

Defending the Peer Review Privilege: Guidance for Health Care Providers and Counsel After *Wheeling Hospital*

Laurie K. Miller*

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* Laurie K. Miller is a Member in the Charleston, West Virginia, office of Jackson Kelly PLLC. Her litigation practice involves the defense of health care providers in medical professional liability actions, nursing home defense, products liability, pharmaceutical and medical device litigation, commercial litigation and mass/toxic torts. She is admitted to practice in West Virginia and North Carolina as well as the federal courts of both states, including the Fourth Circuit and the Supreme Court of the United States. Ms. Miller has been named to Best Lawyers in America in the areas of Health Law, Commercial Litigation and Products Liability (defense). She is a member of DRI and is currently serving on DRI's prestigious Law Institute and served as the Blockbuster Program Chair for the 2017 DRI Annual Meeting. She is also a past member of the DTCWV Board of Governors and currently serves as the President of the Board of Directors of the Ronald McDonald House Charities of Southern West Virginia. Ms. Miller wishes to thank Sarah A. Phipps, associate at Jackson Kelly PLLC, for her assistance on this manuscript.

I. INTRODUCTION

Health care providers are generally familiar with the doctor-patient privilege, which protects information exchanged between a physician and a patient for the purposes of rendering or receiving health care services.¹ The statutory peer review privilege is similar, except it protects communications between health care providers who are engaged in the review and critique of both specific and general elements of health care with the overall goal of health care improvement.² This Article will explore what peer review is, why it needs to be preserved, the basic elements of peer review protection, and how to prepare and defend a privilege log under the new *State ex rel. Wheeling Hospital, Inc. v. Wilson*³ decision by the Supreme Court of Appeals of West Virginia.

II. WHAT IS PEER REVIEW?

Peer review is the process by which doctors, hospitals, and other health care providers review the performance of other doctors and health care providers.⁴ The earliest known peer review can be traced to the American College of Surgeons.⁵ In 1919, the College sought to standardize hospitals, organize medical staffs, and set minimum standards.⁶ In the early 20th century, peer review was developed “as a way to review the quality of the care rendered by physicians and surgeons.”⁷ It became a requirement in 1952 for “hospitals to perform peer review to qualify for accreditation.”⁸ “[P]eer review developed into the primary method of evaluating the quality of physician services at . . . hospital[s] . . .”⁹

Peer review today is much more prevalent. It “is performed in a variety of settings, such as part of the quality assurance program of a hospital or other health care institution, a medical society or a third-party payer of health care

¹ 45 AM. JUR. PROOF OF FACTS 2D 595 § 2 (2017). *See, e.g.*, W. VA. CODE ANN. § 27-3-1 (West 2017) (declaring “[c]ommunications and information obtained in the course of treatment or evaluation of any client or patient [as] confidential information”).

² 41 C.J.S. *Hospitals* § 16 (2017).

³ 782 S.E.2d 622 (W. Va. 2016).

⁴ C.J.S., *supra* note 2.

⁵ *See The 1919 “Minimum Standard” document*, AM. COLL. OF SURGEONS, <https://www.facs.org/about-ac/s/archives/pasthighlights/minimumhighlight> (last visited Nov. 6, 2017).

⁶ *See id.*

⁷ Susan O. Scheutzw, *State Medical Peer Review: High Cost but No Benefit—Is It Time for a Change?*, 25 AM. J. L. & MED. 7, 12–13 (1999).

⁸ *Id.* at 13.

⁹ *Id.*

expenses.”¹⁰ Some peer review committees have been established in response to a state mandate or a federal statute which requires such peer review committees as a prerequisite to receiving federal funding for programs such as Medicare and Medicaid.¹¹ In addition, the Joint Commission now requires hospitals to establish systems for peer review of medical staff.¹²

III. THE NEED FOR PROTECTING THE PEER REVIEW PROCESS

Perhaps the most recognized case on peer review is *Bredice v. Doctors Hospital, Inc.*¹³ Finding a common law basis for a peer review privilege, the *Bredice* court explained:

Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.

The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They are not part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures. The value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is undeniable. This value would be destroyed if the meetings and the names of those participating were to be opened to the discovery process.¹⁴

While the concept of peer review is extremely important, it can pose a host of problems for those asked to participate if the outcomes of the review are not protected. A physician asked to participate in the critique of a fellow physician may be disinclined to do so if there will be publication or disclosure

¹⁰ *Id.*

¹¹ See Dorothy Duffy & Martha C. Romney, *Medicine and Law: Recent Developments in Peer Review and Informed Consent*, 26 TORT & INS. L.J. 331, 334 (1991).

¹² See *id.*

¹³ 50 F.R.D. 249 (D. D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

¹⁴ *Id.* at 250; see also Thomas J. Hurney, Jr. & Roddy Stieger, *Defending Actions Alleging Negligent Medical Staff Decisions*, presented at 2010 DRI Medical Liability Seminar, published January 20, 2010.

of his or her comments, notes, opinions, or conclusions. A physician may be concerned about potential defamation or antitrust lawsuits arising from participation in a review resulting in the termination, suspension, or denial of another physician's staff privileges.¹⁵ A physician may also be concerned about loss of patient referrals if he/she participates in a candid peer review of a colleague. Further, if the information generated during the peer review process can be produced during discovery or introduced at trial in a civil action, especially a medical malpractice lawsuit, the effectiveness of peer review could be hampered because physicians will be reluctant to provide a complete, honest evaluation and analysis during the peer review process.

The purpose of making peer review privileged or confidential is to promote candor and confidentiality in the peer review process and to foster aggressive critiquing of medical care and qualifications by a doctor's peers.¹⁶ To fulfill these purposes and concerns, all 50 states, the District of Columbia, and the federal government have passed statutes designed to protect communications and documents that are part of the peer review process and/or provide immunity for those who participate in the peer review process.¹⁷

Statutes from several states contain legislative findings about the purpose of peer review protection which consistently cite the concept of balance between patient protection and doctor privacy.¹⁸ Describing the legislative purpose of the peer review privilege, the Supreme Court of Appeals of West Virginia noted, "The enactment of West Virginia Code §§ 30-3C-1 to -3 (1993) clearly evinces a public policy encouraging health care professionals to monitor the competency and professional conduct of their peers in order to safeguard and

¹⁵ See *Garrison v. Herbert J. Thomas Mem'l Hosp. Ass'n*, 438 S.E.2d 6, 10 (W. Va. 1993) (stating that, under West Virginia law, peer review immunity does not apply where information provided "is false and the person providing such information knew, or had reason to believe, that such information was false" (quoting W. VA. CODE ANN. § 30-3C-2 (West 2017))).

