RECENT DEVELOPMENTS IN MEDICINE AND THE LAW

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This article discusses recent developments in three areas, all of which relate to discovery in medical malpractice cases. The first topic is claims of spoliation in the context of medical malpractice. The second topic is the evolving peer review privilege and its limitation or expansion by state courts. Finally, we discuss two important cases in which state courts have interpreted HIPAA's privacy rules and applied them in the context of ex parte communications with treating physicians and pre-suit discovery of a plaintiff's medical information.

I. CLAIMS OF SPOLIATION OF EVIDENCE IN MEDICAL MALPRACTICE CASES

Claims of spoliation, or destruction of evidence, seem to be playing an increasing role in medical malpractice lawsuits, especially as technological advances in medical record keeping and equipment enhance health care providers' ability to record and maintain a patient's medical information. While state courts may differ, recent case law suggests that litigants across all jurisdictions are pushing courts to impose greater sanctions—such as default judgments or striking of pleadings—under a wider variety of circumstances. However, another commonality among state courts is their preference to resolve cases on the merits, which requires them to balance this preference with the potential prejudice caused by the missing evidence. All of these issues are addressed in the case summaries below. The first issue we address is notice and the question of when the duty to preserve evidence is triggered. We next address recent attempts by litigants to expand the definition of spoliation from "intentional" to "negligent" destruction of evidence.

A. *Notice Requirement: When Is the Legal Duty to Preserve Evidence Triggered?*

The Supreme Court of Georgia recently expanded a party's duty to preserve evidence by holding that actual notice of pending or potential litigation is not required; rather, the duty is triggered when a party knows or reasonably should know that the injured party is contemplating litigation.[1] In so holding, the court expressly disapproved of the Georgia Court of Appeals' reasoning in another recent case in which it affirmed the trial court's denial of a spoliation instruction. In that case, a device used during a medical procedure was replaced before the defendant received notice of litigation.[2]

1. Phillips v. Harmon, 774 S.E.2d 596, 604 (Ga. 2015).
2. *Id.* at 604–05 (citations omitted).

In *Hand v. South Georgia Urology Center, P.C.*, the plaintiff underwent transurethral microwave thermotherapy to treat his enlarged prostate.[3] In performing the procedure, the defendant urologist used a Targis System device, which included a thermometer component that monitored the temperature of the prostate gland and automatically stopped the procedure if the temperature reached a certain level.[4] The urologist later determined that the procedure burned a hole between the plaintiff's rectal and urethral tissues, causing a rectal-urethra fistula.[5] As a result, the plaintiff and his wife filed a medical malpractice claim, alleging that the defendant failed to ensure that the thermometer was properly positioned.[6]

The defendant claimed that the device had malfunctioned in this and subsequent procedures.[7] As a result, the manufacturer retrieved the device and replaced it with a new one three months after the plaintiff's procedure.[8] After the defendant learned of the plaintiff's injury, he claimed to have "lost faith" in the device and stopped using it completely.[9] The trial court returned a verdict for the defendant, and on appeal the plaintiffs contended that the court erred in failing to give a spoliation instruction because the device used during the plaintiff's surgery was no longer available.[10]

The court first noted that "spoliation refers to the destruction or failure to preserve evidence that is necessary to *contemplated or pending litigation*."[11] Notice of the injury alone did not constitute sufficient notice.[12] Ultimately, the court determined that the defendant had no notice that the plaintiffs were contemplating litigation when the device was replaced, and thus the court did not err in rejecting the spoliation instruction.[13]

Shortly thereafter, the Supreme Court of Georgia reexamined the notice issue in *Phillips v. Harmon* and held that a hospital's duty to preserve evidence may begin upon its own belief in forthcoming litigation.[14] Specifically, by conducting an internal investigation following injury to a newborn child, the hospital may have triggered a legal duty to preserve potential evidence.[15]

3. 769 S.E.2d 814, 816 (Ga. Ct. App. 2015), *disapproved by* Phillips v. Harmon, 774 S.E.2d 596 (Ga. 2015).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 817.
9. *Id.* at 816–17.
10. *Id.* at 817, 820.
11. *Id.* at 820.
12. *Id.*
13. *Id.* at 821.
14. 774 S.E.2d 596, 604 (Ga. 2015).
15. *Id.* at 605.

