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Complex Litigation

Medical Malpractice Discovery: A Critical Analysis of the Self-Critical Analysis Privilege

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When an unusual incident involving a patient occurs at a health care facility, it may be the subject of peer review by a committee created within the hospital. This kind of review is likely if the incident caused the patient to file a medical malpractice complaint.

Peer review analysis and the reports from morbidity and mortality committees contain a great deal of factual information relevant to a medical malpractice case. Notwithstanding, defendants have been largely successful in shielding these materials during discovery by arguing that these documents are protected by the so-called self-critical analysis privilege.

The self-critical analysis privilege was initially introduced in *Bredice v. Doctors Hospital Inc.*, 50 F.R.D. 249 (D.D.C. 1970). The first part of this article will discuss the origin of the self-critical analysis privilege under *Bredice*, and the subsequent developments in the privilege under the federal common law. Following the *Bredice* decision, the privilege has been criticized, modified and ultimately even rejected by some circuit courts.

The second part of this article will discuss the application of the self-critical analysis privilege by New Jersey courts. A review of the history of the Garden State's application of the privilege demonstrates that lower courts' early opinions were fraught with inconsistencies.

Ultimately, these decisions were rendered moot by the state Supreme Court's holding in *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524 (1997), which followed the majority of the federal courts and rejected an absolute common law self-critical analysis privilege in favor of a "balancing approach" to determine the discoverability of self-evaluative materials.

Finally, we will conclude by discussing the present status of the discovery of peer-review materials in medical negligence cases in New Jersey. We will also address federal and state statutes that are often cited as a basis for asserting the privilege. Additionally, we will attempt to anticipate the future direction of New Jersey case law with the benefit of insight supplied by the federal common law.

Federal Common Law

Surprisingly, the self-critical analysis privilege originated in a rather modest two-page opinion in *Bredice v. Doctors Hospital Inc.* In *Bredice*, the plaintiff — who was the administratrix of the estate of Frank Bredice — sought production of the minutes and reports of any boards or committees of the defendant hospital that discussed medical treatment which allegedly led to the decedent's death. Initially, the hearing examiner recommended a denial of the plaintiff's request "on the grounds of public policy and a failure to show good cause." Id. at 250.

In reviewing the plaintiff's objection to the determination of the hearing examiner, the decision observed that the minutes and reports at issue were created during the medical staff's internal review of the very medical treatment that allegedly caused the decedent's death. Further, the review was performed to fulfill the defendant hospital's certification requirements by the Joint Commission on Accreditation of Hospitals (JCAH).

Specifically, the court noted that a prerequisite to JCAH accreditation is a system atic medical peer review of "clinical work done in the hospital on at least a monthly basis," which should include a review of "selected deaths, unimproved cases, infections, complications, errors in diagnosis and results of treatment of patients in the hospital as well as those recently discharged." The goal of the peer review process was said to be "improve-

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ment in the available care and treatment." Id. at 250.

In the court's opinion, hospital peer review was important because "[c]andid and conscientious evaluation of clinical practices is a sine qua non of adequate hospital care." Id. Moreover, because "[c]onstructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as denunciation of colleague's conduct in a malpractice suit," the "overwhelming public interest" required that a "qualified privilege" attach to the minutes and reports of medical peer review meetings. Accordingly, these items were not to be disclosed unless a plaintiff is able to demonstrate an "exceptional necessity." Id. at 251-52.

Following the decision in *Bredice*, the self-critical analysis privilege was often invoked in actions that involved governmental enforcement of federal statutes. Typically, the privilege was asserted by the defendant that the government was prosecuting in an effort to prevent disclosure of incriminating materials under the law alleged to have been violated. See e.g., *U.S. ex rel., Falsetti v. Southern Bell Telephone*, 915 F. Supp. 308 (N.D. Fla. 1996); *Reich v. Hercules Inc.*, 857 F. Supp. 367 (D.N.J. 1994); *U.S. v. Dexter Corp.*, 132 F.R.D. 8 (D. Conn. 1990); *N.L.R.B. v. North American Can Lines Inc.*, 611 F. Supp. 760 (D.C. Ind. 1985); *F.T.C. v. TRW Inc.*, 479 F. Supp. 160 (1979).

In these cases, courts universally compelled disclosure of the documents, reasoning that since the self-critical analysis privilege was created to promote the public interest, "a court should take cognizance, in an action brought by the United States to enforce duly enacted laws, of Congress' role in declaring what is in the public interest." *U.S. v. Dexter Corp.*, 132 F.R.D. at 9; *U.S. ex rel., Falsetti v. Southern Bell Telephone*, 915 F. Supp. at 313; *Reich v. Hercules Inc.*, 857 F. Supp. at 371.