¹⁶ See *Young v. Saldanha*, 431 S.E.2d 669, 673 (W. Va. 1993). See also *Bredice*, 50 F.R.D. 249; *Glover v. Griffin Health Servs.*, No. X06CV055001692S, 2007 WL 3173658, at *4 (Conn. Super. Ct. Oct. 11, 2007) (finding that a "Grand Rounds meeting serves as an important educational tool not only to provide an understanding and a critique of the care provided by a particular doctor, but also to provide a teaching mechanism to enhance the quality of future medical care, which are all goals consistent with the public policies implicated by the peer review privilege"); *Pardo v. Gen. Hosp. Corp.*, 841 N.E.2d 692, 700 (Mass. 2006); *HCA Health Servs. of Va., Inc. v. Levin*, 530 S.E.2d 417, 420 (Va. 2000); *Claypool v. Mladineo*, 724 So. 2d 373, 383 (Miss. 1998); *Trinity Med. Ctr., Inc. v. Holum*, 544 N.W.2d 148, 155 (N.D. 1996); *Cruger v. Love*, 599 So. 2d 111, 114-15 (Fla. 1992); *Moretti v. Lowe*, 592 A.2d 855, 857 (R.I. 1991).

¹⁷ See *Virmani v. Novant Health, Inc.*, 259 F.3d 284, 290 (4th Cir. 2001); Anita Modak-Truran, *A Fifty-State Survey of the Medical Peer Review Privilege*, CASE V. LAW, http://www.butlersnow.com/wp-content/uploads/pdfs/attorney_publications/case-law-a-fifty-state-survey-of-the-medical-peer-review-privilege.pdf (last visited Nov. 6, 2017) (providing examples of the statutory medical peer review privilege in all 50 states and the District of Columbia).

¹⁸ See, e.g., FLA. STAT. ANN. § 395.001 (West 2017); GA. CODE ANN. § 31-7-130 (West 2017).

improve the quality of patient care.”¹⁹ “The peer review privilege represents a legislative choice between medical staff candor and the plaintiff’s access to evidence.”²⁰

IV. THE PEER REVIEW PRIVILEGE IN WEST VIRGINIA

Peer review in West Virginia is “the procedure for evaluation by health care professionals of the quality and efficiency of services ordered or performed by other health care professionals, including practice analysis, inpatient hospital and extended care facility utilization review, medical audit, ambulatory care review, claims review and patient safety review.”²¹ The party asserting the privilege has the burden of proving it.²² Health care professionals are defined as “individuals who are licensed to practice in any health care field and individuals, who, because of their education, experience or training participate as members of or consultants to a review organization.”²³ A “review organization” in West Virginia is defined as

any committee or organization engaging in peer review . . . [that] gather[s] and review information relating to the care and treatment of patients for the purposes of: (i) Evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care. It shall also mean any hospital board committee or organization reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto, and any professional standards review organizations established or required under state or federal statutes or regulations.²⁴

West Virginia’s peer review privilege provides that

[t]he proceedings and records of a review organization shall be confidential and privileged and shall not be subject to subpoena or discovery proceedings or be admitted as evidence in any civil action arising out of the matters which are subject to evaluation and review by such organization and no person who was in

¹⁹ *Young*, 431 S.E.2d at Syl. Pt. 2.

²⁰ *State ex rel. Shroades v. Henry*, 421 S.E.2d 264, 268 (W. Va. 1992). *See also* WASH. REV. CODE ANN. § 7.71.010 (West 2017) (stating that “it is necessary to balance carefully the rights of the consuming public who benefit by peer review with the rights of those who are occasionally hurt by peer review”).

²¹ W. VA. CODE ANN. § 30-3C-1 (West 2017).

²² *Young*, 431 S.E.2d at Syl. Pt. 1; *Shroades*, 421 S.E.2d at Syl. Pt. 2.

²³ § 30-3C-1.

²⁴ *Id.*

attendance at a meeting of such organization shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such organization or as to any findings, recommendations, evaluations, opinions or other actions of such organization or any members thereof: Provided, That information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action merely because they were presented during proceedings of such organization, nor should any person who testifies before such organization or who is a member of such organization be prevented from testifying as to matters within his knowledge, but the witness shall not be asked about his testimony before such an organization or opinions formed by him as a result of said organization hearings: Provided, however, That an individual may execute a valid waiver authorizing the release of the contents of his file pertaining to his own acts or omissions, and such waiver shall remove the confidentiality and privilege of said contents otherwise provided by this section: Provided further, That upon further review by any other review organization, upon judicial review of any finding or determination of a review organization or in any civil action filed by an individual whose activities have been reviewed, any testimony, documents, proceedings, records and other evidence adduced before any such review organization shall be available to such further review organization, the court and the individual whose activities have been reviewed. The court shall enter such protective orders as may be appropriate to provide for the confidentiality of the records provided the court by a review organization and all papers and records relating to the proceedings had before the reviewing court.²⁵

The Supreme Court of Appeals of West Virginia has had occasion to interpret the state's peer review statute in a number of contexts over the years in an effort to more carefully define the structure of the privilege. An application for the issuance or renewal of staff privileges that is created solely for consideration by a hospital credentialing committee is protected by the health care peer review privilege pursuant to section 30-3C-3 of the West Virginia Code.²⁶

²⁵ *Id.* § 30-3C-3.

²⁶ *See generally* *State ex rel. Charles Town Gen. Hosp. v. Sanders*, 556 S.E.2d 85, 94 (W. Va. 2001) (holding that credentialing and privilege committees are review organizations to which the peer review privilege applies); *cf. State ex rel. United Hosp. Ctr. v. Bedell*, 484 S.E.2d 199, 213 (W. Va. 1997) (holding that certain incident reports may not be protected from discovery under the work product doctrine because they may not always be prepared in anticipation of litigation;

V. ORIGINAL SOURCE DOCUMENTS AFTER THE WHEELING HOSPITAL DECISION

Like most peer review statutes across the country, West Virginia's statute has broad protection for records and activities of peer review organizations, but not for "original source" documents.²⁷ Until recently, the contours of what it meant to be an "original source document" had not been addressed by the Supreme Court of Appeals of West Virginia. It has long been a concern of health care providers that peer review files containing documents that could be gathered from other external, non-peer review sources, could be compelled from their privileged peer review files. Indeed, one health care provider, Camden Clark Medical Center, nearly had just such a result.²⁸

Camden Clark was a party in a medical professional liability and negligent credentialing case pending in Wood County, West Virginia.²⁹ During the course of the litigation, plaintiffs moved to compel production of certain credentialing and other peer review files.³⁰ After a lengthy briefing process, privilege log preparation, a hearing and an *in camera* review of the credentialing files, Circuit Judge John D. Beane ordered the disclosure of certain documents listed on the privilege log (roughly 1/7 of the credentialing files).³¹ Because they were "available from original sources extraneous to the credentialing process," they were not protected by the peer review privilege.³² Judge Beane's ruling happened to come down on the same day as *Wheeling Hospital*.³³

Wheeling Hospital arose from a garden variety medical professional liability action in which the plaintiff contended that her vocal cords had been severed in the course of a thyroidectomy procedure, leaving her with difficulty breathing and swallowing and inability to speak.³⁴ She also pled a negligent

declining to address the peer review privilege argument covering the documents). *Bedell* notes that the hospital raised the peer review privilege below, but did not raise it on appeal. *Id.* at 208 n.9.

