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Illinois Supreme Court Addresses Various Privilege Claims in the Case of a Negligent Credentialing Claim in *Klaine v. Southern Illinois Hospital Services*

Information collected by a hospital during the physician credentialing process is deemed confidential by the Illinois Health Care Professional Credentials Data Collection Act (Credentials Act). 410 ILCS 517/15(h). Many hospital defendants claim privilege pursuant to the Credentials Act when asked to produce credentialing documents during discovery. The issue of whether these documents are privileged, in addition to being confidential, had not been significantly addressed by the courts. However, the Illinois Appellate Court, Fifth District, and the Illinois Supreme Court have now weighed in and determined that certain documents are not privileged and must be produced in cases involving claims of negligent credentialing.

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 a plaintiff alleges negligent credentialing. As the discussion below shows, practitioners should advocate for a narrow interpretation of *Klaine*. Additionally, a bill was recently introduced in the Illinois General Assembly that would overturn at least part of the *Klaine* decision, and defense counsel and their clients should advocate for its passage.

Background

In *Klaine*, the plaintiff alleged that the defendant surgeon performed a negligent gallbladder surgery which resulted in additional procedures. *Klaine*, 2014 IL App (5th) 130356, ¶ 5. The plaintiff also alleged claims against the hospital for negligent credentialing of the defendant surgeon. *Id*. During discovery, the plaintiff filed a motion to compel defendant hospital to produce various documents, including defendant surgeon's application for privileges and list of procedures performed. *Id*. The defendant's response to the motion asserted that the documents requested were privileged pursuant to the Credentials Act. *Id.* After an in camera inspection, the circuit court ruled that all of the documents were privileged except for three group exhibits. *Id*. ¶ 6. The hospital filed a motion to reconsider the court's ruling on two of the group exhibits, and that motion was denied. *Id*. The defendant then filed a motion for finding of contempt in order to allow for an interlocutory appeal. *Id.* That motion was granted and the appeal followed. *Id.* At issue on appeal was whether three of the surgeon's applications for privileges at the defendant hospital, and other documents containing information regarding the surgeon's procedures performed over the past 5 years, were privileged from production in discovery. *Id*. ¶ 13, 33.

The court first addressed the applications for staff privileges. *Id.* ¶ 13. The hospital argued that the applications were privileged pursuant to § 15(h) of the Credentials Act. The Credentials Act, *inter alia*, creates a standardized form for health care professionals to complete when applying for staff privileges at hospitals, and also provides confidentiality to data collected. Section 15(h) provides:

> Any credentials data collected or obtained by the ... hospital **shall be confidential**, as provided by law, and otherwise may not be redisclosed without written consent of the health care professional ... [A]ny redisclosure of credentials data contrary to this Section is prohibited.

410 ILCS 517/15(h) (emphasis added); *Klaine*, 2014 IL App (5th) 130356, ¶ 16.

The issue was whether that language found in § 15(h) creates a privilege that makes credentials applications undiscoverable. *Id.* ¶ 17. The hospital relied upon *TTX Co. v. Whitley*, which found that information contained within tax returns was privileged pursuant to the confidentiality provision within the Illinois Income Tax Act. *Id.* ¶ 19, citing *TTX Co. v. Whitley*, 295 Ill. App. 3d 548, 555 (1st Dist. 1998). Reasoning that information otherwise discoverable does not become privileged merely because it is confidential, the court declined to follow *TTX Co*. finding that no such privilege applied in the instant case. *Id.* ¶ 20. Generally, privileges are "strongly disfavored" and therefore Illinois courts have been cautious to expand privileges created by statute or create privileges that have not been already created by the legislature. *Id.* ¶ 17 (citing *Birkett v. City of Chicago*, 292 Ill. App. 3d 745, 749 (2d Dist. 1997) and *People v. Sanders*, 99 Ill. 2d 262, 271 (1983)). Information deemed confidential by the legislature does not equate to a privilege. *Klaine*, 2014 IL App (5th) 130356, ¶ 18. This conclusion is supported by specific provisions within the Illinois Medical Studies Act, 735 ILCS 5/8-2012 – 2015 (MSA). *Klaine*, 2014 IL App (5th) 130356, ¶¶ 18-38. The MSA specifically states that information generated under its provisions "shall not be admissible as evidence, nor discoverable in any action of any kind in any court or before any tribunal, board, agency or person." *Id.* ¶ 18 (citing 735 ILCS 5/8-2102). The MSA also provides that the information is confidential, nondiscoverable, and nonadmissible. *Id.* The *Klaine* court reasoned that if the Illinois legislature intended for a privilege to attach to the information created pursuant to the Credentials Act, it would have expressly stated so, as it did with the similar hospital information pursuant to the MSA. *Id.*

The court did find that privileged information was contained within the applications. *Id.* ¶ 22. Specifically, the hospital had retained a consulting company to conduct an external peer review of the defendant surgeon. Information regarding the company's findings from the review were contained within one of the applications. The court found that this information was privileged pursuant to the MSA, which generally protects information generated by a hospital's peer review process, and therefore must be redacted from the application. *Id.*

