

Legal Update: Nelson v. Landmark Medical Center and Gould v. Cheng

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In two recent decisions Judge Alice B. Gibney, Presiding Justice of the Rhode Island Superior Court, addressed the issue of the peer review privilege. This privilege, intended to protect the necessary internal procedures used by medical institutions to review potentially adverse events in order to improve the quality of patient care, has often been the subject of contentious argument and debate both inside and outside the courtroom. While the purpose of the peer review privilege is to encourage internal review, Rhode Island courts have repeatedly and substantially undermined the scope of the privilege.

Although the party claiming the privilege has the burden of demonstrating its applicability, what must be done in order to satisfy this burden remains unclear. Judge Gibney's decisions do not clarify this situation.

First, in *Nelson v. Landmark Medical Center* Judge Gibney addressed Landmark Medical Center's motion asking the Court to reconsider an order compelling the production of documents that the defendant argued were covered by the peer review privilege. On reconsideration, Judge Gibney declined to halt production of peer review documents, finding that the defendant's privilege log contained insufficient information to justify the application of the privilege. In particular Judge Gibney noted that the defendant's privilege log:

- failed to describe the committees claimed to be covered by the peer review privilege;
- failed to describe the nature and purpose of the withheld documents with sufficient specificity to demonstrate that the documents constitute records and proceedings of a peer review board; and
- contained no reference to hospital bylaws or sworn statements by hospital officials to substantiate the roles of the committee's in question.

In a written decision, Judge Gibney stated that “mere labels ... are insufficient to allow a conclusion that such committees are in fact ‘peer review boards.’”

The decision in *Nelson*, however, did not provide guidance as to what is necessary in order for a party to establish the existence of the claimed peer review privilege. Those asserting the privilege in the future have, therefore, been left in the position of knowing that the privilege logs that have been prepared for years in order to support claims of privilege will, probably, be found to be insufficient. In addition, those asserting the privilege will have to make an educated guess as to the amount of information that must be included in a privilege log in order to justify the claimed privilege.

While it can be inferred from Judge Gibney’s decision that references to either by-laws and/or sworn statements are required in order to establish the nature of the committee claimed to be a peer review committee, questions remain as to how much other information must be disclosed in a privilege log. This places parties in the awkward position of trying to provide as much information as possible without actually revealing any privileged material, an often precarious balance.

One potentially attractive solution to this quandary is to request *in camera* review. An *in camera* review involves the submission of the privileged documents to the Judge, who then reviews them privately without disclosing them to the other party, following which the Court makes a ruling as to which documents, if any, must be produced.

While Judge Gibney denied the defendant’s request for *in camera* review

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in *Nelson*, based on her belief that it was untimely, she granted a similar request in *Gould v. Cheng*. In the second case, *Gould*, Judge Gibney determined that privilege logs submitted to support the peer review privilege were insufficient, reaffirming many of her holdings in *Nelson*. The court again focused on whether the documents constituted records and proceedings of a committee that is a peer review board. However, the Court granted a request for *in camera* review. In so holding, the Judge noted that *in camera* review is appropriate in circumstances where the applicability of the claimed privilege is unclear. Since this is likely to be a recurrent problem, *in camera* reviews may become increasingly popular.

The advantages of *in camera* review are obvious. Instead of being presented with what are, of necessity, often ambiguous privilege logs, the Judge will have the actual documents in his/her possession. A judge can more readily gain an understanding of the documents, and the context of their creation, from a review of the documents themselves as opposed to a privilege log. As such, the request for *in camera* review of the documents claimed to be privileged represents a reasonable alternative until the Court clearly defines what must be contained in a privilege log.