The plaintiffs alleged that the defendant hospital and its providers were negligent in failing to notice the signs of fetal distress following her child's birth.[16] Although the hospital maintained medical records electronically, the nurses took notes on paper fetal monitor strips during labor and delivery.[17] The strips were not considered part of the official record, but the nurses referred back to them to complete the official record.[18] The hospital maintained the strips for thirty days post-delivery and routinely destroyed them.[19] The strips at issue were destroyed pursuant to hospital procedure.[20]

According to the plaintiffs, the strips at issue were critical to their claim regarding the promptness of treatment, and the destruction of the strips warranted a spoliation instruction.[21] Further, they claimed that the defendants had notice of litigation because the hospital launched an internal investigation pursuant to its "Sentinel Events Policies" after the event.[22] The trial court declined to give a spoliation instruction because the defendants had "no knowledge or notice of potential litigation," and the court of appeals affirmed the denial.[23]

The court determined that a duty to preserve evidence arises when the defendant knows or reasonably should know that the injured party is contemplating litigation.[24] Thus, courts should consider what the defendant did or did not do in response to the injury, including the extent of any internal investigations.[25] The court noted that the appellate court had upheld the trial court's ruling based on the "legally incorrect premise that a defendant's duty to preserve only required notice of a claim or litigation *from the plaintiff*, i.e., actual notice, without regard to other circumstances."[26] As a result, the court reversed and remanded the case.[27]

B. *Intentional Versus Negligent Destruction of Evidence*

In *Cloninger v. Chen*, the Court of Appeals of Washington refused to expand the definition of spoliation to include negligent, as well as intentional, destruction of evidence and held that the trial court properly denied a spoliation instruction in a wrongful death case involving a vital sign monitor.[28]

16. *Id.* at 603.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 604.
23. *Id.*
24. *Id.*
25. *Id.* at 605.
26. *Id.*
27. *Id.*
28. No. 31833-8-III, 2014 WL 6601997, at *3–4 (Wash. Ct. App. Nov. 20, 2014).

The case arose out of the death of Cloninger, who suffered brain damage during a routine lithotripsy procedure.[29] Following a challenging extubation process, Cloninger suffered a laryngospasm and began to asphyxiate.[30] The defendant anesthesiologist unsuccessfully attempted to reintubate Cloninger, who was eventually reintubated by another anesthesiologist.[31] Despite Cloninger's vital signs eventually being restored, he later died due to brain damage.[32]

Throughout the event, a Datascope machine monitored Cloninger's vital signs.[33] This machine had the capacity to record data; however, it operated in "real time" mode, which displayed—but did not record—vital signs.[34] Additionally, the hospital had a policy of resetting Datascopes before their next use, as they did in this instance.[35] The plaintiff learned through the discovery process that no Datascope records existed and sought a spoliation instruction at trial.[36] The trial court refused to give the instruction.[37]

The court noted that in past decisions, spoliation had been defined as "the intentional destruction of evidence."[38] Further, to determine whether a sanction is appropriate, courts have examined "the importance of the evidence and the culpability of the party that destroyed the evidence."[39] The plaintiff argued on appeal that the court should expand the definition of spoliation to include negligent destruction of evidence, relying on the holding in *Henderson v. Tyrell*, where the court essentially used a negligence standard in determining whether a spoliation instruction was appropriate.[40]

The court found it unnecessary to determine whether Washington recognized a negligent standard.[41] In looking at the facts, the court determined the machine was set on "display only," and the defendant anesthesiologist was not even aware that it could record and print data.[42] Further, there was no evidence that the machine was ever recording the decedent's vital signs so it would have been "mere speculation" to believe that information would have been obtained if hospital personnel had printed the re-

29. *Id.* at *1.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at *3.
36. *Id.* at *2.
37. *Id.*
38. *Id.* at *3.
39. *Id.* (citing Sweet v. Sisters of Province in Wash., 895 P.2d 484, 492 (Alaska 1995)).
40. *Id.* at *3 (citing Henderson v. Tyrrell, 910 P.2d 522, 542 (Wash. Ct. App.1996), *as amended on denial of reconsideration* (Mar. 14, 1996)).
41. *Id.*
42. *Id.*

cords.[43] Thus, because the plaintiff failed to show that evidence existed that could have been preserved, there could be no determination that the defendants had a duty to preserve.[44]

C. *Prejudicial Effect of the Missing Evidence*

In determining whether to sanction a party for spoliation of evidence, courts consider whether the missing evidence results in the plaintiff's inability to prosecute his or her case. As discussed in the following cases, however, if the plaintiff has access to other records, witnesses, or other means to obtain the information, courts are less willing to issue sanctions. If plaintiffs can show that the missing evidence disrupts their ability to prove certain facts, even if not essential to their case, sanctions are more likely to result.

