

The Case of an Extraordinarily Important Privilege, Handled Extraordinarily

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In a procedurally unusual case, the Virginia Supreme Court has ruled for the first time on Va. Code § 8.01-581.17, the statute which makes hospital peer review records privileged. The statute provides, in pertinent part, that peer review records:

may not be disclosed or obtained by legal discovery proceedings unless a circuit court, after a hearing and for good cause arising from extraordinary circumstances being shown, orders the disclosure

In *HCA Health Services of Virginia v. Levin*,¹ the Supreme Court unanimously held that the privilege conferred by Va. Code § 8.01-581.17 applied to all genres of litigation, not simply to medical malpractice actions, and that the privilege does not belong to, nor can it be unilaterally waived by, the individual who is the subject of the peer review process. In addition, the Supreme Court rejected the notion that a defendant's normal need to defend himself is sufficient to constitute "good cause arising from extraordinary circumstances." Thus, the Supreme Court's decision confirms and reinforces the vitality of the peer review privilege in Virginia.

The procedural development of *Levin* is also interesting. Both the method that had to be employed by the hospitals in order to appeal and the appellate courts' handling of the appeal demonstrated the importance of the issues presented. To understand this facet of the case, however, the facts surrounding the case must be discussed.

SUBPOENAS ARE SERVED

In the summer of 1999, WJLA-TV in Washington, D.C. requested that subpoenas be served on Reston Hospital Center, the former Pentagon City Hospital, and the Inova Health System seeking any peer review records concerning Dr. Stephen M. Levin, M.D.. Dr. Levin had sued WJLA-TV and others for defamation as a result of news stories that accused him of sexual assaults upon female patients under the guise of internal pelvic diagnostic examinations. WJLA-TV sought the hospitals' peer review records concerning Dr. Levin in order to substantiate the statements in the news stories and to mitigate any claim for damages. None of the hospitals was a party to the defamation suit. They merely were thought to possess records that

could benefit WJLA-TV in its defense.

The Hospitals filed a motion to quash the subpoenas, based on the privilege created by Va. Code § 8.01-581.17, and a hearing on the motion was held on August 27, 1999. Following the argument of counsel, the Circuit Court orally ruled that the privilege in Va. Code § 8.01-581.17 applied only in medical malpractice actions and that, in any event, WJLA-TV's need to defend itself justified disclosure as "good cause arising from extraordinary circumstances being shown," the sole exception to the privilege provided for in the statute. As a consequence, the Circuit Court indicated that it would not quash the subpoenas.

HOSPITALS RISK CONTEMPT

Because the Hospitals expressed an interest in appealing the Circuit Court's ruling (clearly a non-appealable interlocutory ruling), the Circuit Court delayed entry of its order to permit the Hospitals to research how they might properly appeal. That research revealed that the Hospitals would have to refuse to comply with the subpoenas and invite a civil contempt citation. The order of contempt would constitute an appealable order. This "legal fact of life" was not a very palatable alternative for the Hospitals, who consider themselves to be good corporate citizens of the Commonwealth.

Upon being advised of the results of the Hospitals' research and of the likelihood that the Hospitals would risk a contempt order by refusing to disclose the peer review records, the Circuit Court advised all parties that it would review the matter further. Subsequently, on October 22, 1999, the Circuit Court issued a letter opinion that reaffirmed the Circuit Court's oral conclusions at the August 27, 1999 hearing. Therefore, the ball was squarely placed in the court of the Hospitals. Should they comply or should they go into contempt of court?

Peer review is a vital aspect of the ongoing process to ensure quality of care in Virginia hospitals. A medical staff that realizes that its candor and criticism of a fellow physician may make its way into the public domain would soon become reluctant and unwilling to participate in frank dialogue and critical analysis. Thus, as unattractive as the option of contempt was, the Hospitals decided that they had to refuse to disclose their records in order to vindicate what they

believed to be a very important privilege—a privilege that inured to patients' welfare and good medical care.

Upon being advised that the Hospitals would not disclose, the Circuit Court, on November 9, 1999, found them in contempt and imposed a daily fine of \$150 on each Hospital. The Circuit Court also required them to bear the cost to the parties that was caused as a result of the trial's delay.

