Protecting Your Peer-Review Rights

ACR’S COUNSEL ELABORATE ON LEGAL ISSUES WITHIN THE FEDERAL AND LOCAL PEER-REVIEW PROCESSES.

The ACR General Counsel’s Office and the Quality and Safety Department are often asked whether RADPEER™ materials can be subpoenaed or “discovered” in court. As with most legal matters, the answer is more complicated than a simple “yes” or “no.”

The American Medical Association (AMA) and many other bodies take a narrow view of the medical peer-review process. The AMA defines it as “the process by which a professional review body considers whether a practitioner’s clinical privileges or membership in a professional society will be adversely affected by a physician’s competence or professional conduct.”

While this definition may have sufficed in the initial uses of peer review within a hospital, the College and many states now take a much broader view. Peer review matters for the ACR because all sites initially applying for or renewing their accreditation must be active participants in a physician peer-review program. Thus, RADPEER, or an equivalent program, is required for accreditation (except for mammography and image-guided biopsy programs). And because Medicare will require accreditation for advanced diagnostic imaging as of Jan. 1, 2012, the link between peer review and quality care is even more critical.

Since the purpose of peer review is to assess competency and promote quality treatment and patient safety, logically, it should be conducted on a regular basis at lower levels and in many places other than the traditional hospital setting. For example, in radiology alone, freestanding diagnostic imaging, interventional treatment, and radiation oncology centers now provide many services that hospitals had previously exclusively provided.

To ensure that participants in the peer-review process can express their opinions freely without fear that the peer whom they are reviewing will be able to retaliate against them or that a patient may use their peers’ comments or analysis for a claim or lawsuit against them, medical professionals have sought statutory protections against such uses of peer-review materials. Unfortunately, the key federal peer-review law, the Health Care Quality Improvement Act of 1986, only provides protection to members and staff of professional review bodies that meet certain requirements.

Reviewing State and Local Law

Protection for practice-level, peer-review activities is governed primarily by state law. At that level, most attention is properly focused on ensuring that the process is confidential and that the results are not subject to legal discovery or admissible in court. The College and its Virginia chapter were successful in placing language in the state’s peer-review law that specifically protects ACR peer-review programs and materials. The 2006 Virginia Code § 8.01-581.17 – Privileged communications of certain committees and entities, states that “… Additionally, for the purposes of this section, accreditation and peer-review records of the American College of Radiology and the Medical Society of Virginia are considered privileged communications.”

This statement means that a Virginia court will normally not order disclosure of such information during a lawsuit.

When a lawsuit is filed in another state seeking ACR peer-reviewed materials, that plaintiff may obtain a court order directing the College to disclose the information but then must ask a Virginia court to enforce that order. The Virginia court applies Virginia law and thus should refuse to enforce the other state’s order.

We have succeeded with this strategy both in lawsuits filed in Virginia and those filed in other states’ courts that seek to enforce their disclosure orders against the College via the Virginia courts. However, with RADPEER, the ACR does not retain any physician or patient identifiable data, and once the plaintiffs’ attorneys realize this fact, they almost always drop their request for information.

The problem may arise when a plaintiff files an action in your state seeking RADPEER materials in your possession. Depending on the wording of the law in your state, the courts may be able to order your practice to disclose such data. The same is true for information produced by other similar peer-review programs. The key factor in most cases is usually the scope of the state peer-review protection, not the specific program.

The College has frequently championed peer review as a means of achieving safe, high-quality patient care and understands the necessity of protecting participants in this process. Now that many payers require participating physicians and practices to have peer-review programs, and the federal government will soon do so as well, the ACR is working with its state radiology societies, state medical societies, and the AMA to strengthen and enforce state and federal peer-review protections.

Bill Shields, J.D., LL.M., CAE (bshields@acr.org), is ACR general counsel. Tom Hoffman, J.D., CAE (thoffman@acr.org), is ACR associate general counsel.

ENDNOTES