In contrast to cases that involve government prosecution, federal cases involving the private enforcement of federal statues are inconsistent in their application of the privilege of self-critical analysis. In private antitrust actions under the Sherman Act, courts have universally held that the public interest in eliminating monopolies outweighs the private interest in promoting industry self-regulation.

Consequently, in antitrust cases, self-critical documents sought by plaintiffs have universally been compelled. *Memorial Hospital For McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981); *Pagano v. Oroville Hospital*, 145 F.R.D. 683 , 692 (E.D. Cal. 1993); *Wei v. Bodner*, 127 F.R.D. 91 (D.N.J. 1989); *Quinn v. Kent General Hospital Inc.*, 617 F. Supp. 1226 (D. Del. 1985); *Robinson, Jiricko and Dorsten v. Lapeer County General Hospital*, 88 F.R.D. 583 (E.D. Mich 1980).

Many of the criticisms leveled at the self-critical analysis privilege in employment discrimination cases have been utilized by the courts in the context of other litigation to permit expansive disclosure of materials during discovery.

Curiously, when evaluating the self-critical analysis privilege, the federal courts' commitment to eliminating racial and gender discrimination appears to be less zealous than their desire to curb violations of the antitrust laws. In cases involving race, age or gender discrimination, the courts are split as to whether self-critical documents in the possession of employers should be disclosed.

The self-critical analysis privilege is raised more often in anti-discrimination lawsuits than any other cause of action. This is because defendant employers often develop affirmative action plans by their own initiative, or pursuant to Equal Employment Opportunity Commission regulations. Plaintiffs will often seek these plans to show a lack of good faith on the part of defendant employers to eradicate discrimination. See *Reynold Metals Co. v. Rutherford*, 564 F.2d 663 (4th Cir. 1977); *U.S. v. Harris Methodist Fort Worth*, 970 F.2d 94 (5th Cir. 1992); *Holland v. Muscatine General Hospital*, 971 F. Supp. 385 (S.D. Iowa 1997); *Harding v. Dana Transport Inc.*, 914 F. Supp. 1084 (D.N.J. 1996); *Brem v. DeCarlo, Lyon, Hearn & Pazourek*, 162 F.R.D. 94 (D. Md. 1995); *Aramburu v. Boeing Co.*, 885 F. Supp. 1434 (D. Kan. 1995); *Tharp v. Sivyer Steel Corp.*, 149 F.R.D. 177 (S.D. Iowa 1993); *Eitienne v. Mitre Corp.*, 146 F.R.D. 145 (E.D. Va. 1993); *LeMasters v. Christ Hospital*, 791 F. Supp. 188 (S.D. Ohio 1991); *Williams v. Vulcan-Hart Corp.*, 136 F.R.D. 457 (W.D. Ky. 1991); *Hardy v. New York Times Inc.*, 114 F.R.D. 633 (S.D.N.Y. 1987); *Urseth v. City of Dayton*, 653 F. Supp. 1057 (S.D. Ohio 1986); *Schafer v. Parkview Memorial Hospital Inc.*, 593 F. Supp. 61 (N.D. Ind. 1984); *Witten v. A.H. Smith & Co.*, 100 F.R.D. 446 (D. Md. 1984); *Rosario v. New York Times Co.*, 84 F.R.D. 626 (S.D.N.Y. 1979); *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971).

Some courts have held that the self-critical analysis privilege prevents disclosure of affirmative action plans in employment discrimination cases. These courts usually reason that compelling the production of these kinds of documents would have a chilling effect on affirmative action because it would discourage companies from engaging in frank self-criticism when seeking to comply with the law. See, e.g., *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. at 285; *Jamison v. Storer Broadcasting Co.*, 511 F. Supp. 1286 (E.D. Mich. 1982); *Roberts v. National Detroit Corp.*, 87 F.R.D. 30 (E.D. Mich. 1980); *McClain v. Mack Trucks Inc.*, 85 F.R.D. 53 (E.D. Pa. 1979).

However, other federal courts faced with similar facts have concluded that compelling disclosure of affirmative action plans would have no effect on an employer's compliance with anti-discrimination laws. Thus, in *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211, 217 (D. Mass. 1980), the court observed that the internal development of an affirmative action plan is not a voluntary undertaking,

but one compelled by law. See also, *Tharp v. Sivyer Steel Corp.*, 149 F.R.D. at 187; *Williams v. Vulcan-Hart Corp.*, 136 F.R.D. at 459; *Hardy v. New York Times Inc.*, 114 F.R.D. at 642 ; *Witten v. A.H. Smith & Co.*, 100 F.R.D. at 453.

