilege did not apply.[8] In *Adkins*, an African American surgeon alleged hospital administrators and physicians who served on a Georgia hospital's medical executive committee violated his civil rights in summarily suspending and not renewing his privileges at the hospital based on his race.[9] In discovery, the physician requested copies of the peer review records of every physician at the hospital during his seven years at the hospital.[10] The defendants filed a motion for protective order premised upon Georgia's state medical peer review privilege.[11]

The federal district court concluded Georgia's state statutory protection protected the requested non-party physician peer review materials from discovery, even in federal court.[12,13] On appeal, the Eleventh Circuit vacated the district court's grant of summary judgment to the defendant hospital administrators and medical executive committee members, finding the district court improperly limited the scope of discovery by allowing the plaintiff physician to obtain copies of peer review materials for only physicians in the hospital's Department of Surgery.[14] The Eleventh Circuit noted that, although all fifty states and the District of Columbia recognize some form of medical peer review privilege, both the federal Fourth and Seventh Circuit Courts of Appeal previously had determined there was no such corresponding federal privilege.[15] While acknowledging a federal medical peer review privilege would "promote vigorous oversight of physician performance," the *Adkins* court noted such a privilege "must be considered against a corresponding and overriding goal-the discovery of evidence essential to determining whether there has been discrimination in employment."[16] Also recognizing health care providers "have a legitimate interest in keeping peer review documents confidential and in protecting them from widespread dissemination," the *Adkins* court noted there is a difference between recognizing the privilege and protecting the confidentiality of such documents through protective orders or other mechanisms.[17]

B. Federal District Courts in Florida Also Have Not Recognized a Medical Peer Review Privilege.

Federal district courts in Florida have followed the *Adkins* decision faithfully.[18] Other district courts in the Eleventh Circuit have taken the same approach.[19]

IV. Discussion: The Privileged Nature of a Non-Party Physician's Peer Review and Disciplinary Records Depends on the Plaintiffs' Choice of Forum, The Citizenship of the Parties, and the Plaintiff's Choice as to Whether to Pursue Federal and State Law Claims or Just State Law Claims, Which Can Lead to Inconsistent Results

The crux issue with respect to whether to recognize a federal medical peer review privilege in discrimination cases brought by physicians against hospitals is, in the words of the federal Fourth Circuit of Appeal, "whether the interest in promoting candor in medical peer review proceedings outweighs the need for probative evidence in a discrimination case."[20] State and federal courts in Florida have chosen different paths in recognizing a medical peer review privilege in discovery in civil litigation. Nevertheless, this disparity in treatment between federal and state court can lead to truly bizarre results, with such materials protected in one forum (state court) but not the other (federal court).

Whether a non-party physicians' peer review and disciplinary materials are privileged or not in civil litigation thus currently depends entirely on the parties' choice of forum: state or federal court. This leads to inconsistent application of the privilege depending on whether the defendants are diverse or not, whether a plaintiff chooses to file an action in federal court if he is pursuing a federal claim, even if the plaintiff pursues state or federal claims that in some cases may be subject to identical legal standards, like Title VII and FCRA discrimination claims.

To make matters even worse, even for cases that were filed or removed to federal court, the materials could possibly receive different treatment depending on the basis for the federal court's jurisdiction. To the extent the case is in federal court under federal question jurisdiction, the materials would not be privileged from disclosure pursuant to any state statute protecting such materials from disclosure in discovery. The same would be true if all defendant(s) were diverse, thus making the basis for the court's jurisdiction diversity jurisdiction.[21] However, pursuant to Fed. R. Evid. 501, a state medical peer review privilege *may* apply if the basis for the federal court's jurisdiction is diversity but the plaintiff is pursuing *only* state law discrimination claims.

Similarly, if a plaintiff files suit in state court against a non-diverse defendant and asserts federal claims but the defendant(s) choose not to remove the case to federal court on the basis of federal question jurisdiction, then the plaintiff cannot obtain other physicians' peer review materials. What this means is that to some degree whether the non-party physicians' peer review and disciplinary records are privileged is up to the parties and, in particular, the plaintiff.