The applications also contained information that was reported to the National Practitioner Data Bank (NPDB) which defendant hospital asserted was privileged. *Id.* ¶ 26. Settlements, judgments, disciplinary actions, and other various information regarding health care professionals are required to be reported to the NPDB pursuant to the Health Care Quality Improvement Act (Quality Improvement Act). *Id.* (citing 42 U.S.C. §§ 11131 - 11134 (2012)). Hospitals must request this reported information for each staff applicant. *Id.* The defendant hospital argued that information reported is deemed confidential and is generally not to be disclosed. *Id.* The court disagreed relying upon language within the Quality Improvement Act which states that the information reported may be disclosed if authorized under applicable state law. It concluded that Illinois discovery rules require disclosure pursuant to the plaintiff's negligent credentialing claim. *Id.* ¶

27. The court therefore found that the peer review information must be redacted, but the remaining information contained within the applications was discoverable. *Id.*

Next, the court considered defendant hospital's argument that documents containing information on the defendant surgeon's procedures were privileged pursuant to the MSA. *Id.* ¶ 33. This group of documents included details regarding the surgeon's procedures over five years, including the type of procedure, date performed, and the patient's name. *Id.* ¶ 34. To support its claim that the MSA applied, the hospital submitted affidavits from two of its managers. *Id.* ¶ 35. The affidavits asserted that various documents are submitted to the credentialing committee for review when a physician applies for reappointment to the hospital staff. *Id.* ¶ 36. However, the affidavits did not specifically identify the documents at issue on appeal, and therefore the court was unable to determine what role those documents played in the credentialing process. *Id.* Also, while the court acknowledged that the MSA applies to information generated by a hospital credentialing committee for the purpose of internal quality control, documents created prior to the initiation of the process does not fall within the purview of the MSA. *Id.* ¶ 38. The documents were therefore non-privileged and subject to discovery. *Id.*

In its 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. *Id.* ¶ 10. It claimed that the applications for staff privileges were privileged, in their entirety, pursuant to § 15(h) of the Credentials Act. *Id.* If the court found the applications were not privileged in their entirety, the hospital system set forth two alternative arguments. First, the hospital system claimed any references to information reported to the National Practitioner Data Bank should be redacted because such information is privileged under § 11137 of the Health Care Quality Improvement Act of 1986. 42 U.S.C. § 11137(a). Second, the hospital system claimed any information regarding the defendant physician's treatment of nonparties should be redacted as privileged under the Credentials Act and physician-patient privilege. *Klaine*, 2016 IL 118217, ¶ 11.

Whether a Physician's Applications for Staff Privileges are Privileged Under Illinois' Credentials Act

The Illinois Supreme Court first addressed whether the defendant physician's applications for staff privileges were privileged in their entirety under section 15(h) of the Credentials Act. *Id.* ¶ 17. Section 15(h) provides:

> 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, except that in any proceeding to challenge credentialing or recredentialing, or in any judicial review, the claim of confidentiality shall not be invoked to deny a health care professional, health care entity, health care plan, or hospital access to or use of credentials data. Nothing in this Section prevents a health care entity, health care plan, or hospital from disclosing any credentials data to its officers, directors, employees, agents, subcontractors, medical staff members, any committee of the health care entity, health care plan, or hospital involved in the credentialing process, or accreditation bodies or licensing agencies. However, any redisclosure of credentials data contrary to this Section is prohibited.

410 ILCS 517/15(h) (emphasis added).

Because §15(h) provides that all credentials data collected or obtained by a hospital "shall be confidential" and "may not be redisclosed," the hospital system argued that the legislature explicitly created a privilege making the applications for staff privileges both nondiscoverable and inadmissible. *Klaine,* 2016 IL 118217, ¶ 23.

In support of its argument, the hospital system pointed to *TTX Co. v. Whitley*, 295 Ill. App. 3d 548 (1st Dist. 1998). In *TTX Co.*, the appellate court was presented with a similar statutory confidentiality provision, and held that such confidential materials were privileged and could not be disclosed. *Klaine,* 2016 IL 118217, ¶ 10 (citing *TTX Co.*, 295 Ill. App. 3d at 556). In fact, the *TTX Co*. court specifically held, "[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]." *Klaine,* 2016 IL 118217, ¶ 26 (*quoting TTX Co.*, 295 Ill. App. 3d at 556) (internal quotations omitted).

However, the Supreme Court found *TTX Co.* to be distinguishable because the *TTX Co*. court did not rely solely on the statutory confidentiality provision to deny discovery. *Klaine,* 2016 IL 118217, ¶ 26. Because the *TTX Co*. court also held the requested information to be irrelevant, the Supreme Court found *TTX Co*. to be "inapposite" to the discovery sought in *Klaine. Id*. ¶¶ 26-27.

The Court stated that a statutory confidentiality provision "does not necessarily mean that an impenetrable barrier to disclosure has been erected." *Id*. ¶ 24. In the case of such a confidentiality provision, it held that "disclosure will depend on whether applying an evidentiary privilege "promotes sufficiently important interests to outweigh the need for probative evidence." *Id.* (internal citation and quotations omitted). 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." *Id*. ¶ 28 (internal citation and quotations omitted).

