

Massachusetts High Court Sides with Board of Registration in Medicine Over Scope of Peer Review Privilege

On August 11, 2009, the Massachusetts Supreme Judicial Court announced its decision in the case of *Board of Registration in Medicine v. Hallmark Health Corporation, et al.* In light of the decision, Massachusetts hospitals may wish to review their policies and procedures regarding the creation and retention of records involving physician qualifications given the court's clarification of the scope of the Board's power to subpoena such records.

At the trial court level, Hallmark Health had argued successfully that documents obtained or created by it during the credentialing process were protected from disclosure in response to investigative subpoenas issued by the Disciplinary Unit of the Board of Registration in Medicine (Board)—because those records could be categorized as being “necessary to comply with [the hospital's] risk management and quality assurance programs and ‘necessary to the work product’ of one or more of its designated peer review committees.” The Supreme Judicial Court has now reversed the trial court decision and remanded the case to the trial court for a document by document analysis in accordance with its opinion.

In reversing the trial court's decision, the Supreme Judicial court opined that there are two categories of peer review protected material. Certain materials reflecting the contents of proceedings of a hospital's medical peer review committee—such as the actual reports and records of such proceedings—may be obtained by the Board only after the commencement of adjudicatory proceedings seeking disciplinary action. In contrast, materials that may be deemed “less central” to the peer review process—such as incident reports and materials compiled by a credentialing service—may be obtained by the Board at an earlier stage while its disciplinary unit is still evaluating whether to pursue disciplinary action as a result of a complaint against a physician.

Although the Supreme Judicial Court did not clearly identify the boundaries of this “less central” distinction, it provided guidance to the trial court and to other health care organizations likely to face the same issues in the future. Specifically, the court adopted the qualification, articulated in an earlier lower court opinion, that documents must have been created “by, for, or otherwise as a result of a ‘medical peer review committee’” in order to be capable of being withheld in the face of an investigative subpoena from the Board. The court further suggested that documents that may have been generated by other components of a qualified patient care assessment program or obtained from other sources will not be protected from disclosure to the Board notwithstanding that they may have been presented to a peer review committee for its consideration.

As noted above, Massachusetts hospitals may wish to review their policies and procedures in the wake of the court's decision. Amendments to such policies and procedures may reduce difficulties in responding to future subpoenas from the Board.

For more information on this, please contact your usual Ropes & Gray advisor.