Peer Review Immunity is a Bar to Doctor's Allegations of Defamation

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When a doctor is subject to a formal peer review proceeding, those involved must pay close attention to the medical staff bylaw and any hospital policies, procedures, and rules governing the process. These protections require a high degree of confidentiality, to protect the physician subject to review and those serving as reviewers and decision-makers.

However, even where the process is followed and confidentiality is maintained, allegations of defamation may result. The Eighth Circuit Court of Appeals recently announced a decision on a set of facts like this, which is by no means unique to this one case.[1]

Our blog post will highlight lessons learned from that recent appellate decision, as hospitals and those engaged in peer review proceedings can benefit from this example.

Importance of Procedure and Following the Letter of the Law. In this case, the doctor's remaining claims for defamation were barred because the hospital got the benefit of peer review immunity. In deciding to apply immunity, the court's review was limited to whether the peer reviewers abided by their own established procedures. In this case, the doctor claimed that he did not get proper notice of the peer review proceedings, because at the last minute additional cases were added to the review. However, the Eighth Circuit rejected this argument, explaining that the doctor "point[ed] to no rules that would have required notice in this situation." Because the hospital followed all of its own rules, it got the benefit of immunity. The lesson here is fairly straightforward: read your procedures, and follow them. Keep a copy of the rules and procedures in hand; refer to them early and often. Faithful adherence can result in immunity to later accusations of wrongdoing, defamation related or otherwise. Conversely, failure to follow your procedures could prove fatal in a subsequent lawsuit.

Subjective State of Mind Irrelevant. Another common allegation is that immunity should not attach because the peer review proceedings were motived by "malice." Getting to the bottom of malice means that a court will make an objective inquiry, focused not on what the reviewers personally believed, but rather on how the process was conducted. In this case, the doctor complained of several "willfully false statements." But the Eighth Circuit wisely redirected, clarifying that this is exactly the sort of subjective analysis foreclosed by peer review immunity standards. This point once again emphasizes the importance of sticking to procedure.

Proceed with an Appeal in Mind. Contentious peer review appeals and board meetings should be conducted with the assistance of counsel. There are many ways that these proceedings can go wrong, and there are patterns among these cases. For example, in this case, the doctor alleged defamation, professional jealousy, and anticompetitive motives. These are some of the most common allegations arising out of peer review proceedings. Having the assistance of a lawyer experienced in this area helps to control those allegations and safeguard the application of immunity. It also helps to work with a seasoned

peer review lawyer who has the ability and the experience to take your case through all levels of appeals. With an aggrieved doctor, the multiple levels of appeals can stretch on for years. In this case it was five years. While winning a legal action on appeal is not the same thing as having a successful peer review, actions taken during the peer review process often do significantly impact the success or failure of defending the subsequent appeal. Continuity and complexity of representation is critical so that your case can be prepared for multiple levels of appeal before the peer review is even complete.

Case reference: *Sherr v. HealthEast Care System*, Case no. 19-3272 (8th Cir. June 2, 2021).

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[1] See e.g., *Wheeler v. Methodist Hosp.*, 95 S.W.3d 628 (Tex. App. 2002); *Marshall v. Planz*, 145 F. Supp. 2d 1258 (M.D. Ala. 2001); *Williams v. Baptist Health*, 2019 Ark. App. 482, 587 S.W.3d 275 (2019), vacated, 2020 Ark. 150, 598 S.W.3d 487 (2020); *Vranos v. Franklin Med. Ctr.*, 448 Mass. 425, 862 N.E.2d 11 (2007); *Fullerton v. Fla. Med. Ass'n, Inc.*, 938 So. 2d 587 (Fla. Dist. Ct. App. 2006).