Applying these principles, the Court held that the confidentiality clause at issue did not create a blanket privilege against discovery of the applications for staff privileges because there was insufficient evidence that such a privilege would advance interests outside the truth-seeking process. *Id*. And, 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 applications were "highly relevant" to the plaintiffs' negligent credentialing claim. *Id.* ¶ 27. Going further, the Court explained, "we fail to see how a cause of action for negligent credentialing could proceed if we were to deny plaintiffs access to this information." *Id.* Finally, the Court rejected the argument that the applications were privileged under the Medical Studies Act, 735 ILCS 5/8-2101, 8-2102, because such a reading would expand the Medical Studies Act privilege beyond the scope intended by the legislature. *Klaine,* 2016 IL 118217, ¶ 30 (citing *Frigo v. Silver Cross Hosp. & Med. Ctr.*, 377 Ill. App. 3d 43, 66 (1st Dist. 2007)).

Information Reported to the National Practitioner Data Bank

The court next considered the hospital system's argument that information within the applications concerning reports made to the National Practitioner Data Bank (NPDB) should be redacted. *Klaine,* 2016 IL 118217, ¶ 32. In asserting that such information was privileged, the hospital system relied upon section 11137(b)(1) of the Health Care Quality Improvement Act, which states "[i]nformation reported under this subchapter is considered confidential." *Id.* (*citing* 42 U.S.C. § 11137(b)(1)).

In rejecting this argument, though, the court noted that the same section also provides 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." *Klaine*, 2016 IL 118217, ¶ 33 (*citing* 42 U.S.C. § 11137(b) (1)). The court went on to detail federal regulations requiring hospitals to query the NPDB for practitioners on its staff. *Klaine*, 2016 IL 118217, ¶ 35 (*citing* 45 C.F.R. § 60.17(a)(1) & (2)). It then noted another federal regulation that 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. *Klaine*, 2016 IL 118217, ¶ 35 (*citing* 45 C.F.R. § 60.18(a)(1)(v)). Reading all of this in conjunction, 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." *Klaine*, 2016 IL 118217, ¶ 36.

Information Regarding Treatment of Nonparties: HIPAA and the Physician-Patient Privilege

Finally, the Court addressed whether information in the physician's applications regarding care and treatment of other non-party patients was privileged under the physician-patient privilege, 735 ILCS 5/8-802. *Id*. ¶ 38. The Court seemed to give scant consideration to this issue because individual patient identifiers either were not included or had already been redacted. *Id.* ¶ 42. For this reason, HIPAA protections were not at issue. *Id.* ¶ 39. Nonetheless, the hospital system argued that the physician-patient privilege was broader than HIPAA and "should be applied to require the redaction of all references to medical care and treatment rendered to nonparties." *Id.* ¶ 40. However, because the plaintiff did not seek the medical records of nonparties, and because the applications contained only information regarding treatment provided or procedures performed by the defendant physician at the hospital system, the Court found no privilege applied to this "raw data." *Id*. ¶ 42.

Careful Analysis and Legislation May Narrow the Scope of *Klaine*

While *Klaine* may seem damaging at first glance, its scope is somewhat limited, and legislation has been introduced to add a privilege clause to the Credentials Act. First, throughout the opinion, the Supreme Court makes clear that its application is limited to cases where a cause of action for negligent credentialing has been alleged. And, of course, a plaintiff must have a good faith basis and plead facts to establish a cause of action for negligent credentialing before discovery may proceed.

Additionally, the Court's finding with regard to NPDB materials appears limited. The Court only found discoverable the "references in [the defendant physician's] applications to material reported to the NPDB." *Id*. ¶ 34. Therefore, defense counsel should consider whether other information reported to or obtained from the NPDB is privileged, especially information sought or obtained by a quality control committee.

Furthermore, *Klaine* does not stand for the proposition that non-party patient-identifying information is discoverable. The decision makes clear that such information should not be produced or the patient-identifying information should be redacted. *Id*. ¶¶ 39, 42.

Finally, House Bill 4986 was recently introduced in the General Assembly. 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 ... ." H.B. 4986, 99th Gen. Assemb., Reg. Sess. (Ill. 2016). If this legislation becomes law, it would make clear that such information is privileged and nondiscoverable, because as the court explained, "when the plain language of a statute creates a privilege, the information may not be disclosed, regardless of its relevance." *Klaine*, 2016 IL 118217, ¶ 28. Defense counsel and their clients should strongly advocate for this legislation, which would obviate most of the damage done in *Klaine.*

Conclusion

A physician's hospital credentialing file is commonly requested during discovery in medical malpractice cases. The Credentialing Act provides that these documents are confidential and, prior to *Klaine*, it was generally assumed in practice that they were also privileged. Attorneys must keep in mind, however, that the plaintiff's claims included allegations of negligent credentialing of the defendant surgeon and the appellate court's analysis considered this distinction in finding the documents discoverable. Also, when analyzing credentialing documents in response to requests for production, it is important to recognize that otherwise discoverable documents may contain privileged information. The privilege log should therefore accurately reflect these specific scenarios.

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