In *Weiss v. Bellevue Maternity Hospital*, a New York appellate court upheld the lower court's denial of a motion to strike the defendant's answer on the grounds of spoliation of evidence where medical records were destroyed pursuant to a policy of the hospital's successor.[45]

The plaintiff filed a medical malpractice action against the defendant hospital alleging that the defendant's failure to timely deliver her child resulted in profound hypoxic brain injury, rendering him permanently disabled.[46] During discovery, the plaintiff learned that the labor and delivery records were destroyed pursuant to the records retention policy of the hospital's successor.[47] The hospital retained adult records for six years following discharge and retained infant records until the child turned twenty-one, as required by law.[48] The plaintiff's labor and delivery records were considered to be part of the mother's records and were not separated from other birth records prior to destruction.[49]

The court determined there was no indication that the hospital acted maliciously or in bad faith in discarding the records, but instead was acting in the regular course of business.[50] Further, the plaintiffs failed to establish that the unavailability of labor and delivery records resulted in an inability to prosecute their case because they had access to other pertinent records and had the opportunity to depose the OB/GYN and hospital personnel.[51] Thus, the lower court did not abuse its discretion in declining to strike the defendant's answer.[52]

43. *Id.*
44. *Id.*
45. 121 A.D.3d 1480, 1481–82 (N.Y. App. Div. 2014).
46. *Id.* at 1480.
47. *Id.* at 1481.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 1482.
52. *Id.*

In *Newberry v. Silverman*, the Sixth Circuit, applying Ohio law, affirmed the district court's decision to dismiss a spoliation claim.[53] The plaintiff brought a dental malpractice claim against the defendant and alleged spoliation of evidence.[54] Initially, when the plaintiff requested his dental records, he was told that the defendant's current records software was incompatible with the older records and therefore they could not access them.[55] The defendant eventually provided some of the records, but the plaintiff was informed that the rest had been discarded at some unspecified point in the past in order to reduce the size of the plaintiff's file.[56]

Under Ohio law, a spoliation claim requires five elements: (1) pending or probable litigation, (2) the defendant's knowledge of such litigation, (3) the defendant's willful destruction of relevant evidence, (4) actual disruption of a claimant's litigation due to the destruction, and (5) damages flowing from the spoliation.[57] In affirming the decision to dismiss the spoliation claim, the Sixth Circuit explained that the plaintiff's claim was flawed because he failed to plead facts to support the inference that the destruction of the dental records actually disrupted his case.[58] Additionally, he failed to plead facts indicating that the defendant intentionally destroyed the documents to prevent their appearance in court.[59] The fact that the records were missing did not move the allegations of willful destruction beyond mere inference and "innuendo."[60]

In another Ohio case, *Siegel v. University of Cincinnati College of Medicine*, the Ohio Court of Appeals affirmed the trial court's finding that the plaintiff did not prove that performing a partial autopsy—and not a full autopsy—harmed her ability to pursue their claim.[61]

The plaintiff, the decedent's mother, brought a spoliation claim against a defendant neurosurgeon claiming that his order for a partial autopsy instead of a full autopsy constituted spoliation and fraud, thereby depriving the neurosurgeon of the civil immunity afforded to him as a state employee.[62] In affirming the lower court's decision, the appellate court noted that nothing in the record suggested that an autopsy of the brain would have revealed information not available in the imaging studies or other records.[63] Consequently, the plaintiff never moved the decision

53. 789 F.3d 636, 647 (6th Cir. 2015).
54. *Id.* at 640, 643.
55. *Id.* at 639.
56. *Id.*
57. *Id.* at 647.
58. *Id.*
59. *Id.*
60. *Id.*
61. 28 N.E.3d 612, 631 (Ohio Ct. App. 2015).
62. *Id.* at 629–31.
63. *Id.* at 630.

not to perform the complete autopsy "beyond insinuation" of what the defendant neurosurgeon was attempting to conceal.[64] The court noted that the plaintiff might have succeeded had she presented expert witnesses to establish that (1) a full autopsy would have revealed information that the imaging and medical records could not, or (2) avoiding the autopsy may have concealed the fact that brain conditions were the proximate cause of death.[65]

Conversely, in *Piedmont Newnan Hospital v. Barbour*, a Georgia appellate court held that spoliation sanctions were appropriate against a hospital for its failure to preserve digital images of a "resting test" of patient's heart.[66]

The plaintiff asserted a medical malpractice claim against the defendant hospital and one of its nurses, alleging they failed to ensure that an IV was correctly placed in his arm during a stress test, causing complex regional pain syndrome (CRPS).[67] During the stress test, a "resting" image of the plaintiff's heart was taken.[68] The plaintiff sought spoliation sanctions because the defendant admittedly failed to preserve the digital images, despite written requests from the plaintiff's attorney.[69] The trial court applied a sanction prohibiting the defendants' witnesses from testifying or arguing that the IV was properly ported during the "resting phase."[70] The defendants appealed, arguing that (1) the images were not "necessary" for the case, and (2) the sanctions were prejudicially overbroad.[71]

