Federal investigations trump peer-review privilege: how healthcare providers lose control of peer-review materials when the feds come calling

A recent case from the Eastern District of Wisconsin, United States v. Aurora Health Care, Inc., highlights the limited nature of the protection afforded health care providers by state-law peer-review statutes and the federal “self-critical review” privilege during a federal investigation. In that decision, the court refused to recognize either privilege in the context of a federal investigation. The decision serves as a valuable lesson to health care providers; namely, conducting investigations into matters involving potential violations of federal law through peer review programs will not shield documents generated during such investigations from disclosures in response to federal investigative subpoenas.

Under the False Claims Act (FCA) the federal government can pursue damages and penalties for fraudulent claims for payment made to the government. The FCA allows the government to issue “civil investigative demands” or “CIDs” – akin to subpoenas – when investigators believe the recipient may have relevant information. Generally a CID or subpoena should be enforced if it seeks “reasonably relevant” information related to an investigation within an agency’s authority.

Aurora Health Care sought to quash portions of a CID on the basis of Wisconsin’s state peer-review statute and the “self-critical review” privilege occasionally recognized in federal common law. The peer review and self-critical review privileges are aimed at promoting candid and frank discussions and reviews by medical professionals to improve patient care and treatment. All 50 states and the District of Columbia recognize some type of privilege or confidentiality for health professionals’ peer review actions.

In cases like malpractice actions where state law controls, federal courts may apply the privilege afforded by state-law statutes according to their terms. But where federal law governs, federal courts can choose whether to recognize and apply a state privilege. Federal courts use this power sparingly and only after weighing the probative value and need for potentially shielded evidence against the importance of the public good the privilege seeks to protect.

Federal courts generally recognize the important policy function peer review plays, but, as the Aurora court noted, no other federal court had recognized a peer review privilege to allow a subpoena recipient to shield documents from a federal investigation. In balancing competing principles, federal courts take the position that the government’s access to relevant information in investigations of issues, such as health care fraud, trumps the confidentiality interests underlying the peer-review privilege. Accordingly, federal courts do not enforce state-law peer review privileges or the federal self-critical review privilege against the federal government during a federal investigation even though private litigants in federal courts may still be barred from discovering some of the same potentially relevant documents.

The Aurora court also noted the Health Care Quality Improvement Act (HCQIA) provides qualified immunity to “professional review action” participants for damages resulting from the review...
action.\textsuperscript{8} The HCQIA does not, however, protect materials created during or for the review action from discovery in litigation. In fact, many courts cite Congress’s apparent decision to eschew a broad privilege in favor of the qualified immunity provided in the HCQIA as an indication that Congress does not favor a peer review privilege.\textsuperscript{9}

The lesson for health care providers is that peer review privilege will not shield information gathered during the peer-review process from discovery by the federal government in health care fraud investigations. State peer review statutes, the self-critical review privilege, and the HCQIA will not allow providers to withhold documents from federal investigators. Accordingly, providers should consult with their general counsel or outside attorneys when undertaking any internal investigation of potential violations of federal law to get advice regarding whether the investigation should be handled by counsel rather than through the provider’s peer-review program. When such investigations are conducted at the direction of counsel, there are stronger arguments that certain investigative materials such as interview memoranda and documents containing counsel’s analysis and conclusions may be protected from discovery under the attorney-client privilege and attorney work product doctrines. While some documents, such as patient records and billing information, will always be discoverable, use of counsel to manage investigations regarding potential violations of federal law will afford providers more control in determining whether, when, and how to disclose information learned in an internal investigation to the government.

\begin{itemize}
\item<1-> 31 U.S.C. § 3729.
\item<2-> U.S. v. Markwood, 48 F.3d 969, 976-77 (6th Cir. 1995)(classifying CIDs as administrative subpoenas and setting forth the “reasonably relevant” standard); U.S. v. Winmer, 835 F.Supp. 208, 220 (M.D. Pa. 1993) aff’d, 30 F.3d 1489 (3rd Cir. 1994);
\item<3-> EEOC v. Quad/Graphics, Inc., 63 F.3d 642, 645 (7th Cir. 1995)(applying the “reasonably relevant” standard to administrative subpoenas).
\item<4-> WIS. STAT. § 146.38.
\item<5-> Nw. Mem. Hosp. v. Ashcroft, 362 F.3d 923, 925-26 (7th Cir. 2004)(noting evidentiary privileges applicable to federal-question suits are governed by federal law common law under Fed. R. Evid. 501, not state law).
\item<6-> Jaffee v. Redmond, 518 U.S. 1, 9-10 (1996).
\item<8-> See, Bredice, 50 F.R.D at 250-251 (With respect to request for documents in a private malpractice case, “what someone at a subsequent date thought of these acts or omissions is not relevant to the case.”)(quoting Richard v. Maine Central R., 21 F.R.D. 590, 592 (D. Me. 1957); Mem. Hosp. for McHenry Cty. v. Shadur, 664 F.2d 1058, 1062 (7th Cir. 1981)(citing Bredice for the proposition that peer review information is not relevant to medical malpractice claims, but declining to recognize privilege in antitrust case because recognition could stop the antitrust action altogether where plaintiff’s theory was based on misuse of the peer review process itself).
\item<9-> 42 U.S.C. § 11111.
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