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A REVIEW OF MEDICAL LIABILITY AND HEALTHCARE ISSUES

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A Word From the Practice Group Chair

In this edition we discuss a new Illinois Appellate Court Decision and an Illinois Supreme Court decision which modify existing medical malpractice law in Illinois.

Rick Hunsaker's note on the *Fragogiannis* case mentions the shift toward "trial by library" that only serves to diminish a doctor's chances of obtaining a good trial result in Illinois. However, with the right trial counsel, you will be much better equipped to deal with this new threat. That is just one reason why it is critical that you insist on the best legal representation when sued by a patient.

Mark Hansen and Matt Thompson have summarized the *Klaine* case which increases the likelihood that your applications for staff privileges, procedure summaries and case histories will be discoverable in civil litigation in Illinois. As a consequence, you may want to cultivate the practice of dictating those documents in the same way you would if 12 jurors were listening to you dictate.

We consider it our duty to keep you informed of new developments in Illinois medical legal matters and we are honored to serve as defense counsel for some of the finest medical professionals and institutions in and around Illinois.

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Recent Appellate Court Decision Discusses Issues of Apparent Agency and Admissibility of Practice Algorithms

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In a medical liability case tried in Cook County, the issues of apparent agency between a physician and hospital and the admissibility of medical literature at trial were reviewed by the First District Appellate Court. The case, *Fragogiannis v. Sisters of St. Francis Health Services Inc.*, 2015 IL App (1st) 141788, involved an emergency room patient who was intubated following an extreme attack of asthma. During the initial intubation attempt, the patient vomited. Despite efforts to re-intubate, the patient ultimately suffered cerebral hypoxia and brain death. A $4.7 million verdict was returned by the jury in favor of the patient's estate.

The plaintiff claim that the emergency room physician, who was an independent contractor, acted as an "apparent agent" of the hospital. The appellate court examined the language in the patient consent where it was acknowledged that all medical decisions were those of the physician, an independent contractor, and not the hospital. Despite this language, the court concluded that an executed consent, signed by a family member, was insufficient to serve as a basis to dismiss the legal claim that the emergency room physician was an "apparent agent" of the hospital. In cases where apparent agency is alleged, courts look to factors such as the posting

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of signs alerting patients to the fact that physicians working in the hospital are not hospital employees, patient acknowledgment of such relationships in written consent documents and the absence of any other evidence suggesting that a physician is an agent or employee of the hospital. In *Fragogiannis*, the court focused upon the fact that the consent was not only signed by the decedent's son but was executed after the patient was apparently brain dead. The court noted that "a third party signing a consent form after the negligence has occurred and after the patient is brain dead would not inform any unsuspecting patient that the four doctors that treated the individual were independent contractors." *Fragogiannis*, 2015 IL App (1st) 141788, ¶22.

The second issue on appeal was the admissibility of excerpts from the Manual of Emergency Airway Management. At trial, it was admitted that the manual was "'standard,' 'well-respected,' 'a very good book,' 'a standard book' and 'a good source.'" *Id*. ¶28. However, there was no admission that the manual was "authoritative." In fact, language from the manual itself stated that an intubation algorithm recommended to practitioners "cannot be considered to be scientifically proven as the only or even necessarily the best way to approach any one clinical problem or patient." *Id*. ¶33. Despite such language, the court concluded that it was appropriate to read from the manual at trial, for purposes of cross examining defense experts and not for the purpose of expressing the applicable standard of care. Both the hospital and the emergency room physician objected at trial because plaintiffs' counsel read the algorithm, verbatim, as if it was an expression of the appropriate standard of care for emergent intubation when the Manual itself made no such claim.

As of the writing of this article, the defendants have filed a Petition for Leave to Appeal with the Illinois Supreme Court. Heyl Royster's Professional Liability Practice Group will continue to monitor this appeal to determine whether the First District's decision is modified or reversed by the Illinois Supreme Court.

Richard Hunsaker focuses his practice in a wide variety of health care arenas. Richard has taken more than 30 cases to verdict. He has an impressive record of favorable trial results, particularly in defending cases arising in the health care context. Richard has defended physicians, nurses, hospitals and medical device manufacturers. In the broader realm of professional liability, he has also defended clients in the fields of architecture, dentistry, medicine, veterinary medicine and insurance. Richard has served as coordinating counsel for a major medical device manufacturer in the management and defense of its general liability claims pending in various jurisdictions throughout the United States. In addition, Richard has experience in defending major corporate interests in the class action setting, particularly claims against health care providers. In that context, he has also served as administrative counsel in the settlement of an Illinois class action claim.