The appellate court determined that although the defendants' claim that the records were not "necessary" had some credibility, the images themselves would have been important proof one way or the other.[72] Further, assuming that the IV was not working correctly during the resting test, the images were the only objective way for the plaintiff to have proven otherwise.[73] Thus, the court held that the trial court applied the necessary factors in issuing a spoliation sanction.[74]

64. *Id.* at 631.
65. *Id.*
66. 774 S.E.2d 822, 830 (Ga. Ct. App. 2015), *reconsideration denied* (July 30, 2015).
67. *Id.* at 825.
68. *Id.* at 824.
69. *Id.* at 829.
70. *Id.*
71. *Id.*
72. *Id.* at 830.
73. *Id.*
74. *Id.* The factors the trial court considered included: (1) whether the defendant was prejudiced as a result of the destruction of evidence, (2) whether the prejudice could be cured, (3) the practical importance of the evidence, (4) whether the plaintiff acted in good or bad faith, and (5) the potential for abuse if the expert testimony about the evidence was not excluded. *Id.*

D. *Trial Court Has Broad Discretion in Determining Sanctions*

Assuming that a plaintiff establishes his or her claim of spoliation, courts have broad discretion in determining the type of sanction to issue. However, the sanction chosen should reflect a balance between the prejudicial effect of the missing evidence and the preference to resolve cases on their merits.

In *Schlossbach v. Boudreau*, the Appeals Court of Massachusetts affirmed the trial court's denial of the plaintiff's motion for default judgment on the grounds of spoliation of evidence.[75] The plaintiff filed a medical malpractice claim against the defendant OB/GYN, alleging that the defendant was negligent when she performed a procedure to alleviate an abscess in the plaintiff's Bartholin gland and perineal cyst and then subsequently failed to diagnose an active infection.[76] The defendant's records of the treatment were "not adequately detailed" and the notes regarding one of the plaintiff's follow-up visits were missing.[77] The plaintiff argued that the defendant's failure to maintain the records prejudiced her ability to present her case.[78]

In order to "spoliate" records, the party must have "lost or destroyed existing relevant evidence."[79] Here, the plaintiff did not contend that the defendant "failed to maintain or make available existing records"; rather, the plaintiff contended that the defendant "failed to prepare minimally adequate treatment records." The court found it difficult to conclude that the defendant "spoliated" records that never existed.[80]

Additionally, assuming that the trial judge found sufficient evidence of spoliation with regard to the missing examination notes, the court's denial of the plaintiff's motion for default judgment was appropriate given its broad discretion.[81] The court noted that the "sanction chosen should be balanced to both remedy whatever prejudice the evidentiary loss has occasioned while at the same time allowing the matter to be resolved to the greatest extent possible on the merits."[82] Under the circumstances of this case, the court held that the plaintiff had sufficient materials relating to her treatment to enable her expert witness to form his opinions.[83] The court further explained that while it did not want to minimize "the plaintiff's trial difficulties" or "the defendant's admitted breach of her

75. No. 14–P–924, 2015 WL 3539787, at *2 (Mass. App. Ct. 2015), *review denied* (Mass. Sept. 2, 2015).
76. *Id.* at *1.
77. *Id.*
78. *Id.*
79. *Id.* at *2.
80. *Id.*
81. *Id.*
82. *Id.* (citations omitted).
83. *Id.*

duty to maintain adequate medical records," it could not fully evaluate whether less severe sanctions—such as an adverse inference instruction—would have been appropriate because the plaintiff did not provide a full trial transcript.[84]

In *Hughes v. Covey*, a New York appellate court disagreed with the lower court's exercise of discretion in imposing a sanction striking the defendants' answers on the grounds of spoliation of evidence and ruled that a lesser sanction of an adverse inference charge was appropriate.[85]

The plaintiff asserted a medical malpractice claim against the defendant cardiologist and sought images of a nuclear stress test that was performed.[86] The defendant subsequently sent an optical disk believed to contain the images to a data recovery company, but the images were not recovered.[87] The appellate court found sufficient evidence to support the determination that the defendants had failed to properly preserve the evidence. The court also found, however, that the plaintiff had failed to establish that the unavailability of the images left him "prejudicially bereft of the ability to prosecute the action."[88] The appellate court noted that although a spoliation sanction is within the broad discretion of the court, a court may impose a sanction less severe than striking a pleading "where the missing evidence does not deprive the moving party of the ability to establish his or her case."[89]

II. RECENT INTERPRETATIONS OF THE PEER REVIEW PRIVILEGE

The peer review privilege involves a balance between encouraging health care providers to continuously review and improve the quality of patient care and disclosing information to patients. The privilege is statutory in most states, and therefore courts are constantly being asked to interpret the language of these statutes and either limit or expand the scope of the privilege, depending on whether the plaintiff or defendant is asking. The following case summaries contain several states' interpretations of their peer review statutes and the parties' arguments for and against expansion of the privilege.