The hospital originally argued in its petition that both the incident report and the investigation report are protected from discovery under the attorney-client privilege. However, it became clear during oral argument before this Court that the hospital no longer believes that these materials are protected by this privilege. In that we agree with the hospital's assessment of the materials, our discussion on this issue will be brief.

Id. at 208.

²⁷ See § 30-3C-3. See generally Hurney, Jr. & Stieger, *supra* note 14.

²⁸ See *infra* App. A.

²⁹ See *infra* App. A.

³⁰ See *infra* App. A.

³¹ See *infra* App. A.

³² See *infra* App. A.

³³ See *infra* App. A; State *ex rel.* Wheeling Hosp., Inc. v. Wilson, 782 S.E.2d 622, 622 (W. Va. 2016).

³⁴ *Wheeling Hosp.*, 782 S.E.2d at 627.

credentialing claim and sought discovery of the credentialing files for the physician at issue.³⁵ Wheeling Hospital objected to the discovery, asserting the peer review privilege and producing a privilege log.³⁶ Plaintiff moved to compel production of certain documents on the log.³⁷ After an *in camera* review, the circuit court ordered the majority of them produced.³⁸ The plaintiff's assertion that the documents met the "original source" exception to the peer review privilege was persuasive to the circuit court because they were not created solely for credentialing and were available from sources extraneous to the credentialing process.³⁹ Thus, the hospital was ordered to produce the documents from its peer review file.⁴⁰ Reversing, the Supreme Court of Appeals held:

[W]here documents sought to be discovered are used in the peer review process but either the document, itself, or the information contained therein, is available from an original source extraneous to the peer review process, such material is discoverable from the original source, itself, but not from the review organization that has used it in its deliberations.⁴¹

Therefore, while documents that originate in a non-review organization do not become privileged by their presentation to a review organization,⁴² the critical point for purposes of discovery is that such documents or information may only be obtained from the "*original, external sources*, but not from the peer review committee, itself."⁴³ Stated another way,

[T]he source of nonprivileged material cannot be the peer review committee or any other entity or individual included within the protections of the committee privileges. Rather, a party must seek the documents and communications from a nonprivileged source [The] privilege [permits] only the withholding of the fact that ordinary business records were reviewed by the committee, not the ordinary business records themselves. The peer review privilege protects the products of the peer review

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See id.*

³⁸ *Id.*

³⁹ *Id.* at 627–28.

⁴⁰ *Id.* at 628.

⁴¹ *Id.* at 635.

⁴² *Id.* at 632 (citing *State ex rel. Shroades v. Henry*, 421 S.E.2d 264, 269 (W. Va. 1992)).

⁴³ *Id.* at 633 (quoting W. VA. CODE ANN. § 30-3C-3 (West 2017); Syl. Pt. 4, *State ex rel. Brooks v. Zakaib*, 588 S.E.2d 418 (W. Va. 2003); Syl. Pt. 3, *State ex rel. Shroades v. Henry*, 421 S.E.2d 264, 269 (W. Va. 1992). *See also* *Irving Healthcare Sys. v. Brooks*, 927 S.W.2d 12, 18 (Tex. 1996).

process: reports, records (including those produced for the committee's review as part of the investigative review process), and deliberations.⁴⁴

Following the *Wheeling Hospital* decision, Judge Beane of the Circuit Court of Wood County, West Virginia, reconsidered his earlier order compelling Camden Clark Medical Center to produce original source documents from its credentialing files. Judge Beane wrote:

This Court's prior order was based on a determination that externally sourced and therefore non-privileged material could properly be obtained from a review organization and a party seeking such non-privileged material need not obtain it from a "non-privileged source." This Court, evidently wrongly, concluded that the statute demarks privileged material not privileged sources and that to require a party seeking disclosure of non-privileged information to obtain it from various and sundry entities when a review organization of a party defendant is in possession of it unnecessarily increases the time, effort and cost of discovery.⁴⁵

The court went on to require a more detailed privilege log from the hospital, consistent with *Wheeling Hospital* (as will be discussed more, below).⁴⁶ Under *Wheeling Hospital*, this result suggests that peer review privilege logs in West Virginia will be critical in determining whether a document has an "original source" outside the peer review file.

VI. PRIVILEGE LOGS AND THE *WHEELING HOSPITAL* DECISION

While the "original source" holding in *Wheeling Hospital* was only one part of the court's ruling, it effectively drove the court's other holdings in the case. In order to make "original source" materials identifiable and discoverable, the court focused on defining the requirements for privilege logs for documents sought to be protected by the peer review privilege.

While [prior] authorities all provide significant guidance as to the precise parameters of the peer review privilege, the facts of the case *sub judice* clearly demonstrate that this black and white line of demarcation is tinged with many, many shades of gray uncertainty. Although the party asserting the protections

⁴⁴ *Wheeling Hosp.*, 782 S.E.2d at 633 (emphasis added) (quoting *In re Living Ctrs. of Tex., Inc.*, 175 S.W.3d 253, 260 (Tex. 2005)).

⁴⁵ *See infra* App. B.

⁴⁶ *See infra* App. B. Ultimately, Camden Clark was never compelled to produce any materials at all from its peer review files in this case, and the plaintiffs sought no materials from any original sources that were identified on the privilege log. *See infra* App. B.

afforded by the privilege bears the burden of demonstrating its applicability by “[m]ore than mere assertions,” it is clear to us that we have not yet scrupulously considered all the myriad scenarios in which peer review documents may be generated or considered.⁴⁷

Prior to the *Wheeling Hospital* decision,

[t]he general procedure involved with discovery of allegedly privileged documents [was] as follows: (1) the party seeking the documents must do so in accordance with the reasonable particularity requirement of Rule 34(b) of the West Virginia Rules of Civil Procedure; (2) if the responding party asserts a privilege to any of the specific documents requested, the responding party shall file a privilege log that identifies the document for which a privilege is claimed by name, date, custodian, source and the basis for the claim of privilege; (3) the privilege log should be provided to the requesting party and the trial court; and (4) if the party seeking documents for which a privilege is claimed files a motion to compel, or the responding party files a motion for a protective order, the trial court must hold an in camera proceeding and make an independent determination of the status of each communication the responding party seeks to shield from discovery.⁴⁸

A privilege log therefore had to name the document, its date, and its custodian, and it had to provide the source and basis for the claim of privilege.⁴⁹ In response, it was up to the party requesting the documents to either accept the response or challenge the claim of privilege with a motion compel.⁵⁰ In response to a motion to compel, the burden falls on the party asserting the privilege to prove that the privilege applies to each document for which it is asserted.⁵¹

For privilege logs containing documents protected by the peer review privilege, *Wheeling Hospital* set forth a “single, cohesive framework to provide precise parameters to courts reviewing allegedly privileged documents”⁵² The court held:

⁴⁷ *Wheeling Hosp.*, 782 S.E.2d at 631–32.