Illinois Supreme Court Limits Claims of Privilege in Negligent Credentialing Cases

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In its recent opinion in *Klaine v. Southern Illinois Hospital Services*, 2016 IL 118217, the Illinois Supreme Court addressed the privileged nature of certain documents when negligent credentialing is alleged. While, the court rejected arguments in support of certain privileges, defendants can argue for a narrow interpretation of *Klaine*. Furthermore, a bill was recently introduced in the Illinois General

Assembly that would overturn the *Klaine* decision, at least in part. Lawmakers should be encouraged to pass this legislation.

Background

The plaintiffs claim was originally limited to medical malpractice. However, the plaintiffs later added a claim against the hospital system for negligent credentialing of the defendant physician. For a limited number of documents, the hospital system claimed privilege. The trial court agreed that many of the documents were privileged, but found other documents were not. The hospital system disagreed with the trial court's determination as to two groups of documents: (1) the defendant physician's three applications for staff privileges, and (2) procedure summaries and case histories of the defendant physician. The hospital system maintained that these documents were privileged pursuant to the Health Care Professional Credentials Data Collection Act (Credentials Act) and the Medical Studies Act. In order to appeal, the hospital system refused to produce the documents so that it would be found in "friendly" contempt.

The appellate court affirmed the trial court's order, with two exceptions. First, it ordered all references to an external peer review report within one application to be redacted. It also ordered any patient identifying information within any of the documents to be redacted in accordance with federal regulations.

On appeal to the Illinois Supreme Court, the hospital system limited its challenge to the discoverability of the defendant physician's three applications for staff privileges. The hospital system claimed the applications for staff privileges were completely privileged under section 15(h) of the Credentials Act. If the court found the applications were not privileged in their entirety, the hospital system argued alternatively that:

1. Any reference to information reported to the National Practitioner Data Bank (NPDB) must be redacted because it is privileged under section 11137 of the Health Care Quality Improvement Act of 1986.
2. The hospital system argued that any information regarding the defendant physician's treatment of nonparties was privileged under the Credentials Act and physician-patient privilege.

Applications for Staff Privileges and the Credentials Act

First, the supreme court considered whether the defendant physician's applications for staff privileges were privileged in their entirety under section 15(h) of the Credentials Act, which provides in relevant part:

> Any credentials data collected or obtained by the health care entity, health care plan, or hospital *shall be confidential*, as provided by law, and otherwise may not be redisclosed without written consent of the health care professional...

The hospital system relied upon the statute's provisions providing that all credentials data collected or obtained by a hospital "shall be confidential" and "may not be redisclosed," to argue that the legislature created an explicit privilege protecting the applications for staff privileges. The hospital system pointed to *TTX Co. v. Whitley*, 295 Ill. App. 3d 548 (1st Dist. 1998) to support its argument. In *TTX Co.*, the appellate court considered a similar statutory confidentiality provision, and held that confidential materials were privileged. The

TTX Co. court specifically found, "[i]n the absence of a statutory exception to the confidentiality rule, permitting disclosure of [the confidential] information pursuant to the discovery order would violate the explicit prohibition of such disclosures as stated in [the statute]."

Despite the similarity, the supreme court found the *TTX Co.* decision distinguishable because the *TTX Co.* court did not rely solely on the statute's confidentiality provision. Because the *TTX Co.* court also found the requested information to be irrelevant, the supreme court believed the *TTX Co.* decision was "inapposite" to the discovery sought in *Klaine*.

Instead, the supreme court found that a statute's confidentiality provision "does not necessarily mean that an impenetrable barrier to disclosure has been erected." It held that in the case of a statutory confidentiality provision, "disclosure will depend on whether applying an evidentiary privilege promotes sufficiently important interests to outweigh the need for probative evidence." On the other hand, the court held that "when the plain language of a statute creates a privilege, the information may not be disclosed, regardless of its relevance" because "the statutory privilege is an indication that the legislature has determined that other interests outside the truth-seeking process must be protected."