84. *Id.* at *3.
85. 15 N.Y.S.3d 195, 197 (N.Y. App. Div. 2015).
86. *Id.* at 196.
87. *Id.*
88. *Id.* at 197.
89. *Id.*

A. *Privileged Materials*

(1) Objective Facts Are Covered by the Peer Review Privilege According to the Supreme Court of Michigan

In *Krusac v. Covenant Medical Center*,[90] the Supreme Court of Michigan held that objective facts contained in an incident report were protected by the peer review privilege, reversing a prior holding in *Harrison v. Munson Healthcare, Inc.*[91]

A representative of the estate of Dorothy Krusac filed a medical malpractice action against the defendant hospital after Krusac fell off an operating table and later died.[92] During discovery, the plaintiff learned that one of the nurses in the operating room filled out and submitted an incident report shortly after the event.[93] Shortly before trial, the plaintiff filed a motion in limine asking the court to conduct an in camera review of the report and provide the plaintiff with the facts contained in the report.[94] The defendant objected, arguing that the peer review privilege protected the information. Relying on the *Harrison* case—which held that the peer review privilege did not apply to objective facts contained in an incident report—the trial court ultimately ordered the defendant to produce the first page of the incident report, which contained only objective facts.[95]

The defendant sought review by the Supreme Court of Michigan after the Court of Appeals denied leave for immediate appeal and denied a motion to stay the proceedings.[96] The Supreme Court of Michigan granted leave to appeal in order to address whether *Harrison* erred in its analysis of the scope of the peer review privilege.[97]

Michigan's peer review statutes, set forth in Michigan Comprehensive Laws §§ 333.20175(8) and 333.21515, protect "records, data, and knowledge" collected for or by a peer review committee.[98] On appeal, the Supreme Court of Michigan analyzed the terms in the statutes according to their dictionary definitions and found that "record, data, and knowledge" plainly encompassed objective facts.[99] The court strictly interpreted the statute and determined that the court in *Harrison* was incorrect in concluding that the legislature intended to exclude objective facts from the peer review privilege.[100]

90. 865 N.W.2d 908, 914 (Mich. 2015).
91. 851 N.W.2d 549 (Mich. Ct. App. 2014).
92. *Krusac*, 865 N.W.2d at 910.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 912; MICH. COMP. LAWS ANN. §§ 333.20175(8), 333.21515 (2006).
99. *Krusac*, 865 N.W.2d at 912.
100. *Id.* at 913.

The court also addressed the plaintiff's contention, as stated in *Harrison*, that shielding objective facts from discovery "would grant risk managers the power to unilaterally insulate from discovery firsthand observations that the risk manager would prefer remain concealed."[101] In rejecting this argument, the court noted that the privilege applies only to "records, data and knowledge that are collected for or by the committee . . . 'for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients.'"[102] Further, the litigant may still obtain relevant facts through eyewitness testimony, including from the author of the incident report, and from the patient's medical record.[103] Thus, the court overruled *Harrison* and remanded the case.[104]

(2) Peer Reviews Conducted by Third Parties Are Protected, Despite Florida's Constitutional Preemption of the Peer Review Privilege

In *Bartow HMA, LLC v. Edwards*, a Florida court considered whether Amendment 7 to the Florida Constitution, which preempts the peer review privilege, applied to peer review reports prepared by an outside company.[105] The court held that Amendment 7 did not apply, and the external peer review reports were privileged.[106]

The plaintiff filed a medical malpractice action against the defendants, a hospital and surgeon, alleging that her common bile duct was severed during a gallbladder removal surgery.[107] During discovery, the plaintiff sought documents from the hospital relating to its investigation of the defendant surgeon's care and treatment of the plaintiff as well as any other patients within five years of the lawsuit.[108] At issue in this case were peer review reports that the hospital's counsel requested for litigation purposes from an external peer review company.[109] These reports each referenced a specific patient and included the reviewing physician's opinion as to whether the standard of care was met.[110]

The plaintiff argued that she was entitled to these documents pursuant to Amendment 7, which preempts the statutory peer review privilege by providing patients a right of "access to any records made or received in the course of business by a health care facility or provider relating to