⁴⁸ Syl. Pt. 2, *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 658 S.E.2d 728 (W. Va. 2008).

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ *See* Syl. Pt. 1, *State ex rel. HCR Manorcare, LLC v. Stucky*, 776 S.E.2d 271 (W. Va. 2015) (quoting Syl. Pt. 2, *State ex rel. Shroades v. Henry*, 421 S.E.2d 264 (W. Va. 1992)) (“The determination of which materials are privileged under *W.Va. Code*, 30-3C-1 [1975], *et seq.* is essentially a factual question and the party asserting the privilege has the burden of demonstrating that the privilege applies.”).

⁵² *Wheeling Hosp.*, 782 S.E.2d at 635.

[T]o determine whether a particular document is protected by the peer review privilege codified at W. Va. Code § 30-3C-3 . . . a reviewing court must ascertain both the exact origin and the specific use of the document in question. Documents that have been created exclusively by or for a review organization, or that originate therein, and that are used solely by that entity in the peer review process are privileged. However, documents that either (1) are not created exclusively by or for a review organization, (2) originate outside the peer review process, or (3) are used outside the peer review process are not privileged. We further hold that, where documents sought to be discovered are used in the peer review process but either the document, itself, or the information contained therein, is available from an original source extraneous to the peer review process, such material is discoverable from the original source, itself, but not from the review organization that has used it in its deliberations. Finally, we hold that the party seeking the protections of the peer review privilege bears the burden of establishing its applicability by more than a mere assertion of privilege.⁵³

So what does this mean in practice? It means that in order to protect the peer review privilege (or any privilege, for that matter), counsel representing a health care provider must provide a road map for the court and the plaintiff for each document sought to be protected, including where to get it outside the peer review file—the original source. The privilege log must provide the name (or description) of the document, the date, the document’s custodian, where the document originated (whether that is internal or external to the review organization and whether it was created exclusively by or for a review organization), how the document is used (including whether it is used exclusively for peer review or additional purposes) and the source of the privilege.⁵⁴

The court provided examples of types of documents protected by the peer review privilege which can be helpful when constructing a privilege log. For example, “[d]ocuments that have been created exclusively by or for a review organization, or that originate therein, and that are used solely by that entity in the peer review process are privileged.”⁵⁵ In this category, the court reaffirmed that applications for medical staff privileges are privileged.⁵⁶ Additionally, examples of documents protected by the peer review privilege are documents that “come within the statutory definition of the purpose for which a review

⁵³ *Id.*

⁵⁴ *See id.* at 636.

⁵⁵ *Id.* at 635.

⁵⁶ *Id.* at 629 (citing *State ex rel. Charles Town Gen. Hosp. v. Sanders*, 556 S.E.2d 85, 92–93 (W. Va. 2001)).

organization may be established and are materials that the peer review committee either created or requested be generated for the committee's exclusive use."⁵⁷ Included within this category, the court identified two more categories of documents that are also privileged: "(1) documents that '[e]valuat[e] and improv[e] the quality of health care rendered' and (2) materials that 'establish[] and enforc[e] guidelines designed to keep within reasonable bounds the cost of health care.'"⁵⁸ Then, within these categories, the court noted that a peer review committee's "analysis of physicians' procedures and their outcomes" are privileged as are committee "evaluation[s] of health care costs related to various patients' care outcomes."⁵⁹

Based on *Wheeling Hospital*, a privilege log for a peer review or credentialing file might have columns that look like this:

DOCUMENT DESCRIPTION	DATE(S)	CUSTODIAN	ORIGIN	USE	SOURCE/ BASIS OF PRIVILEGE
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The key columns in the log are obviously the "origin" and "use" columns. For each document in a peer review file, where the document originated and how it was used (and whether it was used exclusively) by the peer review committee is critical—both in the sense that it may determine whether an individual document will be protected by the privilege and because it will tell a requesting party where to go to get the document outside of the peer review file.

Sometimes the original source can be relatively easy to address. For example, a physician's CV or a diploma may be in a credentialing file as support for an application for privileges. The original source of the CV is the physician and the original source of the diploma is the physician or institution. If a plaintiff wants those documents, they may be obtained from the doctor if he or she has them, but a plaintiff cannot obtain them from the hospital's credentialing file.

Often times the original source of a document may very well be another review organization, meaning the document may not be discoverable from its original source either—particularly where the original source is external to the review organization. An example could include information gathered during the credentialing process from the National Practitioner's Data Bank ("NPDB") about a specific physician. While the original source of the document is the NPDB, this database is not generally accessible to plaintiffs.⁶⁰ Additionally, such documents are arguably created for the review organization exclusively for the purpose of credentialing. These kinds of distinctions and descriptions aid the

⁵⁷ *Id.* at 635 (citation omitted).

⁵⁸ *Id.* (citation omitted).

⁵⁹ *Id.* at 635–36.

⁶⁰ 45 C.F.R. § 60.20 (2017) ("Information reported to the NPDB is considered confidential and shall not be disclosed outside the Department of Health and Human Services, except as specified in §§ 60.17, 60.18, and 60.21 of this part.").

circuit court in its assessment of whether the documents are privileged as well as discourage a plaintiff from digging into other sources that may need to be identified—particularly where those other original sources are actually with other review organizations within the health care institution. As demonstrated in *Wheeling Hospital*, the content of the privilege log is critical to sustaining the burden of proving the application of the peer review privilege.⁶¹

For example, hospitals are required to track and report certain information about complication rates, rates of infection, readmissions, etc. to Medicare. Such data is likely kept outside of the credentialing committee, but it may be considered as part of an application for renewal of staff privileges. But, again, this information is arguably being kept for yet another peer review purpose which must be made plain to a court. Unlike the first example, though, the health care provider is the original source of the information, not Medicare. Key to the analysis here are the different peer review purposes for which the information is being kept. For example, an infection control committee (likely a review organization because it is focused on evaluation of the quality of health care rendered) may keep the data on post-surgical infections, readmission, and complication rates, but it is reported only in the aggregate, as required, to the government. To the extent those numbers are then sliced and diced to relate to one particular physician only at the time of re-credentialing, they remain protected by the peer review privilege even though the larger aggregate data is kept by a different review organization. Aggregate data may be available from original sources like Medicare, but drilling down into specific data for specific physicians should still be protected by the privilege.