Moreover, it has been observed that employers have a "litigation motive" to continue complying with the law irrespective of its statutory compulsion, because affirmative action plans are utilized to establish a defense on behalf of employers in federal discrimination cases. *Witten v. A.H. Smith & Co.*, 100 F.R.D. at 453.

Finally, courts applying the privilege of self-critical analysis to affirmative action plans in employment discrimination cases have been accused of overestimating the importance of the confidentiality of self-critical materials by ignoring other factors that deter candid self-critical evaluation:

> For example, sanctions against employees are often a possibility when self-evaluative investigations are undertaken. An employee's interest in protecting himself and his fellow employees from discipline is likely to be at least as great as his interest in protecting his employer from suit. Thus, the additional deterrence of investigation occasioned by the possibility of discovery may be minute. *O'Connor v. Chrysler Corp.*, 86 F.R.D. at 217.

It is noteworthy that many of the criticisms leveled at the self-critical analysis privilege in employment discrimination cases have been utilized by the courts in the context of other litigation to permit expansive disclosure of materials during discovery. Thus, in *In re Crash Near Cali Columbia on Dec. 20, 1995*, 959 F. Supp. 1529 (S.D. Fla. 1997), the court compelled production of the defendant airline's investigation of an air crash.

In denying the airline's assertion of the self-critical analysis privilege, the court held that disclosing the report would not result in a decreased effort to investigate aircraft accidents because airlines had a litigation motive to internally investigate such disasters to aid their defense of lawsuits. Id. at 1533.

Similarly, in *In Re Grand Jury Proceedings, Etc.*, 861 F. Supp. 386 (D. Md. 1994), the court compelled the defendant company to produce the report of an outside audit that measured its compliance with FDA regulations. The court rejected the defendant's argument that compelling such internal reviews would have a chilling effect on self-regulation, noting that self-regulation of products is still required to avoid future civil liability. Id. at 390.

Federal courts that have addressed the discoverability of peer review reports in medical malpractice cases subsequent to *Bredice v. Doctors Hospital Inc.* have been inconsistent in their application of the self-critical analysis privilege. Only the federal district courts in Washington, D.C., have remained completely faithful to *Bredice*'s rationale. Thus, in *Mewborn v. Heckler*, 101 F.R.D. 691 (D.D.C. 1984), the court refused to order the production of the minutes, reports or other documents generated by a peer review meeting that concerned care rendered to the plaintiff, holding that the principles announced in *Bredice* were applicable to the case. Id. at 693.

Similarly, in *Spinks v. Children's Hospital National Medical Center*, 124 F.R.D. 9 (D.D.C. 1989), the court refused to compel production of all documents related to a morbidity and mortality meeting that was held to evaluate the treatment of the plaintiff, because a "qualified privilege" applied to the materials and the plaintiff did not meet the burden of showing an "exceptional necessity" for the documents. Id. at 11-12. Finally, in *Laws v. Georgetown University Hospital*, 656 F. Supp. 824 (D.D.C. 1987), the court even extended *Bredice*'s holding by refusing to compel the production of a memo that was written by the plaintiff's treating physician and sent to the director of anesthesiology, detailing complications that arose during the patient's medical treatment. Id. at 825.

However, outside the District of Columbia, the federal courts immediately began diluting the self-critical analysis privilege in medical malpractice cases. In *Gillman v. United States*, 53 F.R.D. 316, 317 (S.D.N.Y. 1971), the plaintiff was the administratrix of the estate of a psychiatric patient who committed suicide by covering his body with turpentine and lighting himself on fire. A board of inquiry was created to investigate whether there were grounds for discipline against any hospital personnel for inadequate supervision.

The board of inquiry issued a report regarding their findings and conclusions, and the hospital's director issued a report which discussed the findings and conclusions of the board and his own conclusions. The plaintiff sought production of these reports and production of the statements of hospital personnel which were taken by the board of inquiry during its investigation of the incident.

The court relied on *Bredice*, and denied the plaintiff access to the board of inquiry's reports as well as the report of the director of the hospital. Id. at 318. Nevertheless, the court allowed the plaintiff access to hospital personnel statements. The court said that such statements, taken shortly after the incident, were "unique and can never be duplicated precisely." Id. at 319. In allowing disclosure of the statements of hospital personnel, the court provided the plaintiff with those parts of the statements that described the incident at issue, but redacted all parts of those statements that amounted to suggestions or comments about future hospital procedure. Id. at 320.