APPEALS NOTED

Appeals were promptly noted to the Court of Appeals, and the Hospitals requested expedited review. When the Circuit Court declined to stay the daily fine pending appeal, the Hospitals requested the Court of Appeals stay the daily fines, which the Court of Appeals did on December 16, 1999. The Court of Appeals also agreed to expedite the appeal. However, a week later, on December 23, 1999, the Hospitals got an early Christmas surprise when the Supreme Court issued an order, pursuant to Va. Code § 17.1-409(A) and (B)(1), to take jurisdiction of the appeal. Thus, in five months the case went from the Circuit Court to the Supreme Court, a fact that highlighted the importance of the peer review privilege.

Briefing was completed on March 13, 2000, and the Supreme Court entertained oral argument on April 17, 2000—again, expeditious handling by the Supreme Court. Worthy of note also is the fact that the American Hospital Association, the American Medical Association, the Virginia Hospital and Healthcare Association, and the Medical Society of Virginia filed a joint *amicus curiae* brief supporting the Hospitals. Finally, on June 9, 2000, the Supreme Court issued its decision reversing the Circuit Court and annulling the daily fines levied under the order of contempt.

THE COURT'S OPINION

Senior Justice Compton authored the Court's opinion. In that opinion, Justice Compton relied, as an initial matter, on the fact that the language of Va. Code § 8.01-581.17 was "clear, unambiguous, and unqualified."² Based on this fact, the Court concluded that the privilege applies to all types of litigation, not just to medical malpractice actions.³ The Court rejected the argument that the statute's placement in the medical malpractice section of Title 8.01 indicated

a legislative intent to limit the privilege’s application to medical malpractice actions.⁴ The Court pointed out that such a limiting of the privilege would not further the “obvious” legislative intent “to promote open and frank discussion during the peer review process.”⁵

Similarly, the Court ruled that the privilege does not belong to the individual who is the subject of the peer review process and cannot be unilaterally waived by that individual.⁶ WJLA-TV had argued that Dr. Levin waived the privilege when he filed his defamation suit. Again, the Court commented that the purpose of the statute would be frustrated if an individual physician could unilaterally waive a statutory privilege that encourages other physicians “to participate candidly in the peer review of *other* physicians, with the expectation that the information submitted will remain confidential and shielded from public disclosure.”⁷

Lastly and perhaps most importantly, the Court addressed the issue of what constitutes “good cause arising from extraordinary circumstances.” WJLA-TV argued successfully to the Circuit Court that it needed the peer review records to defend itself by using any evidence that Dr. Levin did not enjoy a good reputation among his peers and, if necessary, to mitigate any damages. The Supreme Court, however, saw it differently. “The need to establish a defense, which must be made in all civil actions, is the essence of usual and ordinary, and is not ‘extraordinary.’”⁸ Thus, for the first time, the Supreme Court dispelled the notion that a litigant’s normal need for evidence is sufficient to satisfy the good cause requirement of the statute.⁹

The Supreme Court’s decision in *Levin*, is a major victory for hospitals and their medical staffs. However, it is important to remember that the real beneficiaries of this decision and the privilege in Va. Code § 8.01-581.17 are the patients who use the services of Virginia hospitals and Virginia physicians. Physicians are trained as they go through their medical school years and residency programs to engage in peer review where the criticism can be blunt and not at all sugar-coated. Nevertheless, that acceptance of and participation in peer review absolutely depends on a confidential process that encourages candor and a willingness to explore another physician’s treatment of

a patient in utter and complete candor. Whether we like it or not, our litigious society alarms physicians who have no desire to be drawn into time-consuming and expensive litigation merely because they participated in a peer review process. The Supreme Court’s decision in *Levin* has provided definitive assurance that the peer review privilege is both important and strong in Virginia, encouraging medical staffs to review their members and take action when necessary to protect patients and to promote better patient care.



¹ 260 Va. 215, 530 S.E.2d 417 (2000).

² 260 Va. at 220, 530 S.E.2d at 419.

³ *Id.* at 220, 530 S.E.2d at 420.

⁴ 260 Va. at 220-21, 530 S.E.2d at 420.

⁵ 260 Va. at 221, 530 S.E.2d at 420.

⁶ *Id.*

⁷ *Id.*

⁸ 260 Va. at 222, 530 S.E.2d at 420.

⁹ In the only other reported case concerning Va. Code § 8.01-581.17, the United States District Court for the Western District of Virginia did order the disclosure of a physician’s peer review records to enable that physician to prepare his defense against serious criminal charges. The District Court noted the extreme gravity of the possible punishment of the physician and cited concerns about unspecified constitutional issues to conclude that there was “good cause arising from extraordinary circumstances.” *United States v. Mettatal*, No. Crim. A. 96-0034-H., 1997 WL 599296 (W.D. Va. Aug. 20, 1997).

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