As noted by the federal Fifth Circuit Court of Appeals, "medical peer review materials are sensitive and inherently confidential, and protecting that confidentiality serves an important public interest."[22] Therefore, the only way to truly harmonize the differing treatment of physician peer review records under state and federal law in Florida would be to require a protective order or similar protection from disclosure before the records are produced in discovery in federal court. This also would safeguard the non-party physicians' privacy rights in their own peer review and disciplinary materials while also permitting the physician plaintiff to prove his or her claims. This would ensure, in the words of the *Adkins* court, the confidentiality of these records is not "compromised by wayward hands."[23]

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[2] Physician peer review materials can include both peer review materials themselves, as well as testimony regarding or which takes place either during or in furtherance of the peer review process. This article will concentrate on the actual documentary materials themselves, as those are typically the most important in the types of civil rights/discrimination claims which physicians bring against hospitals at which their clinical privileges to treat patients are suspended or terminated or the physician is disciplined in some way.

[3] Fla. Stat. § 395.0191(8).

[4] *Id.* § 395.0193(8).

[5] *See, e.g., Cruger v. Love*, 599 So.2d 111, 114 (Fla.1992)(acknowledging the discovery privilege for peer review committees is "designed to provide that degree of confidentiality necessary for the full, frank medical peer evaluation which the legislature [has] sought to encourage.'")(quoting *Holly v. Auld*, 450 So.2d 217, 219-20 (Fla. 1984)); *Tenet Healthsystem Hosps., Inc. v. Taitel*, 855 So.2d 1257, 1258 (Fla. 4th DCA 2003)(same); *Beverly Enters.-Fla., Inc. v. Ives*, 832 So.2d 161 (Fla. 5th DCA 2002)(same); *Leikensohn v. Cornwell*, 434 So.2d 1030 (Fla. 2d DCA 1983); *Fidelity & Cas. Co. of N.Y. v. Lopez*, 375 So.2d 59 (Fla. 4th DCA 1979); *Argonaut Ins. Co. v. Peralta*, 358 So.2d 232 (Fla. 3d DCA 1978).

[6] *See Holly*, 450 So.2d at 220.

[7] *See, e.g., Miami Heart Institute v. Reis*, 638 So.2d 530 (Fla. 3d DCA 1994)(Florida medical peer review privilege protected from disclosure in physician's defamation action against medical center and administrators records relating to physician's application for staff privileges at a non-party heart institute even though medical center and administrators asserted need for records to prove their defenses.).

[8] 488 F.3d 1324 (11th Cir. 2007).

[9] *Id.* at 1326-27.

[10] *Id.* at 1327.

[11] *Id.*

[12] The case, which involved all non-diverse defendants, was in federal court pursuant to federal question jurisdiction based on the plaintiff's federal civil rights claims.

[13] *Id.*

[14] *Id.* at 1330-31.

[15] *Id.* at 1327-28; *see also Virmani v. Novant Health Inc.*, 259 F.3d 284 (4th Cir. 2001); *Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981).

[16] *Id.* at 1328-29.

[17] *Id.* ("In the absence of the privilege, the district court retains its authority to protect [a hospital's] interests through other established means such as protective orders, confidentiality agreements, and, when appropriate, by disclosure only after an in-camera review of these documents.").

[18] *Awwad v. Largo Med. Ctr., Inc.*, No. 8:11-CV-1638-T-24TBM, 2012 WL 1231982, at *2 (M.D. Fla. Apr. 12, 2012)(ordering production of non-party physicians' peer review materials disciplined for the same offenses as the plaintiff).

[19] *See, e.g., Mawulawde v. Board of Regents of University System of Georgia*, No. CV 105-099, 2007 WL 2460774, at *11 n.12 (S.D. Ga. Aug. 24, 2007)(ordering production of the physician plaintiff's comparator physicians' credentialing and disciplinary files but ordering the parties first to submit a consent protective order).

[20] *Virmani v. Novant Health Inc.*, 259 F.3d 284, 287 (4th Cir. 2001).

[21] This assumes, of course, that all defendants are diverse. As a matter of diversity jurisdiction, a defendant can remove a case from state to federal court only if *all* defendants in the action are not citizens of the state in which the lawsuit was filed, failing which the action cannot be removed to federal court.

[22] *United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 103 (5th Cir. 1992).

[23] 488 F.3d at 1329.