101. *Id.* at 913–14.
102. *Id.*
103. *Id.* at 914.
104. *Id.* at 914-15.
105. No. 2D14-3450, 2015 WL 4154180, at *4–5 (Fla. Dist. Ct. App. July 10, 2015).
106. *Id.* at *5.
107. *Id.* at *1.
108. *Id.*
109. *Id.* at *3.
110. *Id.*

any adverse medical incident."[111] The defendants argued that the external peer review reports did not fall within Amendment 7 because they were not "made or received in the course of business."[112]

In analyzing whether the records were "kept in the ordinary course of business," the court looked to principles of statutory construction.[113] The court noted that while some records, such as internal risk management investigations, are kept pursuant to a statutorily mandated duty and therefore are kept in the ordinary course of business, hospitals are not statutorily required to retain external experts to evaluate adverse medical incidents.[114] Next, in analyzing whether the reports related to "adverse medical incidents," the court found that while the reports did address such incidents, they contained expert opinions requested by counsel and thus were not part of the hospital's regular peer review process.[115] The plaintiff argued that the retention of the external peer review company was "an attempt by the hospital to outsource the peer review process and cloak it with protection from discovery under Amendment 7."[116] However, the court determined that the external peer review was not an attempt to circumvent the disclosure requirements of Amendment 7, noting that the result may have been different if the hospital had not conducted an internal peer review.[117]

B. *Non-Privileged Materials*

In the following cases, courts in North Carolina and Pennsylvania declined to expand the definition of a peer review committee under their state statutes. In *Hammond v. Saini*, the Supreme Court of North Carolina addressed whether a root cause analysis team (RCA team) was a medical review committee pursuant to North Carolina's peer review statute.[118] The court held that documents authored by the RCA team were not privileged.[119]

The plaintiff was undergoing plastic surgery for the removal of a possible basal cell carcinoma when a fire broke out in the operating room, which left her with permanent injuries and scars.[120] As a result of her injuries, the plaintiff filed a medical malpractice action against the plastic surgeon.[121] After the fire, Cumberland County Health System established

111. *Id.* at *1–2.
112. *Id.*
113. *Id.* at *3.
114. *Id.*
115. *Id.* at *4.
116. *Id.*
117. *Id.* at *5.
118. 766 S.E.2d 590, 591 (N.C. 2014).
119. *Id.* at 593.
120. *Id.* at 591.
121. *Id.*

the RCA team to investigate the event.[122] When the plaintiff sought records from the RCA team, the defendant claimed that the RCA team was a medical review committee and therefore these records were privileged pursuant to the peer review statute.[123]

The court reviewed the statutory definition of a "medical review committee," which is "formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing."[124] The court noted that the party asserting the privilege carries the burden and must show either how the committee was created or how the written procedure it operated under was adopted.[125]

The defendant produced an affidavit from its risk manager in support of its argument that the RCA team was a "medical review committee."[126] However, the court determined that the affidavit was insufficient because it did not explain the formal organization processes that led to the adoption of the RCA team or its policies, nor did it identify any of the departments or personnel involved.[127] Rather, the affidavit merely recited the language of the peer review statute and offered "conclusory assurance" that each requirement had been satisfied.[128] Given the lack of evidence, the court was unable to conclude that the RCA team constituted a medical review committee pursuant to the statute. The court therefore held that the peer review privilege did not apply to the documents at issue.[129]

A Pennsylvania court reached a similar decision in *Yocabet v. UPMC Presbyterian* when it held that the peer review privilege did not apply to documents submitted by the defendant hospital for the purpose of a Center for Medicare & Medicaid Services/Department of Health investigation.[130] The issue before the court was whether the Department of Health was acting as a "professional health care provider" pursuant to the peer review statute.[131]

The plaintiff filed suit against UPMC after complications resulting from a kidney transplant.[132] After the incident, the Pennsylvania Department of Health, on behalf of the Centers for Medicare and Medicaid Services, conducted an investigation of the hospital's transplant program to determine if it was eligible to continue participating in the Medicare/

122. *Id.*
123. *Id.* at 591–92.
124. *Id.* at 592.
125. *Id.*
126. *Id.*
127. *Id.* at 592–93.
128. *Id.* at 592.
129. *Id.* at 593.
130. 119 A.3d 1012, 1025 (Pa. Super. Ct. 2015).
131. *Id.* at 1020.
132. *Id.* at 1016.