Other federal courts have distinguished between factual statements and opinions, thus restricting the self-critical analysis privilege to evaluative materials in other kinds of cases. See, e.g., *Rosario v. New York Times* (employment discrimination); *Snipes v. BIC Corp.*, 154 F.R.D. 301, 308 (M.D. Ga. 1994) (products liability); *Wei v. Bodner*, 127 F.R.D. at 100 (antitrust case).

In *Davidson v. Light*, 79 F.R.D. 137, 139 (D. Colo 1979), the plaintiff sought production of an infection control report, which was created by the defendant hospital's infection control committee. The report contained "both factual data relating to the plaintiff's infection, and opinions or evaluations by the review committee of the care received by the plaintiff from the staff." Id. Notwithstanding the assertion of the self-critical analysis privilege, the court disclosed the report, distinguishing *Bredice* by pointing out that while the infection control committee engaged in some self-critical activities, it was established to implement hospital policy, and was thus not a "retrospective review" of medical care in general. Id.

The most recent federal case to consider the application of the self-critical

analysis privilege to medical peer review materials was *Todd v. South Jersey Hospital System*, 152 F.R.D. 676 (D.N.J. 1993). In *Todd*, the plaintiff sued her obstetrician, Dr. Yoon, and the hospital. Id at 679. Despite the fact that Yoon had been summoned by the hospital to deliver Todd's baby, he never appeared, and the plaintiff suffered complications during her son's delivery. Discovery revealed that in the year preceding the incident, the defendant physician had been cited on 20 occasions by the hospital for failing to respond to nurses' calls and failing to attend his patients' deliveries. Id. The plaintiff sought, inter alia:

• The minutes from obstetrics department meetings in which Yoon's professional performance was discussed;

• Each audit and review of the doctor's charts;

• All peer review records pertaining to Yoon's professional conduct;

• All peer review records pertaining to Caesareian sections performed by Yoon; and

• All peer review records pertaining to birth injuries sustained by children who were delivered by Yoon. Id. at 679.

In determining whether the plaintiff was entitled to discovery of these materials, the court rejected the "exceptional necessity" requirement of *Bredice* in favor of a "balancing approach" to determine whether the peer review materials held by the defendant hospital had to be disclosed. Id. at 683. Thus, in determining whether the plaintiff was entitled to the materials sought, the court weighed the following three factors: (1) the extent to which the information may be available from other sources; (2) the degree of harm that the litigant will suffer from its unavailability; and (3) the possible prejudice to the agency's investigation. Id. at 683.

The court held that the need for the materials had been demonstrated because they would enable the plaintiff to determine when the hospital first began questioning the competency of Yoon, and this was essential to the administrative negligence claim on the part of the hospital. Likewise, it was clear that these materials were unique and not available from any other source. Finally, the court held that there would not likely be a disruption in the peer review committee's function if discovery of the materials were allowed because peer review would still remain an attractive means of quality control to hospital administrators even if the materials occasionally became discoverable in cases against hospitals. Id.

In adopting this balancing approach instead of the "exceptional circumstances" test, the court in *Todd* was following the majority of the federal opinions coming after *Bredice* which recognized the self- critical analysis privilege, but required a lower standard for disclosure. See, e.g., *Holland v. Muscatine General Hosp.*, 971 F. Supp. at 391; *Eitienne v. Mitre Corp.*, 146 F.R.D. at 147; *Tharp v. Sivyer Steel Corp.*, 149 F.R.D. at 182; *LeMasters v. Christ Hospital*, 792 F. Supp. at 190; *Solarex Corp. v. Arco Solar Inc.*, 121 F.R.D. 163, 169 (E.D.N.Y. 1988); *Hardy v. New York Times Inc.*, 114 F.R.D. at 641-642; *Apex Oil v. DiMauro*, 110 F.R.D. 490, 496 (S.D.N.Y. 1985); *Witten v. A.H. Smith & Co.*, 100 F.R.D. at 454; *Schafer v. Parkview Memorial Hospital Inc.*, 593 F. Supp. at 64; *Gray v. Board of Higher Education, City of New York*, 92 F.R.D. 87, 93 (1981). In fact, prior to *Todd*, the New Jersey federal district courts had previously directly criticized the "exceptional necessity" requirement of *Bredice*, stating:

"At the very least the *Bredice* requirement that exceptional necessity must be shown to overcome the privilege goes too far. Such a requirement is too expansive and in derogation of the Supreme Court's express opinion that privileges should be narrowly construed." *Wei v. Bodner*, 127 F.R.D. at 100-01.

