THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
IDC QUARTERLY

Medical Malpractice Update

Edna L. McLain
HeplerBroom LLC, Chicago

Context is the Key: Understanding When Incident Reports are Privileged Under the Long Term Care Peer Review and Quality Assessment and Assurance Protection Act

When defending a hospital or nursing home, chances are you will grapple with the decision to produce or not produce incident reports. While several courts have analyzed whether hospital incident reports are protected from discovery under the Medical Studies Act, 735 ILCS 5/8-2101, a recent opinion from the Illinois Appellate Court Second District is the first to analyze whether the Long Term Care Peer Review and Quality Assessment and Assurance Protection Act ("Quality Assurance Act"), 745 ILCS 55/1, *et. seq*., affords similar privileges for nursing homes. *Lindsey v. Butterfield Health Care II, Inc.,* 2017 IL App (2d) 160042. The court emphasized that the context and timing of the report's generation is the key.

In *Lindsey*, the Second District considered whether the trial court erred in ordering the defendant nursing home to disclose various documents, including an incident report and six written witness statements prepared during an internal investigation following a resident's slip and fall, which the defendant asserted were privileged under the Medical Studies Act and the Quality Assurance Act. *Lindsey*, 2017 IL App (2d) 160042, ¶¶ 3-7. Because both statutes contained similar language and covered similar subject matters, the court concluded that, under the *in pari materia* doctrine, both statutes should be interpreted harmoniously. *Id*. ¶ 11.

The Medical Studies Act states, in pertinent part, that

> [a]ll information, interviews, reports, statements, memoranda, recommendations, letters of reference or other third party confidential assessments of a health care practitioner's professional competence, or other data of…committees of licensed or accredited hospitals or their medical staffs…or their designees (but not the medical records pertaining to the patient), used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care or increasing organ and tissue donation, shall be privileged, strictly confidential…

735 ILCS 8/2101. It further states that such information "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." 735 ILC 5/8-2102. Similarly, the Quality Assurance Act provides that the proceedings, communications, and records of a peer review or a quality assessment and assurance committee shall be privileged and confidential and "shall not be subject to discovery or introduction into evidence in any civil action." 745 ILCS 55/4.

Given the limited case law interpreting and analyzing the Quality Assurance Act, the Second District looked to a number of cases discussing the purpose and limits of the Medical Studies Act. *Lindsey*, 2017 IL App (2) 160042, ¶ 13. First, the court noted that the Medical Studies Act's purpose is "to encourage candid and voluntary studies and programs

used to improve hospital conditions and patient care or to reduce the rates of death and disease." *Id.* ¶ 12. Without a statutory privilege over the proceedings and documents generated during the peer-review process, it is believed that physicians would be reluctant to have candid discussions about their colleagues. *Id.* However, the court noted that the statutory privilege had its limits even under the Medical Studies Act.

The Second District considered the Illinois Supreme Court's decision in *Roach v. Springfield Clinic* and the First District's decision in *Chicago Trust Co. v. Cook County Hosp.*, to determine whether the Medical Studies Act's statutory privilege extended to documents generated and information gathered before the peer-review process began. *Roach v. Springfield Clinic*, 157 Ill. 2d 29, 41 (1993); *Chicago Trust Co. v. Cook County Hosp.*, 298 Ill. App. 3d 396, 401 (1st Dist. 1998). In *Roach*, the defendant asserted that conversations between the hospital's chief of anesthesiology and the nursing staff before the peer-review committee met were privileged. *Roach*, 157 Ill. 2d at 40. In *Chicago Trust*, the defendant asserted certain incident and situation reports prepared by hospital staff after a patient's ventilator became disconnected were privileged under the Medical Studies Act because the reports were part of the review by the "Hospital Oversight Committee," which was part of the quality assurance process. *Chicago Trust Co.*, 298 Ill. App. 3d at 403.

The appellate court acknowledged these decisions supported the proposition that documents generated specifically for a peer-review committee are privileged, but clarified that documents prepared, or information generated before a peer-review committee had been initiated would not be protected by the Medical Studies Act. *Lindsey*, 2017 IL App (2d) 160042, ¶ 12. Further, simply providing information and documents to the peer review committee after its investigation began would not extend the privilege to such previously prepared and generated information. *Id*. ¶ 16. To allow otherwise "would make everything confidential, except for the patient's own medical records." *Id*. ¶ 17, *citing*, *Chicago Trust*, 298 Ill. App. 3d at 406.

In this context, the Second District considered the nursing home's arguments in *Lindsey* asserting privilege under both the Medical Studies Act and Quality Assurance Act for the incident report and six witness statements. The defendant's nursing home administrator provided an affidavit asserting that the incident report and witness statements were prepared pursuant to the nursing home's quality assurance protocols, which required the completion of "internal quality-assurance-investigation reports relating to incidents or accidents involving resident injuries." *Id.* ¶¶ 4-7. The quality assurance committee and/or the fall committee used these reports "to determine ways that the risk of resident falls might be reduced." *Id.* ¶ 4. Absent these quality assurance protocols, the defendant argued that these documents would not otherwise have been generated. *Id*. ¶ 17.

The court dismissed these arguments and found that the documents were similar to the type at issue in *Roach* and *Chicago Trust* and that the documents were generated before any peer-review committee process had started. *Id.* Therefore, the court found no privilege existed under either the Medical Studies Act or the Quality Assurance Act and affirmed the trial court's rulings and remanded for further proceedings. *Id*. ¶ 21.

Practice Pointers

The court's decision in *Lindsey* turned on timing and context. Therefore, when evaluating whether to produce incident reports and witness statements in the context of nursing home and hospital litigation, it is critical to know your organization's policies and procedures concerning the creation and generation of incident reports, as well as statements following an accident involving a resident or patient. You need to know whether your organization-client has a written policy and procedure stating that an incident report following a resident or patient injury is required by a quality assurance

or other peer review committee. If such a policy exists, you need to determine when the report and investigation was initiated and by whom. Best practice dictates that you interview the person(s) who prepared the report and other supporting documents to determine if the report and investigation conducted complied with the organization's written policy and procedure. Likewise, a designated individual from the committee should prepare an affidavit in anticipation of interrogatories and document requests seeking production of incident reports and statements. The affidavit should state that the person who initiated the investigation is a member of the committee with authority to start the investigation, that the report and any witness statements were generated at the request of a quality committee, that the policy mandating a report was followed, and that the results were provided to the quality committee. In responding to discovery requests, a Illinois Supreme Court Rule 201(n) privilege log, asserting the privileges under the Medical Studies Act or Quality Assurance Act, should also be drafted in order to begin building a record in advance of any motion to compel.

About the Author

Edna L. McLain is an associate attorney of *HeplerBroom LLC*. Ms. McLain graduated from the University of Illinois, Champaign-Urbana, in 1991, with a Bachelor of Arts degree in English, and she received her Juris Doctorate from the Saint Louis University School of Law in 2002. She is admitted to the bars of Illinois, Missouri and Wisconsin and the U.S. District Court of the Northern District of Illinois. Ms. McLain focuses her practice in the areas of medical malpractice, insurance defense and toxic torts. She is a member of the Illinois Association of Defense Trial Counsel.

About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.iadtc.org or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, idc@iadtc.org.