Medicaid program.[133] When the plaintiff sought these records during discovery, UPMC claimed that they were confidential under the Pennsylvania Peer Review Act (PRA).[134]

The court noted that the PRA protects "proceedings and records of a review committee," which is identified as "any committee engaging in peer review" or "a procedure for evaluation by professional health care providers" of the quality of services performed by other providers.[135] First, the court determined that the Department of Health (DOH) was not a professional health care provider merely because it hired professional health care providers to conduct its investigation.[136] Further, UPMC was not participating in the investigation or policing of its own activities but was instead reporting to a governmental body.[137] Thus, application of the peer review privilege did not apply to the DOH investigative records.[138]

Additionally, the court addressed whether documents relating to a UPMC board meeting were privileged.[139] The court determined that the board of directors was a professional health care provider that could conduct peer review.[140] Thus, the court ordered an in camera review of the records to determine if the other privilege requirements were met.[141]

In another Pennsylvania case, *Venosh v. Henzes*, the court held that a quality-of-care review conducted by an insurer was not protected under the peer review privilege.[142] The plaintiff filed a medical malpractice action against the defendants for complications that arose after a total knee replacement.[143] First Priority Health, a subsidiary of Blue Cross of Northeastern Pennsylvania, was the plaintiff's medical insurer.[144] In order to ensure that its insureds were receiving adequate care, Blue Cross regularly conducted reviews of medical treatment delivered by its contracted health care providers and had conducted a review of the plaintiff's surgery.[145] During discovery, the plaintiff sought the investigative records from Blue Cross, which argued that the records were protected under the peer review privilege.[146]

133. *Id.* at 1020.
134. *Id.* at 1018.
135. *Id.* at 1021.
136. *Id.* at 1023.
137. *Id.*
138. *Id.* at 1024–25.
139. *Id.* at 1025.
140. *Id.* at 1027.
141. *Id.*
142. 121 A.3d 1016, 1020 (Pa. Super. Ct. 2015).
143. *Id.* at 1017.
144. *Id.* at 1018.
145. *Id.*
146. *Id.*

The court determined that Blue Cross was not a health care provider for purposes of the peer review privilege because it was not "a member of the medical care profession involved in self-policing," but instead was an organization deciding whether its affiliate IPA-HMO should continue to contract with the health providers in question.[147] Further, the committee was not a "review committee" because it was not operating for one of the stated purposes set forth in the statute.[148] The court determined that because Blue Cross itself was not acting as a health care provider, the fact that it used health care providers to conduct the review did not convert the review into a peer review.[149] Therefore, the documents at issue were not privileged.[150]

III. HIPAA'S APPLICATION IN THE LITIGATION CONTEXT

The final section contains a discussion of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its recent application in medical malpractice cases. HIPAA and its progeny prohibit "covered entities," including physicians, from disclosing "protected health information" or "individually identifiable information that pertains to the physical health of an individual," unless otherwise permitted by statute.[151] However, HIPAA permits disclosure of protected health information "in the course of any judicial or administrative proceeding," either "in response to an order of a court or administrative tribunal" or "in response to a subpoena, discovery request, or other lawful process," if certain procedural safeguards are met.[152]

A. *HIPAA's Application to Ex Parte Communications with Treating Physicians*

In *Caldwell v. Chauvin*, the Supreme Court of Kentucky addressed the issue of whether HIPAA prohibited litigants from conducting ex parte interviews with treating physicians.[153] The plaintiff filed a medical malpractice action against a neurosurgeon for complications arising from a discectomy.[154] During discovery, the defendant sought a qualified protective order allowing him to make ex parte contact with the plaintiff's health care providers.[155] The trial court entered an order allowing the ex parte communica-

147. *Id.* at 1019.
148. *Id.* at 1020 (noting that the stated purposes include: (1) evaluating and improving the quality of health care rendered, (2) reducing morbidity or mortality, or (3) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care).
149. *Id.* (citing Yocabet v. UPMC Presbyterian, 119 A.3d 1012, 1021 (Pa. Super. Ct. 2015)).
150. *Id.*
151. 45 C.F.R. § 164.502(a) (2013).
152. 45 C.F.R. § 164.512(e)(1)(i)–(iii) (2013).
153. 464 S.W.3d 139, 143 (Ky. 2015).
154. *Id.* at 144.
155. *Id.*

tions but limited contact to those physicians who treated the plaintiff for injuries at issue in the litigation.[156] The plaintiff appealed to the Supreme Court of Kentucky after the appellate court denied her petition for a writ of prohibition and motion for intermediate relief.[157]

The Kentucky Justice Association filed an amicus brief on the plaintiff's behalf. The amicus brief provided a comprehensive argument explaining why the trial court's order violated HIPAA.[158] Kentucky Defense Counsel, Inc. filed an opposing amicus brief on behalf of the defendant.[159]

Because HIPAA's privacy regulations do not address ex parte communications between counsel and a covered entity, the court looked to the analysis conducted by two other states with divergent results: Missouri and New York.[160] In *State ex rel. Proctor v. Messina*, the Supreme Court of Missouri narrowly defined the phrase "in the course of a judicial . . . proceeding," concluding that "disclosure under that exception 'must be under the supervisory authority of the court either through discovery or through other formal court procedures.'"[161] Therefore, ex parte interviews did not fall under the litigation exception.[162] The Court of Appeals of New York adopted an opposing viewpoint in *Arons v. Jutkowitz*, when it concluded that "the privacy rule does not prevent this informal discovery from going forward, it merely superimposes procedural prerequisites."[163]