Turning to the confidentiality clause at issue, the court held that it did not create a blanket privilege against discovery of the physician's applications for staff privileges because such a privilege would not advance interests outside the truth-seeking process. Furthermore, the court found the applications were "highly relevant" to the plaintiffs' negligent credentialing claim because the applications for staff privileges were "the only materials which, by statute, [the hospital system] was required to consider in determining whether to credential and recredential" the defendant physician. The court also found that the applications were not privileged under the Medical Studies Act because such a reading would expand the Medical Studies Act privilege beyond the scope intended by the legislature.

Information Reported to the National Practitioner Data Bank

Alternatively, the hospital system argued that information within the applications regarding reports made to the National Practitioner Data Bank (NPDB) should be redacted. In support of its argument, the hospital system relied upon section 11137(b)(1) of the Health Care Quality Improvement Act, which provides "[i]nformation reported under this subchapter is considered confidential."

The supreme court also rejected this argument. The court noted that the same section also states that "[n]othing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure." The court also pointed to federal regulations requiring hospitals to query the NPDB for practitioners on its staff. Another federal regulation allows the NPDB to provide information to an attorney who has filed a medical malpractice action against a hospital, upon the attorney's "submission of evidence that the hospital failed to request information from the NPDB" as required. Reading all of these regulations together, the court found it "clear that information reported to the NPDB, though confidential, is not privileged from discovery in instances where, as here, a lawsuit has been filed against a hospital and the hospital's

knowledge of information regarding the physician's competence is at issue."

Information Regarding Treatment of Other Patients

Finally, the court considered whether the physician-patient privilege protected information in the physician's applications regarding care and treatment of other non-party patients. The court did not address this issue in detail because individual patient identifiers were either not included or had already been redacted. Therefore, HIPAA protections were not at issue. Nonetheless, the hospital system maintained that the physician-patient privilege is broader than HIPAA and "should be applied to require the redaction of all references to medical care and treatment rendered to nonparties." But, because the applications only contained information regarding treatment provided or procedures performed by the defendant physician at the hospital system, and because the plaintiff did not seek the medical records of nonparties, the court found no privilege applied to this "raw data."

Mitigating the Impact of *Klaine*

While *Klaine* is not a positive decision, it is not devastating. The supreme court makes clear that *Klaine* is limited to negligent credentialing cases. Of course, a plaintiff must have a good-faith basis and plead facts to support a cause of action for negligent credentialing before discovery.

Next, the court's decision regarding NPDB materials appears limited. It only found "references in [the defendant physician's] applications to material reported to the NPDB" to be discoverable. It left open the possibility that other information reported to or obtained from the NPDB is privileged, including information obtained by a quality control committee.

Additionally, *Klaine* does not stand for the proposition that non-party patient-identifying information is discoverable. The decision supports the well-accepted rule that such information should not be produced or the patient-identifiers should be redacted.

Finally, legislation was recently introduced in the Illinois General Assembly that would overturn part of the decision. Under the proposed legislation, section (h) of the Credentials Act would be amended to read, in part: "[a]ny credentials data collected or obtained by the health care entity, health care plan, or hospital shall be confidential *and privileged*, and may not be redisclosed . . .." This legislation would make clear that such information is privileged and nondiscoverable. Lawmakers should be encouraged to pass this legislation so that the intended privilege for credentialing information will be restored.

Mark Hansen has extensive experience in complex injury litigation, with an emphasis in medical malpractice, professional liability, and product liability. Mark regularly defends medical providers in professional liability actions involving significant injury or death.

Matt Thompson concentrates his practice in the area of civil litigation, including the defense of cases in the areas of medical malpractice and professional liability, products liability, and commercial litigation. Matt regularly defends physicians, nurses, hospitals and clinics in professional liability claims involving significant injury or death.

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Heyl Royster serves clients in every county in Illinois. We have offices in six major population centers in Illinois - Peoria, Chicago, Edwardsville, Rockford, Springfield, and Urbana - which allows us to appear in any Illinois state or federal court quickly, effectively, and cost-efficiently for our clients. Our offices collaborate with each other and with our clients to achieve client goals. Our statewide practice has earned Heyl Royster a reputation for innovation, excellence, and professionalism and brings our clients a specialized knowledge of the courts and adversaries we face.

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