The Modernized South Carolina Hospital "Peer Review" Law: Mission Accomplished?

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It was a rare sight appearing before the South Carolina General Assembly during the 2012 legislative session. The South Carolina Hospital Association, the South Carolina Association for Justice (Trial Lawyers), and the South Carolina Medical Association (Physicians), standing together to support the passage of comprehensive legislation to modernize South Carolina's peer review law for the greater good. As one observer noted at the time, "Hell must have frozen over."

From its origins in 1978, the hospital "Peer Review Law," as it had come to be known despite that phrase appearing nowhere in the South Carolina Code, was found at S.C. Code Ann. Sections 40-71-10, 40-71-20, and 40-71-30 (note the law also applies to professional societies and DHEC appointed committees, but this discussion focuses on hospitals).

Prior to 2012, the Peer Review Law provided very narrow confidentiality and liability protections for hospital medical staff committees and physician members of those committees as they undertook to investigate the quality of patient care at the hospital. The Peer Review Law focused only on the hospital's medical staff, thereby excluding from the laws protections, through omission, other hospital personnel, committees, the administration and the board. The Peer Review Law's narrow focus seemed to run contrary to its intended purpose – to promote complete candor and open discussions among participants in the peer review process – and to encourage health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care. See Durham v. Vinson, 360 S.C. 639, 602 S.E. 2d 760 (2004). How could this public policy be accomplished if the Peer Review Law failed to recognize that monitoring and maintaining quality patient care is a function of the whole hospital, not just physician members of hospital medical staff committees? Then came the 2012 legislative session.

The Hospital Association, the Trial Lawyers and the Medical Association collectively worked together to address the shortcomings of the Peer Review Law. All seemed to agree that patient safety is best served when all people who work in the hospital setting are encouraged to participate in

candid discussions and reviews of patient care provided by clinicians; whether a physician, nurse, technician or other staff. These three interested groups had to compromise and look for common ground to make it work. And that is what they did. The South Carolina General Assembly took note, and effective June 26, 2012, the Peer Review Law was substantially amended and further codified at S.C. Code Ann. Sections 44-7-390, 44-7-392, and 44-7-394 ("Amended Peer Review Law"). The Amended Peer Review Law expanded to cover the entire hospital, not just medical staff committees. Now, confidentiality and liability protection (qualified immunity limited by a malice standard) extend broadly to the whole hospital, and even multiple hospitals in a health care system. One important carry over from the law circa 2012 – information from original sources is not confidential.

The Amended Peer Review Law also clarified a few things and established a legal process to challenge claims of confidentiality. Here is a brief summary of some of those clarifications:

1. Hospital reports of otherwise confidential information to the South Carolina Department of Health and Environmental Control, the Joint Commission or other accrediting bodies, the South Carolina Board of Medical Examiners, or the National Practitioner Data Bank must not be considered a waiver of the confidentiality under the Amended Peer Review Law.

1. Waiver – confidentiality may be waived when: (a) both the hospital and the physician/affected person agree in writing to a waiver; (b) the hospital and physician/affected person are opposing parties in litigation; or (c) in a medical or hospital malpractice case a witness provides testimony that a court determines, during in camera review, is inconsistent with a prior statement that the witness provided in an otherwise confidential peer review matter.
1. A hospital or affected person may immediately appeal trial court orders compelling production of information that a hospital or affected person believes to be confidential under the Amended Peer Review Law. This was actually a big change from South Carolina common law, which did not allow for an immediate appeal.

There are other details in the Amended Peer Review Law that are important for hospital executives, medical officers, general counsel, malpractice defense attorneys and others who come into contact with the hospital peer review process to know. The law is worth reading. There are only three sections, but they say a lot.

The Amended Peer Review Law has now been on the books for more than eight years. A search of court decisions interpreting this law since the effective date, either on the issue of qualified immunity or confidentiality, shows little judicial activity. In fact, the few published cases citing to the Amended Peer Review Law do not elaborate on the law itself. The General Assembly's intent, as promoted by three key stakeholders who rarely find themselves agreeing on legislation, seems to have been accomplished without spurring years of litigation over meaning. As one of South Carolina's top malpractice defense attorneys recently told me, this legislation has been very successful at achieving the intended goals, and that is why you don't see a lot of litigation over its meaning.

Hopefully the Amended Peer Review Law incentivized hospitals and their staff to broadly and extensively review and investigate the quality of patient care in their facilities to better promote public health in South Carolina.