Ultimately, the *Caldwell* court found the New York approach more persuasive, but imposed a narrower interpretation.[164] The court closely examined the following language of the litigation exception and the procedural prerequisites to disclosure:

> 1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
> (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
> (ii) In response to a subpoena, discovery request, *or other lawful process*, that is not accompanied by an order of a court or administrative tribunal, if:
> (A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party

156. *Id.*
157. *Id.*
158. *Id.* at 146.
159. *Id.*
160. *Id.* at 150.
161. *Id.* (quoting State *ex rel.* Proctor v. Messina, 320 S.W.3d 145, 156 (Mo. 2010)).
162. *Id.* (citing *Messina*, 320 S.W.3d at 155).
163. *Id.* at 150 (quoting Arons v. Jutkowitz, 880 N.E.2d 831, 842 (N.Y. 2007)).
164. *Id.* at 150, 152.

> to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
>
> (B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.[165]

The *Arons* court broadly defined "or other lawful process" to include ex parte interviews and therefore held that "providing 'satisfactory assurance' that the subject of the protected health information was notified of the request or that a qualified protective order had been sought" met the procedural requirements of HIPAA.[166] The *Caldwell* court disagreed with this interpretation, finding that the informal and voluntary nature of ex parte interviews rendered them "unbefitting of the designation of lawful process ascribed to formal discovery tools."[167] Therefore, the court held that while HIPAA does not prohibit ex parte interviews, a party must first seek authorization from the trial court under 45 C.F.R. § 164.512(e)(1) in order to comply with HIPAA.[168]

B. *HIPAA's Application to Florida's Pre-Suit Disclosure Requirements*

In *Murphy v. Dulay*, the Eleventh Circuit affirmed the validity of Florida Statute § 766.1065, which requires plaintiffs to authorize the release of protected health information prior to bringing a medical malpractice action, holding that the statute was fully compliant with HIPAA.[169]

Under Florida law, a prospective plaintiff must provide a prospective defendant with a ninety-day notice of the "intent to initiate litigation for medical negligence," accompanied by, inter alia, an executed authorization for the release of "protected health information that is potentially relevant to the claim of personal injury or wrongful death."[170] The statute provides the precise language that the authorization must contain and expressly allows ex parte interviews with the plaintiff's treating physicians.[171] In *Murphy*, the plaintiff filed a complaint against the defendant seeking a declaration that HIPAA preempted Florida's pre-suit authoriza-

165. *Id.* at 151 (quoting 45 C.F.R. § 164.512(e)(1)(i)-(iii) (emphasis added)).
166. *Id.*
167. *Id.* at 152.
168. *Id.* at 153. The court went on to analyze whether HIPAA was preempted by Kentucky state law and determined that nothing in Kentucky law prohibits defendants from conducting ex parte interviews with the plaintiff's treating physicians. *Id.* at 154–56.
169. 768 F.3d 1360, 1364, 1377 (11th Cir. 2014).
170. *Id.* at 1363–64; FLA. STAT. ANN. § 766.106(2)(a)-(3)(a)); FLA. STAT. ANN. § 766.1065(1).
171. *Murphy*, 768 F.3d at 1365.

tion requirement.[172] The district court granted the plaintiff's request for declaratory relief, holding that because the authorization under the statute was not voluntary, compliance with the statutory pre-suit requirements would result in disclosure of the plaintiff's HIPAA-protected health information ex parte without his consent.[173]

On appeal, the Eleventh Circuit first determined that the pre-suit authorization met the requirements of a valid, written authorization pursuant to HIPAA.[174] The court next analyzed the mandatory nature of the pre-suit notice. As an initial matter, the court noted that HIPAA does not contain an explicit voluntariness requirement.[175] Additionally, the court found that the plaintiff voluntarily chose to seek redress through Florida's judicial system and therefore had the choice to sign or not sign the authorization form.[176] Finally, the court held that the Florida statute was not contrary to HIPAA, recognizing that Florida, like HIPAA, was attempting to "strike a balance between privacy protection and the efficient resolution of medical negligence claims."[177] Thus, the court vacated the district court's order, allowing the court to enforce the pre-suit requirements.[178]

172. *Id.* at 1366.
173. *Id.*
174. *Id.* at 1372.
175. *Id.* at 1375.
176. *Id.*
177. *Id.* at 1377.
178. *Id.* at 1378.