Another example might be incident reports that are kept by a health care provider. Such reports may be maintained by a risk management committee, for example, external to a credentialing committee, but incident reports related to a specific physician may find their way into credentialing files during a re-evaluation of staff privileges. It is critical when identifying the origin of the incident reports on a privilege log that the risk management committee also be defined as a review organization to whom the privilege can extend (assuming it acted as a review organization as demonstrated by the hospital bylaws). It is equally critical when defining the use of the document (*i.e.* improving the quality of health care rendered) that the use by both the risk management committee and the credentialing committee are explained.

To demonstrate the application of the privilege, clear analysis of each document in a peer review file is necessary to protect the privilege post-*Wheeling Hospital*. This may result in privilege logs that are hundreds of pages long, covering hundreds of individual documents. While the process of creating such

⁶¹ See *Wheeling Hosp.*, 782 S.E.2d at 636–37 (discussing the need for a revised privilege log containing the specific origin and precise use of certain documents before the peer review privilege could be applied).

a privilege log is tedious and expensive for health care providers, it is absolutely necessary to maintain entitlement to the privilege.⁶²

VII. BEYOND THE PRIVILEGE LOG: DEFENDING ENTITLEMENT TO THE PRIVILEGE

Wheeling Hospital does not change the other requirements that must be satisfied to assert the right to peer review privilege. The party seeking entitlement to the peer review privilege must

begin [by] establishing that a peer review committee was in existence and that the facility actually investigated the incident or incidents that the disputed documents or information reference. A broad assertion that the committee may rely on a particular type of document or information, if the document was not generated by or under the direction of the committee, is insufficient. For the privilege to attach, the committee must have used or relied on the specific document or information the facility seeks to exclude, and the particular document or information must not be something that is simultaneously available to employees of the facility in the course of their duties separate and apart from any peer review responsibilities.⁶³

Accordingly, for every review organization and peer review document implicated in a case, entitlement to the privilege must be specifically asserted.

The relevant bylaws, policies and procedures of the health care entity establish the committees engaged in peer review activity. If there are specific policies, procedures or bylaws related to credentialing, for example, they should be identified and cited specifically. The same is true of other implicated peer review activities or organizations, like infection control or risk management. Additionally, if there are policies defining who can be a peer reviewer, those should be included as well. The closer the health care entity's policies and procedures can be tied to the peer review statute, the better. It is against this backdrop of a health care facility's peer review policies, procedures, bylaws and committees that the new *Wheeling Hospital* privilege log will be judged, although the statute's language provides fairly broad protection to "any committee or organization engaging in peer review"⁶⁴

⁶² See *infra* App. C (providing orders from Wood County Circuit Court judges denying plaintiffs' motions to compel peer review documents).

⁶³ *Wheeling Hosp.*, 782 S.E.2d at 635 (quoting *Large v. Heartland-Lansing*, 995 N.E.2d 872, 884–85 (Ohio Ct. App. 2013)).

⁶⁴ W. VA. CODE ANN. § 30-3C-1 (West 2017).

VIII. PRACTICE POINTERS

Protecting the peer review privilege is critical to the continual evaluation of improving both the quality and cost of health care. Here are some additional practice pointers, applicable to both outside counsel and in-house counsel, in the overall peer review arena:

(1) Committees engaged in peer review activities that are “peer review organizations” under applicable statutes should be defined as such in bylaws, policies and procedures. Counsel should think proactively by examining the applicable statutes and drafting or revising hospital bylaws, policies, and procedures to specifically define committees as engaging in peer review. In defending peer review, counsel should carefully examine the activities of the individuals or committee involved to ensure that the peer review statutory requirements are satisfied.

(2) Records and documents subject to the peer review privilege are consistently treated as privileged when created. Peer review documents should be segregated by the hospital or committee possessing them, marked and treated as privileged. Take care, however, to ensure that all documents are not simply stamped “confidential” without good reason.

(3) Minutes of peer review committee meetings, to the extent public, should not contain any information protected under the statute. Separate, confidential minutes of peer review activities should be kept and disseminated only consistent with the statute.

(4) Records and documents subject to the peer review privilege should be consistently treated as privileged when responding to discovery requests in civil actions. Peer review documents should not be used during depositions or hearings. The documents should be maintained separately from discoverable documents and information. In responding to discovery, lodge specific objections to producing the information, using the applicable statute and case law, as well as the hospital or organizational bylaws that demonstrate entitlement to the privilege. Do not wait until a motion to compel to make your case for the privilege.

(5) Counsel should make certain that participants in the peer review process do not waive the privilege or inadvertently provide privileged information. Generally, both the individual participant and the organization (hospital, etc.) hold the privilege so it should not be unilaterally waived. Of more concern may be the situation where a participant—appearing as a fact witness in a civil action, and not represented by counsel—is asked questions about peer review and inadvertently waives the privilege. Counsel for the health care provider must be on guard to object, instruct the witness not to answer and seek court intervention to maintain the confidentiality afforded by and to preserve the privilege. Education of peer review participants, accompanied by written agreement to maintain confidentiality, is one way to potentially avoid this circumstance. Vigilance in providing counsel, or appearing at depositions or

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DEFENDING THE PEER REVIEW PRIVILEGE

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hearings where waiver is possible by third party fact witnesses is another step to be considered.

IX. CONCLUSION

Wheeling Hospital provides valuable guidance about how to protect the peer review privilege. While the preparation of privilege logs is tedious (and expensive for the client), privilege logs are a critical and necessary tool in defending the privilege. A detailed and comprehensive privilege log can defeat attempts to breach the privilege and is well worth the time and effort.

X. APPENDIX A

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

CORTNEY TAYLOR, et al.,

Plaintiffs,

v.

//

CIVIL ACTION NO.: 14-C-2497

MARK PERNI, D.O., JENNIFER ANGELILLI,

CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION,

BEST PRACTICES OF WEST VIRGINIA, INC.,

BEST PRACTICES, INC.,

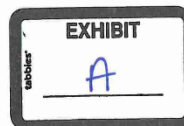
Defendants.

ORDER

On October 5, 2015, came the Plaintiffs by Christopher Regan and J. Zachary Zatezalo, their counsel, the Defendant, Camden Clark Memorial Hospital ("CCMH") by Thomas Hurney, Jr. and Laurie K. Miller, its counsel, and Defendants, Mark Perni, D.O., Jennifer Angelilli, Best Practices of West Virginia and Best Practices, ("Best Practices") by their counsel, Bernard Vallejos, for hearing upon Plaintiffs' Motion to Compel Production of Documents from CCMH and for sanctions. The Court had received and reviewed Plaintiffs' Motion and supporting memorandum, CCMH's Response and memorandum and Plaintiffs' Reply, and multiple exhibits submitted by the parties. Defendant CCMH presented the Court with its Privilege Log (Exhibit 13) and all documents referenced therein and the parties asked the Court to conduct an *in camera* of same and to determine the status of each document/record under Chapter 30 Article 3C as to whether they are properly subject to discovery or confidential.