The self-critical analysis privilege "remains largely undefined" by the federal common law. *Andritz Sprout-Bauer Inc. v. Beazer East Inc.*, 175 F.R.D. 609, 635 (M.D. Pa. 1997). Following the *Bredice* decision, the majority of the courts applying the privilege have either criticized it, or limited its application by lowering the standards for disclosure. There is a lack of consensus about when the privilege should be applied. Thus, most recent cases discussing the privilege criticize its underlying assumptions.

Ultimately, the New Jersey federal District Court decided to completely reject the federal common law self-critical analysis privilege in *Spencer Savings Bank v. Excel Mortgage Corp.*, 930 F. Supp. 835 (D.N.J. 1997). In *Spencer*, the defendant mortgage company sought production of two reports that were created by a financial services provider for the plaintiff, a saving and loan association. The plaintiff would not produce the documents, asserting the self-critical analysis privilege.

A U.S. magistrate refused to recognize the self-critical analysis privilege under federal common law. He observed that since *Bredice* had been decided, the U.S. Supreme Court had expressed reluctance to create or expand privileges. Additionally, in the 27 years of the existence of the privilege:

• It was not uniformly recognized by all states;

• The federal courts were divided about whether the privilege should be recognized;

• There was a lack of uniform support for the privilege among scholars;

• It was never adopted by the Federal Rules of Evidence; and

• The history of the privilege failed to support the proposition that it promoted the public interest. Id. at 839-44.

The Rise and Fall of the Self-Critical Analysis Privilege in New Jersey

The first case to recognize the privilege of self-critical analysis in New Jersey was *Wylie v. Mills*, 195 N.J. Super. 332 (Law Div. 1984). In *Wylie*, an employee of Public Service Electric and Gas Company (PSE&G) was involved in an automobile accident. After the accident, an internal investigation was undertaken at PSE&G in order to determine whether the company should do anything to alter its procedures to avoid future accidents. The investigation yielded a report which one of the co-defendants sought production of during discovery. Id. at 335.

After discussing the fact that federal courts had recognized a federal common law self-critical analysis privilege, the court held that the accident investigation report of PSE&G was privileged. The judge's reasoning was similar to the *Bredice* decision:

"Valuable criticism can neither be sought nor obtained nor generated in the shadow of potential or even possible disclosure. It is not realistic to expect candid expressions of opinion or suggestions as

to future policy or procedures in an air of apprehension that such statements may well be used against one's colleague or employer in a subsequent litigated matter." *Wylie v. Mills*, 195 N.J. Super. at 340.

Accordingly, the court refused to disclose "evaluative" portions of the accident report, while production of factual data was compelled. Id. at 340.

Shortly after *Wylie* laid the foundation for the self-critical analysis privilege in New Jersey, inconsistencies began to develop in its application. A year after *Wylie*, the state Supreme Court decided *McClain v. College Hospital*, 99 N.J. 346 (1985). In *McClain*, the plaintiff was the administratrix of an estate who sought to compel production of three classes of documents pertinent to the decedent's malpractice claim:

- A copy of the executive committee report of the board of medical examiners dealing with the treatment of the decedent;
- A copy of the report of the board's consulting expert witness reviewing the pertinent patient records and findings; and
- A copy of the transcript of the licensee's testimony adduced at the executive committee inquiry relevant to the care provided to the decedent. Id. at 363-64.

While the Court noted that *Wylie v. Mills*, had previously recognized a qualified privilege of self-critical analysis, it advocated using a balancing approach to determine whether the documents sought were discoverable, stating "[a]n applicant, seeking the opinions, conclusions, sources of information and investigative techniques of the agency, should demonstrate a need more compelling than the agency's recognized interest in confidentiality." *McClain v. College Hospital*, 99 N.J. at 359.

Ultimately, the Supreme Court remanded the case back to the trial court to determine whether the documents sought by the plaintiff should be disclosed, because there was inadequate information before the justices to make that decision. In doing so, the Court instructed the lower court to examine: (1) the extent to which the information may be available from other sources, (2) the degree of harm that the litigant will suffer from its unavailability, and (3) the possible prejudice to the agency's investigation. Id. at 351.

Finally, to the extent that the documents under consideration contained any factual material, the lower court was instructed to make such information "reasonably available to the plaintiff, excising matters of opinion or conjecture on the part of agency members." Id. at 363. Thus, the matter was remanded to supplement the record in accordance with the general principles announced by the Court. Id. at 364.

