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RECENT SJC PEER REVIEW CASE -
BOARD OF REGISTRATION IN MEDICINE V. HALLMARK HEALTH
CORPORATION

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On August 11, 2009, the Massachusetts Supreme Judicial Court (SJC) issued its long-awaited decision in the case of *Board of Registration in Medicine v. Hallmark Health Corporation*, No. SJC-10297. This case concerned the attempt by the Massachusetts Board of Registration in Medicine (BRM) to access information contained in a physician's credentialing files, *prior* to the BRM's commencing an adjudicatory proceeding against the physician. The BRM issued investigatory subpoenas on the hospitals which were in possession of the credentialing files, seeking documents related to the physician's credentialing, employment, and competence to practice medicine, as well as incident reports and complaints. The hospitals opposed the subpoenas, asserting that the materials were privileged and protected from disclosure under the Massachusetts peer review statutes, Massachusetts General Laws, Ch. 111, §§204(a) and 205(b). The hospitals did produce a "privilege log" which contained brief descriptions of documents from the physician's credentialing files that were responsive to the BRM's request.

Under §204 the "proceeding, reports and records" of medical peer review committees in Massachusetts are confidential, privileged, and generally not accessible by anyone, including the BRM except after it has initiated an adjudicatory proceeding with the issuance of a statement of allegations against a particular physician. With §205, the Massachusetts legislature extended the §204(a) protections to materials that, while not necessarily "proceedings, reports and records" of a medical peer review committee, are nonetheless "necessary to comply with risk management and quality assurance programs established by the [BRM] and which are necessary to the work product of medical peer review committees." In effect, §205(b) extends §204(a) protections to Qualified Patient Care Assessment Program materials.

A trial court judge had granted summary judgment to the hospitals, thus denying the BRM access to the credentialing materials. However, on appeal the SJC ruled that the §205(b) protections are not co-extensive with those of §204(a), because of what it found to be "unambiguous language" of §205(b) leaving "no doubt that the Legislature intended that the board would have access to materials protected only by § 205 (b)." As the SJC observed: "Section 205 (b) specifically provides that documents protected by that statute 'may be inspected, maintained and utilized by the [board], including but not limited to its data repository and disciplinary unit,' and it does not

require that such access be conditioned on the commencement of a formal adjudicatory proceeding.”

The SJC remanded the case back to the trial court “for an individualized consideration” of whether each of the documents listed on the hospitals’ privilege log falls within the §204(a) or the §205(b) protection, with the burden being on the hospitals to establish that each document is privileged. The SJC observed that “[w]here the files include, among other things, [the physician]’s curriculum vitae and a copy of his medical license, as well as ‘information collected or compiled by a physician credentialing verification service’ [quoting from §205(b)], it is clear enough that not all of those materials are ‘proceedings, reports and records’ of a peer review committee, and that at least some of the materials should therefore be provided to the board.”

This case underscores the importance of having regard for those records in a hospital’s files which are created by, for, or otherwise as a result of a medical peer review committee, in which case the broader privilege of §204(a) would apply. The case also suggests that when responding to BRM investigative subpoenas, hospitals must closely and individually examine each document in their files to determine which statutory protection category it falls under, if it carries a privilege at all. This process can benefit from expert professional and legal input.

Disclosure: The author was co-author of an *amicus curiae* brief submitted in this case on behalf of the Professional Liability Foundation, Ltd. in support of the hospital’s position.