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PAGE 317
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CAROLE JONES
CLERK CIRCUIT COURT



Having completed its review of each document/record, the provisions of the Health Care Peer Review Organization Protection Act and the decision in *State ex rel. Charles Town General Hospital v. Sanders*, 210 W.Va. 118, 556 S.E.2d 85 (2001) the Court FINDS and CONCLUDES the following documents/records are not privileged and therefore are subject to discovery and shall be disclosed and provided to the Plaintiffs and the Court so ORDERS:

Document Description	Bates number
Letter from BestPractices to CCMC	000006
Letter from BestPractices to CCMC(same document as 000006)	000010
Delineation of Clinical Privileges and Procedures Report	000024-000029
Provider Verification Report	000030-000031
Medical Education/Recertification Form	000037
State License(s) & Certifications	000038
Work History/Insurance Coverage/Disclosure	000043-000050
Work History Report: Mark Perni, DO	000054-000064
State License(s) & Certifications	000077
Insurance Coverage Disclosure & Information/Practice Disclosure	000087-000090
Hospital/Healthy Care Entity Affiliations	000110-000111
Insurance Coverage Disclosure	000116
Practice Disclosure Information	000118-000119
Medical Education/Training/State License(s)	000128-000129
Hospital Affiliations/Experience	000132-000134
Insurance Coverage Disclosure	000138
Practice Disclosure Information	000140-000141

Verification of Medical License	000193/000199-200
W.Va. Board of Osteopath	000207
Hospital Staff Verification	000266
Hospital Staff Verification	000279
Fellowship Verification	000289
Hospital Staff Verification	000290-000291
Hospital Staff Verification	000293-000294
Hospital Staff Verification	000303-000304
Continuing Med. Ed. Hours	000313
AMA Current & Historical Medical Licensure	000334-000337
Osteopathic Physician Profile Report	000338-339/343-344/346-348
AMA Physician Profile	000349-000356
Continuing Med. Ed. Report	000367
Doctor Mastery Summary Abstract	000431
Kroll Criminal Background Report	000455-000458
Provider Verification Report	000469-000471
Query Response Title IV	000475
Hospital Affiliations/Work History	000494-000495
Continuing Med. Ed.	000497
Liability Insurance Information	000499-000505
Curriculum Vitae (David Lindsey)	000506-000518
Screening Certificate of Merit	000519-000521
Liability Insurance Verification	000525
Hospital Staff Verification	000526-000527

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DEFENDING THE PEER REVIEW PRIVILEGE

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Clinical Privileges	000542/551/553
Medical License and other Verifications	000554/556
Medical Education	000568
State License(s)/Certifications/Employment	000569/571/573
Liability Insurance Coverage/Addendum/Disclosures	000576-000580/582
Clinical Privileges	000590
Query Response	000592
Emergency Nurse Practitioner	000595
Provider Verification Report	000597
Clinical Privileges	000598
State License(s)/Certifications/Hospital & Work History	000606-607/609/611-612
Liability Insurance Coverage/Disclosure/Information/Verification	000614-615/617-618/620
HIPAA Education Packet	000636-000640
License Information	000643-000645
Clinical Privileges	000660/665/670/675/680
Kroll Background Search	000688-000695
BestPractices letter	000698
DEA Number	000701
License Information	000704-000706
Receive/Review orientation packet	000728
Emergency Nurse Practitioner	000769
Core Privileges	000775
Admission Register	001275-001276

The documents/records found to be subject to discovery represent about one-seventh of those reviewed by the Court and are nearly all part of the credentialing files of Dr. Perni and Nurse Angelilli. The Court finds these documents/records to be available from original sources extraneous to the credentialing process and as such they are not protected by the health care peer review privilege in accordance with *State ex rel. Shroades v. Henry*, 187 W.Va. 723, 421 S.E.2d 264 (1992). In making this decision the Court has been mindful of the conclusion expressed in *Charles Town General Hospital*: "To the extent that the contested documents are available from original sources extraneous to the medical credentialing process, they are not privileged and are subject to discovery. However, those documents, such as applications for staff privileges, that were generated as part and parcel of the credentialing process are protected by the health care peer review privilege pursuant to the terms of W. Va. Code 30-3C-3." *State ex rel. Charles Town General Hospital v. Sanders, supra*, at p.88 / 121.

The status of several documents was particularly difficult for the Court to determine, including those delineating the clinical privileges of the individual defendants as these documents are closely associated with the credentialing process but where a claim for relief is made against a hospital for negligent credentialing, as in the present civil action, the scope of clinical privileges is so fundamental to the claim to warrant disclosure.

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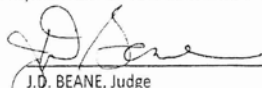
DEFENDING THE PEER REVIEW PRIVILEGE

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In order to allow adequate time for either party to seek appellate review of the Court's decision it is FURTHER ORDERED that the disclosures required by this Order shall be made on or before March 11, 2016.

The Clerk of this Court shall mail certified copies of this Order to all counsel of record.

ENTER: 2-9-2016



J.D. BEANE, Judge

STATE OF WEST VIRGINIA
COUNTY OF WOOD, TO-WIT:

I, CAROLE JONES, Clerk of the Circuit Court of Wood County, West Virginia, hereby certify that the foregoing is a true and complete copy of an order entered in said Court, on the 9 day of Feb 2016, as fully as the same appears to me of record.

Given under my hand and seal of said Circuit Court, this the 11 day of Feb 2016


Clerk of the Circuit Court of
Wood County, West Virginia

By: , Deputy

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

CORTNEY TAYLOR, et al.,

Plaintiffs,

v.

//

CIVIL ACTION NO.: 14-C-2497

MARK PERNI, D.O., JENNIFER ANGELILLI,

CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION,

BEST PRACTICES OF WEST VIRGINIA, INC., BEST PRACTICES, INC.

Defendants.

ORDER

The Court has received and reviewed the Supreme Court of Appeals of West Virginia's recently issued opinion in *State ex rel. Wheeling Hospital, Inc. v. Wilson*, No. 15-0558, February 9, 2016. The decision requires this Court to re-examine its prior order of February 9, 2016, addressing Plaintiffs' Motion to Compel Production of Documents from CCMH and for sanctions. It is important to recognize that the opinion is explicitly intended to provide a clear and precise demarcation of the peer review privilege codified in W. Va. Code 30-3C-1 and must be read in that context and this Court has endeavored to do so.

The decision's core holding is that: "[T]o determine whether a particular document is protected by the peer review privilege codified at W. Va. Code 30-3C-3 (1980), a reviewing court must ascertain both the exact origin and the specific use of the document in question.



The decision describes two classes of privileged documents:

1. Documents that have been created exclusively by or for a review organization;
2. Documents that originate in a review organization and are used solely by such entity in a peer review process.