The clear message in the Supreme Court's decision in *McClain* was that a balancing approach should be applied when determining the discoverability of the evaluative parts of self-critical documents. This balancing approach adopted by the Court was the same procedure adopted by the overwhelming majority of the federal courts that examined the discoverability of self-critical documents subsequent to *Bredice v. Doctors Hospital Inc.* Similarly, the Supreme Court's decision to limit the self-critical analysis privilege to the "evaluative" portions of the peer review materials was consistent with the federal district court's opinion in *Wei v. Bodner*, 127 F.R.D. at 100. See also, *Rosario v. New York Times*; *Snipes v. BIC Corp.*, 154 F.R.D. at 308.

There is something counterintuitive about concealing evidence of negligence in medical malpractice lawsuits in the name of promoting quality assurance in health care.

Following *McClain*, the issue of confidentiality of medical peer review materials was addressed again in *Bundy v. Sinopoli*, 243 N.J. Super. 563 (Law Div. 1990). In that case, the court took a hybrid approach to the issue of self-critical analysis that was based partly on *Wylie* and partly on *McClain*. As in *Wylie*, the court held that the "opinions, criticisms, and evaluations contained in the peer review file come within the self-evaluative privilege and are absolutely protected." Id. at 572.

However, the court, nevertheless, applied a balancing approach, previously reserved for analysis of the propriety of disclosure of evaluative materials, to the factual statements contained within the peer review file. Thus, *Bundy*'s net effect was to create an absolute privilege for evaluative content in peer review materials, extending the balancing requirement to materials that were solely factual in nature, and previously subject to automatic disclosure. Surprisingly, the *Bundy* opinion was later "incorrectly" followed to the letter in *Estate of Hussain v. Gardner*, 264 N.J. Super. 208 (Law Div. 1993).

Rejecting the Self-Critical Analysis Privilege

Ultimately, the New Jersey Supreme Court resolved the confusion created by the lower courts when it refused to recognize a common law privilege of self-critical analysis in *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524 (1997). In *Payton*, the plaintiff brought an action for sexual harassment under New Jersey's Law Against Discrimination. N.J.S.A. 10:5-1 et seq. During discovery, she sought to obtain copies of all of the reports pertaining to the defendant's investigation of her harassment complaints. The defendant moved for a protective order, asserting, among other things, the self-critical analysis privilege. Id. at 534.

In refusing to follow the lead of several prior lower court opinions that had chosen to adopt the federal common law privilege of self-critical analysis, the New Jersey Supreme Court stated:

"We decline to adopt the privilege of self-critical analysis as a full-blown privilege, either qualified or absolute, and disavow the statements in those lower court

decisions that have accorded materials covered by the privilege near absolute protection from disclosure." Id. at 545.

Rather than create a blanket privilege applicable to all cases involving self-criticism, the Court concluded that the concerns about the disclosure of self-critical materials should be addressed "by the exquisite weighing processes that our courts regularly undertake when determining whether or not to order disclosure of sensitive documents in a variety of contexts." Id. This balancing approach is flexible, and adaptable to different circumstances. When utilizing the balancing approach, a court should determine "whether the need for secrecy substantially outweighs the presumption of access." Id.

Discoverability of Medical Peer Review Materials

Subsequent to *Bredice*, the U.S. Congress enacted the Peer Review Improvement Act of 1982 , 42 U.S.C. 1320 et seq. (1982). This statute is administered in the Garden State by the Peer Review Organization of New Jersey Inc. (PRO). The PRO's function is to act as a fiscal and quality assurance check on institutions that provide health care services under the Medicare and Medicaid programs. *Todd v. South Jersey Hospital System*, 152 F.R.D. 676, 685 (D.N.J. 1993).

Pursuant to the requirements of the act, the PRO is required to review the activities of health care providers and determine: (1) whether the care rendered is reasonable and medically necessary, and (2) whether the care rendered meets professional standards of health care practice. Id. Any information that is obtained to carry out these functions is confidential and may not be disclosed to any person. 42 U.S.C. 1320c-9(a). Thus, "no patient record in the possession of [a PRO] shall be subject to a subpoena or discovery proceedings in a civil action." 42 U.S.C. 1320c-9(d). See also, *Todd v. South Jersey Hospital System*.

However, case law has established that the scope of the federal statutory privilege created by the Peer Review Improvement Act is narrow. It applies only to documents that are in the possession of the statutory peer review organization. Id. at 686. The privilege does not have any effect upon the discoverability of documents at their source, and it does not extend to those materials in the possession of any entity beyond the PRO. Id. Thus, documents generated by the statutory peer review organization are not subject to discovery, but documents held and collected by the agency are still discoverable at their source. Id. Consequently, documents held by the peer review committees in hospitals are not ordinarily protected by the privilege created under the Peer Review Improvement Act.