The decision declares that the second class of documents specifically includes applications for renewal of hospital staff privileges and generally that two distinct types of documents are within this category: (1) documents that evaluate and improve the quality of health care rendered and (2) materials that establish and enforce guidelines designed to keep within reasonable bounds the cost of health care. The former include a review organization's analysis of physicians' procedures and their outcomes.

The decision also addresses more thoroughly the so-called "original source" exception to the statutory privilege and quotes from Syl. Pt. 3, *State ex rel. Shroades v. Henry*, 421 S.E.2d 264: "The language of the statute grants a privilege to all the records and proceedings of a review organization, but no privilege attaches to information, documents or records considered by a review organization if the material is 'otherwise available from original sources.'" Yet it is with respect to this exception that the *Wilson* decision forces this Court substantially to reconsider its prior order. The following language is critical:

Where, however, the peer review committee merely uses information that has been generated or supplied by a source external to the committee, such information is discoverable from the *original, external sources*, but not from the peer review committee itself. *Wilson, supra.* and:

We further hold that, where documents sought to be discovered are used in the peer review process but either the document, itself, or the information contained therein, is available from an original source extraneous to the peer review process, such material is discoverable from the original source, itself, but not from the review organization that has used it in its deliberations. *Wilson, supra*.

This Court's prior order was based on a determination that externally sourced and therefore non-privileged material could properly be obtained from a review organization and a party seeking such non-privileged material need not obtain it from a "non-privileged source". This Court, evidently wrongly, concluded that the statute demarks privileged material not privileged sources and that to require a party seeking disclosure of non-privileged information to obtain it from various and sundry entities when a review organization of a party defendant is in possession of it unnecessarily increases the time, effort and cost of discovery.

Upon this Court's review of the documents found in its prior order not to be privileged and subject to discovery, several documents clearly are privileged under *Wilson*, namely those delineating clinical privileges and applications for hospital staff privileges. These include documents numbered: 000024-000029, 000542/551/553, 000590, 000598, 000660/665/670/675/680, and 000775.

It appears to the Court that most of the remaining documents are subject to discovery from their original source but not from the subject review organization – CCMH's credentialing and other peer review committees. In addition, the *Wilson* decision demands a more comprehensive privilege log which must now include both (1) the origin of each and every

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DEFENDING THE PEER REVIEW PRIVILEGE

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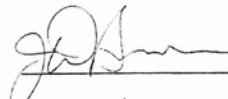
document, with specific information as to whether it was created solely for or by a review committee and (2) every document's use, with disclosures as to whether or not it was used exclusively by such committee. The existing privilege log does not comply with the requirements of *Wilson* and does not contain sufficient information for the Court to make its *in camera* review. It is therefore ORDERED that the defendant, Camden-Clark Memorial Hospital, shall submit a privilege log to this Court and to the plaintiffs as to all documents not yet found privileged which log must include specific information regarding the origin of each document, whether it has been used by any entity other than a peer review or credentialing committee, whether it was created solely for or by a review committee, the specific use of each document with disclosures as to whether or not the document was, in fact, used exclusively by such committee; the privilege log shall be submitted on or before March 31, 2016.

It is further ORDERED that the prior order of this Court entered on February 9, 2016, shall be stayed until further order of this Court.

The Clerk of this Court shall mail copies of this order to all counsel of record.

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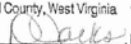

J.D. BEANE, Judge

STATE OF WEST VIRGINIA
COUNTY OF WOOD, TO-WIT:

I, CAROLE JONES, Clerk of the Circuit Court of Wood County, West Virginia, hereby certify that the foregoing is a true and complete copy of an order entered in said Court, on the 23 day of Feb 2016, as fully as the same appears to me of record.

Given under my hand and seal of said Circuit Court, this the 23 day of Feb 2016


Clerk of the Circuit Court of
Wood County, West Virginia

By: , Deputy

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

DONNA BAILEY and MARK BAILEY,
Individually and as parents and next friends
of HEIDI BAILEY,

Plaintiffs,

v.

Civil Action No. 15-C-298
The Honorable Jason A. Wharton

PETER FILOZOF, M.D. and CAMDEN
CLARK MEMORIAL HOSPITAL
CORPORATION, a West Virginia corporation,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION TO COMPEL

On November 28, 2016, the parties, by counsel, appeared for a hearing on *Plaintiffs' Motion to Compel*. Laurie K. Miller of Jackson Kelly, PLLC, appeared on behalf of Defendant Camden-Clark Memorial Hospital Corporation, and Zak Zatezalo of Bordas & Bordas, appeared on behalf of Plaintiffs Dona and Mark Bailey.

Plaintiffs' motion to compel seeks production of certain documents from Camden-Clark Memorial Hospital Corporation's credentialing and peer review files that are listed on its privilege log that was filed in this case. Plaintiffs brought to the hearing on this matter a highlighted list of the documents they seek from these files. (Tr. at 4:7-19.) In addition, Plaintiffs described certain general categories of documents they seek from the peer review and credentialing files including 1.) activity summaries or delineations of privileges (Tr. at 3:24-25); 2.) statistical information (Tr. at 6:13-) including individual physician complication rates (Tr. at 15:11-19) and 3.) incident reports, occurrence reports and/or patient grievances. (Tr. at 15:20-22). Plaintiffs ask this court for an *in camera* review of all of the documents on Defendant's privilege log. (Tr. at 5:13.)

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PAGE 486
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CAROLE JONES
CLERK CIRCUIT COURT



Camden-Clark asserts that both the West Virginia peer review statute codified at W. Va. Code § 30-3C-1 *et seq.* and the West Virginia Supreme Court of Appeals opinions in *State ex rel. Wheeling Hosp., Inc. v. Wilson*, 236 W. Va. 560, 782 S.E.2d 622 (2016); and *State ex rel. Charles Town Hospital v. Sanders*, 210 W.Va. 118, 556 S.E.2d 85 (2001) protect the documents and files on its privilege log from production in this case. (Tr. at 8:16-25; Tr. at 22-23.)

After considering lengthy oral argument by counsel and both parties' briefs as well as relevant West Virginia statutory and case law, the Court now finds as follows:

1. The documents listed on Defendant, Camden-Clark Memorial Hospital Corporation's privilege log in this case have been appropriately withheld from discovery based upon the peer review privilege. (Tr. at 40:15-21.)

2. The statistical information concerning Dr. Filozof requested by the Plaintiffs in this matter (including delineations of privileges, complication rates and other physician specific statistics) is used exclusively for credentialing and re-credentialing and is not available from another source outside the peer review credentialing committee and its associated files. (Tr. at 40:22-25, 41:1-5.)

3. Additionally, with regard to occurrence reports, incident reports and/or patient grievances, the Court finds that those too are generated and used exclusively for peer review processes and are not discoverable in this matter. (Tr. 41:3-5.)