Another narrow federal statutory peer review privilege was created by the Health Care Quality Improvement Act of 1986, 42 U.S.C. 11101 (hereafter HCQIA). The HCQIA was passed to restrict the ability of incompetent physicians to move from state to state without disclosing their prior medical performance. Id. The law sought to accomplish this by establishing "a national clearinghouse of reports of professional review actions which adversely affect the clinical privileges or status of physicians, reports of sanctions taken by boards of medical examiners, and reports of medical malpractice payments." *Pagano v. Oroville Hospital*, 145 F.R.D. at 683.

Under the HCQIA, a hospital has a duty to request information regarding a physician's past history from the Secretary of the Department of Health and Human Services at the time the doctor makes an application for privileges at the institution and every two years thereafter. 42 U.S.C. 11135. Disclosure of the information which is then reported by the secretary to the hospital is prohibited. 42 U.S.C. 11137(b)(1).

It is clear on the face of the statute that the statutory privilege established by the HCQIA does not apply to information or reports that are gathered or generated internally by the hospital itself. Id. See also, *Wei v. Bodner*; *Syposs v. United States*, 179 F.R.D. 406 (W.D.N.Y. 1998). Consequently, like the privilege created under the Peer Review Improvement Act of 1982, the privilege created by the Health Care Quality Improvement Act of 1986 will likely not apply to documents and reports generated by a hospital peer review committee.

The majority of the state legislatures has adopted some form of statutory limitation on the disclosure of medical peer review materials in one form or another. See *Sanderson v. Frank*, 361 Pa. Super. 491, 495 (1987) (observing that 46 states have passed some type of law restricting disclosure of peer review materials). In New Jersey, however, it is noteworthy that only one statutory provision indirectly relates to the subject of peer review materials. The New Jersey Rules of Evidence provide a statutory privilege for "information and data secured by and in the possession of utilization review committees" of certified hospitals or extended care facilities. N.J.S.A. 2A:84A-22.8, N.J.R.E. 507(a).

Under N.J.S.A. 2A:84A-22.8, a utilization review committee is "a specific committee created by the utilization review plan ... [which] is a requirement of a hospital's participation under the Social Security Act, and its further participation in federal and state funded programs." *Todd v. South Jersey Hospital System*, 152 F.R.D. at 682. Thus, it has been established that the term "utilization review committee" is a term of art, referring to a particular type of committee created to perform tasks responsive to the requirements of the federal Medicare statute. Id. at 680. Additionally, "the specific and special attention the Legislature has afforded utilization review committees by N.J.S.A. 2A:84A-22.8 should not be broadened to include other committees and thus frustrate out discovery rules." *Young v. King*, 136 N.J. Super. 127, 130 (Law Div. 1975).

Finally, the privilege enjoyed by utilization review committees applies only to the "notes, audits, recommendations and reports that *are the product of the utilization review committee*." *Todd v. South Jersey Hospital System*, 152 F.R.D. at 682 (emphasis added). Thus, like the federal statutes, it appears that N.J.S.A. 2A:84A-22.8 does not apply to documents at their source.

When the New Jersey Supreme Court rejected the self-critical analysis privilege in *Payton*, it also rejected any common law basis for labeling medical peer review materials privileged in medical malpractice cases. Similarly, while the Peer Review Improvement Act and the Health Care Quality Improvement Act provide some measure of confidentiality to information coming from agencies or organizations established by the government, these statutory privileges are very limited in scope and do not apply to documents

generated by a hospital peer review committee's investigation. The same can be said for the limited privilege created by the New Jersey Evidence Rule 507(a), N.J.S.A. 2A:84A-22.8.

Given the decision of the state Supreme Court to reject a per se self-critical analysis privilege, and the lack of statutory authority barring the discoverability of medical peer review materials, the balancing approach announced in *Payton* takes on critical importance in pre-trial discovery during a medical negligence case in New Jersey. Unfortunately, there are no reported New Jersey cases decided after *Payton* applying the balancing approach to medical peer-review reports.

As stated previously in the 1985 *McClain v. College Hospital* decision, the state Supreme Court instructed the trial court to apply a balancing test to determine the propriety of disclosing self-evaluative materials, finding it was unable to utilize the balancing approach itself because of an inadequate record. 99 N.J. at 364. Nevertheless, the Court did announce some "general principles" for the lower court to follow. Id.