4. Because the Court finds that the categories of documents Plaintiffs seek from the Camden-Clark's privilege log were created exclusively as part of the peer review process and were appropriately withheld from production in this matter based on that privilege, no *in camera* review of the documents on Defendants' log is required. See *State ex rel. Wheeling Hosp., Inc. v. Wilson*, 236 W. Va. 560, 782 S.E.2d 622 (2016).

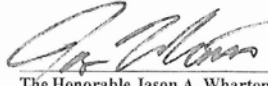
5. The Court notes that prior to the *Wheeling Hospital* decision, Camden-Clark produced to the Plaintiffs all non-privileged "original source" materials listed on its privilege log that would be available from another source outside the peer review and credentialing files and provided Plaintiffs a highlighted log showing all documents that were produced. (Tr. at 18:20-25; 19:1-6.) This Court finds no basis to order any additional production in this matter.

Accordingly, it is therefore **ORDERED** that Plaintiffs' Motion to Compel be, and the same is hereby, **DENIED**.

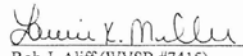
The Court notes all exceptions and objection(s) raised by counsel regarding this Order. The Clerk is directed to send a certified copy of this Order to all counsel of record.

IT IS SO ORDERED.

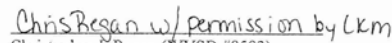
ENTERED this 17th day of January, 2017.


The Honorable Jason A. Wharton

Prepared by:


Rob J. Aliff (WVSB #7415)
Laurie K. Miller (WVSB #8826)
John M. Huff (WVSB # 11043)
JACKSON KELLY PLLC
Post Office Box 553
Charleston, West Virginia 25322
Office: (304) 340-1000
Facsimile: (304) 340-1050
Counsel for the Defendant


Approved by:

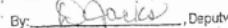

Christopher J. Regan (WVSB #8593)
J. Zachary Zatezalo (WVSB #9215)
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Office: (304) 242-8410
Facsimile: (304) 242-3936
Counsel for Plaintiffs

STATE OF WEST VIRGINIA
COUNTY OF WOOD, TO-WIT:

I, CAROLE JONES, Clerk of the Circuit Court of Wood County, West Virginia, hereby certify that the foregoing is a true and complete copy of an order entered in said Court, on the 17 day of January, 2017, as fully as the same appears to me of record.

Given under my hand and seal of said Circuit Court, this the 18 day of Jan, 2017.


Clerk of the Circuit Court of
Wood County, West Virginia

By: , Deputy

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DEFENDING THE PEER REVIEW PRIVILEGE

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IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

JUSTIN HARRISON and BRITTANY HARRISON,
Individually and as parents and next friends of
CARSON HARRISON and NOAH HARRISON,

Plaintiffs,

CIVIL ACTION NO. 15-C-307
The Honorable Jeffrey B. Reed

v.

CAMDEN CLARK MEMORIAL
HOSPITAL CORPORATION, a
West Virginia Corporation,

Defendant.

CONNIE J. CUNNINGHAM, as Administratrix
and personal representative of
the Estate of CHASE ENOCH, deceased,

Plaintiff,

v.

Civil Action No. 15-C-308
The Honorable Robert A. Waters

CAMDEN CLARK
MEMORIAL HOSPITAL CORPORATION,
a West Virginia Corporation,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO
COMPEL AND DEFENDANT'S MOTION FOR PROTECTIVE ORDER

On May 31, 2016, the parties, by counsel, appeared for a hearing on *Camden-Clark Memorial Hospital Corporation's Motion for a Protective Order* and *Plaintiffs' Cross-Motion to Compel*. Laurie K. Miller of Jackson Kelly, PLLC, appeared on behalf of Defendant Camden-Clark Memorial Hospital Corporation, and Christopher J. Regan of Bordas & Bordas, appeared on behalf of Plaintiffs Justin Harrison, Britany Harrison, and Connie J. Cunningham.

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CAROLE JONES
CLERK OF COURT

After review of the parties' briefs and oral argument of counsel, the Court finds the following:

1. Plaintiffs make take the personal depositions of Fred Ervin and Susan Dearman.

2. Investigation into the peer review process at Camden-Clark Memorial Hospital in the form of Rule 30(b)(7) witness depositions may proceed as requested by Plaintiffs. Actual documents maintained as part of the peer review process, including any conclusions or outcomes that were developed in the course of peer review are privileged, as is any testimony concerning the same, pursuant to West Virginia Code § 30-3C-1 *et seq.*, and shall therefore not be produced or referenced. The Court is deferring an *in camera* review of the putative peer review documents on the privilege log at this time. Plaintiffs may request such review after the relevant depositions are completed.

3. Documents related to "Healthcare Associated Infections" and "Infectious Disease" are not relevant to this matter absent some evidence by the Plaintiffs that the three infants contracted enterovirus at Camden Clark Medical Center. Plaintiffs may make a submission on that issue at a later time.

Accordingly, it is therefore **ORDERED** that Camden-Clark Memorial Hospital Corporation's *Motion for a Protective Order* is **GRANTED** in part and Plaintiffs' *Cross-Motion to Compel* is **DENIED** in part as set forth above. The Court notes all exceptions and objection(s) raised by counsel regarding this Order.

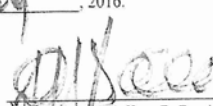
The Clerk is directed to send a certified copy of this Order to all counsel of record in Civil Action Nos. 15-C-307 and 15-C-308.

2017]

DEFENDING THE PEER REVIEW PRIVILEGE

65

IT IS SO ORDERED


ENTERED this 13th day of July, 2016.

 The Honorable Jeffrey B. Reed

Prepared by:


 Thomas J. Hurney, Jr. (WVSB #1833)
 Laurie K. Miller (WVSB #8826)
 JACKSON KELLY PLLC
 Post Office Box 553
 Charleston, West Virginia 25322
 Office: (304) 340-1000
 Facsimile: (304) 340-1050
 thurney@jacksonkelly.com
 lmiller@jacksonkelly.com
 Counsel for Defendant

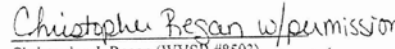
 STATE OF WEST VIRGINIA
 COUNTY OF WOOD, TO-WIT:

I, CAROLE JONES, Clerk of the Circuit Court of
 Wood County, West Virginia, hereby certify that
 the foregoing is a true and complete copy of an
 order entered in said Court, on the 14 day of
July, 2016, as fully as the same appears
 to me of record.

Given under my hand and seal of said Circuit
 Court, this the 15 day of July, 2016.

 Clerk of the Circuit Court of
 Wood County, West Virginia

 By: , Deputy

Approved by:


 Christopher J. Regan (WVSB #8593)
 J. Zachary Zatezalo (WVSB #9215) by ZKM
 BORDAS & BORDAS, PLLC
 1358 National Road
 Wheeling, WV 26003
 Telephone: (304) 242-8410
 Facsimile: (304) 242-3936
 Counsel for Plaintiffs