First, even when factual information is contained in medical peer review documents that contain opinions and conclusions, if the factual information can be severed by redacting the "evaluative" portions of the documents, the factual information must be disclosed. Id. at 363. Second, internal opinions, deliberations or investigative techniques are entitle to a "high degree of confidentiality," but are subject to disclosure if the party seeking it can demonstrate "a need more compelling than the agency's recognized interest in confidentiality." Id. at 359. Finally, hospitals will ordinarily have only a "diminished interest in privacy" in withholding transcripts of testimony adduced during committee investigatory meetings, although conclusions or opinions offered by nontreating physicians may be subject to redaction. Id. at 364.

In considering whether the evaluative portions of peer review materials will be subject to disclosure under the balancing approach announced in *Payton*, and *McClain*, to determine whether the plaintiff's particularized need for the information outweighs the public interest in confidentiality of such reports, a court must: (1) examine the extent to which the information sought by the plaintiff is available from any other source; (2) the degree of harm that the plaintiff will suffer if the peer review materials are not disclosed; and (3) the possible prejudice to the agency's investigation. *McClain v. College Hospital*, 99 N.J. at 351.

Accordingly, prior to making an application for peer review materials, discovery should be largely complete. Only after discovery is finished will the parties be in a position to determine whether there are gaps in proofs available and whether the materials collected in the peer review file are available through other sources. At the completion of discovery, the plaintiff can also better enlist the aid of expert witnesses to address such potential gaps in evidence. If there are gaps in the record, and the plaintiff's expert explains the nature of the missing information and provides an explanation as to its importance, a good argument can be made that evaluative peer review materials must be produced.

Presumably, medical malpractice cases that involve claims of administrative negligence against hospitals will have an easier time meeting the first two requirements of the *Payton* balancing approach. It is axiomatic that when a plaintiff asserts such a claim, it is necessary to know exactly when a hospital began questioning the competence of its allegedly negligent medical practitioner. *Todd v. South Jersey Hospital System*, 152 F.R.D. at 683. Simply put, any discussion involving the competence of a doctor becomes critical evidence in an administrative negligence claim against a hospital, and there is likely no place to obtain this kind of evidence other than from a negligent doctor's peer-review files.

Finally, in examining the defense claim of possible prejudice in producing peer review investigations in the future, one would be ill-advised to take unsubstantiated claims of the "chilling effect of disclosure" at face value. If the federal experience with the self-critical analysis privilege is at all instructive, it teaches us that these kinds of self-serving statements are to be treated with skepticism.

As was the case with the affirmative action plans in employment discrimination cases, medical peer review is not a voluntary activity. It is an activity that is required for accreditation by the Joint Commissions on Accreditation of Hospitals. *Bredice v. Doctors Hospital Inc.*, 50 F.R.D. at 250. It is required for participation under the Social Security Act. *Todd v. South Jersey Hospital System*, 152 F.R.D. at 685. It is also required under the Peer Review Improvement Act for the Medicare and Medicaid programs. Id. Finally, peer review is a required activity under the Health Care Quality Improvement Act of 1986, 42 U.S.C. 11101 et seq.

In addition to the fact that peer review is compelled by regulations and statutes, hospitals have a "litigation motive" to engage in peer review. Any time a doctor commits medical negligence at a hospital, a prompt review of that incident and the institution of appropriate remedial measures establish a defense to future claims of institutional or administrative negligence against the hospital. See *Todd v. South Jersey Hospital System*.

Finally, courts should be wary of overemphasizing the impact that disclosing peer review materials will have on curbing frank and honest discussion of incidents involving medical negligence. As the New Jersey Supreme Court noted in *Payton*, disclosure does not inevitably discourage self-criticism, and consistent public scrutiny is often the best catalyst to promote frank and honest investigations and assessments. *Payton v. New Jersey Turnpike Authority*, 148 N.J. at 547.

Conclusion

There is something counter intuitive about concealing evidence of negligence in medical malpractice lawsuits in the name of promoting quality assurance in health care. From its inception in *Bredice v. Doctors Hospital*, the self-critical analysis privilege has been appropriately limited and criticized. Ultimately, the New Jersey Supreme Court refused to adopt the privilege in *Payton v. New Jersey Turnpike Authority*.

Consequently, when a plaintiff in a medical negligence action seeks to discover materials generated during a hospital's medical peer review process, a strong showing of the need for the materials will outweigh the public interest in confidentiality. The federal experience with the self-critical analysis privilege clearly demonstrates that the policy considerations for confidentiality should be closely scrutinized and challenged. ■