

# Health Law Litigation

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## CREENTIALING AND PEER REVIEW EDITION

### TOPICS OF CURRENT INTEREST

This is the second volume of the Health Law Litigation Committee Newsletter. It is once again devoted to topics of interest in the fields of credentialing and peer review. Sponsored and organized by the Credentialing and Peer Review Subcommittee, this newsletter features three articles by the extremely skilled and highly competent, seasoned practitioners identified below. Hopefully, you found the articles in our previous edition enlightening and will find these articles additionally helpful in addressing issues and problems in those fields. The Subcommittee expresses its gratitude and appreciation to the authors for their hard work and gracious efforts. The Subcommittee also wishes to thank three individuals affiliated with HCA Inc. for their contributions to the publication of this Newsletter: Lisa Frenkel, Esq. of Dallas, Texas for her assistance in proofing and editing articles; and Kellie Worley, Jane Anne Gawlas and Diane Sheffield of Nashville, Tennessee for their numerous and essential tasks and contributions in bringing this project to fruition.

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**Peer Review Privileges in Federal Courts - A Call for Evidentiary Uniformity Or Is the Designated Hitter Good For Baseball?**

**Joseph A. Michels and Sanford L. Dow**

The designated hitter has been the bane of baseball purists since its inception in 1973. He exists only in the American League - often called the "Junior" league because it was formed after its older or "senior" counterpart, the National League. The designated hitter skews the pre-existing dynamics and strategy of the game by allowing the manager to remove his pitcher from the batting lineup and replace him with a "designated hitter." Thus, instead of facing the pitcher - who is usually the weakest batter in the lineup - at the bottom of the batting order, the American League defensive team must face a player who is fresh, focused, and who is often hired solely for his ability to hit the ball and without regard for his defensive skills.

Managers and pitchers who move from league to league are affected most by the designated hitter rule. They must adopt and adapt to their new surroundings. Fortunately, they at least know before the game starts whether they will face a designated hitter or not.

Such is not the case when dealing with evidentiary matters relating to a medical peer review. Today's hospital or practitioner has no assurance that the peer review she participates in today will be protected against civil discovery in a lawsuit heard two or three years from now. The reason for this uncertainty, much like the story of the designated hitter in baseball, is that state and federal courts have failed to adopt uniform rules relating to the protection of peer review proceedings from discovery. While all state courts exempt peer review from discovery except in certain defined instances<sup>1</sup>, many federal courts refuse to recognize a similar privilege. Thus, where a litigant files its suit - *i.e.*, in state court or in federal court - is often a determinative factor in whether any medical peer activities related to his case will be discoverable. In many cases, that distinction can be the difference between a summary judgment and extensive -and expensive - litigation.

Fundamental fairness requires that the critically important protections afforded the medical peer review process not be subject to the forum shopping whims of a creative plaintiff. This article evaluates the evidentiary protections of the most widely recognized peer review immunity statute, the Federal Health Care Quality Improvement Act<sup>2</sup> (the "HCQIA"), discusses the application of the Self-Critical Analysis privilege in federal courts, and urges a uniform application of evidentiary immunity rules for medical peer review proceedings.

The HCQIA was inspired, in part, by Congressional findings that "[t]here is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review."<sup>3</sup> Congress passed the HCQIA to improve the quality of medical care by encouraging physicians to identify and discipline physicians who are incompetent or who engage in unprofessional behavior. Prior to the enactment of the HCQIA, many physicians had been reluctant to participate in peer review because they feared direct reprisal from colleagues they were reviewing or feared lawsuits by those they were reviewing.<sup>5</sup> Congress believed that effective peer review would be furthered "by granting limited immunity from suits for money damages to participants in professional peer review actions."<sup>6</sup> Significantly, Congress also found that the lack of adequate peer reviews resulted not from the risk of disclosures by those conducting the reviews but, rather, from the threat of lawsuits against those involved in the review process. The legislative history to the HCQIA explains:

Doctors who are sufficiently fearful of the threat of litigation will simply not do meaningful peer review. Thus, there is a clear need to do something to provide protection for doctors engaging in peer review if [the national reporting system established by the HCQIA] is to be workable. To that end, the bill provides limited, but essential, immunity.<sup>7</sup>

The statute does not provide an immunity from suit.<sup>8</sup> It only provides for an immunity from damages.<sup>9</sup> To qualify for immunity under the HCQIA, the professional review action in question must meet the standards outlined in the statute;<sup>10</sup> that is, the professional review action must be taken: (i) in the reasonable belief that the action was in furtherance of quality health care; (ii) after a reasonable effort to obtain the facts of the matter; (iii) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and (iv) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of (iii).<sup>11</sup> Importantly, the HCQIA also creates a presumption that a professional review activity meets these standards unless the presumption is rebutted by a preponderance of the evidence.<sup>12</sup>

The HCQIA provides immunity from damages to the professional review committee, its staff, anyone under contract with the committee, and any person who participates with or assists the committee.<sup>13</sup> Finally, the HCQIA grants immunity from damages to those individuals providing information to a professional review body regarding the competence or professional conduct of a physician unless the information is determined to be false and the person providing it knew that the information was false.<sup>14</sup>

### **EVIDENTIARY PROTECTION FOR PEER REVIEW PROCEEDINGS IN FEDERAL COURTS**

Within the context of lawsuits involving peer review matters, a question invariably arises as to whether the documents and other materials prepared as part of the peer review process are privileged from disclosure during discovery. Most state laws exempt the peer review process from discovery. Those protections are generally available in lawsuits filed in state court. The next section of this paper addresses those issues in the context of federal court litigation.

#### **1. Federal Rule of Evidence 501 and the Reluctance to Find New Privileges**

Any analysis of the law of privilege must begin with Rule 501 of the Federal Rules of Evidence.

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness. . . shall be determined in accordance with State law.

In its enactment of Rule 501, Congress "manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis. . .'"<sup>15</sup>

Even though courts have some flexibility, the Supreme Court has cautioned that an evidentiary privilege should not be recognized or applied unless it "promotes sufficiently important interests to outweigh the need for

probative evidence."<sup>16</sup> The starting point in the analysis is always the "fundamental principle that 'the public ... has a right to every man's evidence. In light of this presumption, privileges are disfavored in the law and are strictly construed."<sup>18</sup>

#### **2. Will Federal Law Apply or will State Privileges Control?**

When considering a federal claim, federal courts apply federal common law, rather than state law, to determine the existence and scope of a privilege.<sup>19</sup> Despite applying federal common law, it is important to recognize that, as a matter of comity, federal courts will consider state policies supporting a privilege providing confidentiality.<sup>20</sup> In fact, the Seventh Circuit has even remarked that "a strong policy of comity between state and federal sovereignties *impels* federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy."<sup>21</sup> Moreover, a federal court "may resort to state law analogies for the development of a federal common law of privileges in instances where the federal rule is unsettled."<sup>22</sup>

One case discussing the tensions inherent in this analysis is *Pagano v. Oroville Hospital*.<sup>23</sup> Although the *Pagano* court determined that California's medical peer review privilege was inconsistent with federal law, it also outlined an approach for determining the applicability of state privileges in federal question cases:

The initial determination is whether application of the state law would be inconsistent with federal law. . . . However, when state privilege law is consistent, or at least compatible, with federal privilege law, the two should be read together in order to accommodate the legitimate expectation of the state's citizens. When a court can harmonize the provisions of state privilege with federal discovery law, it only makes sense to apply the state law. . . . It is not necessary to have precise similarity between the federal privilege and state privilege in order to utilize the state law. If such similarity were required, federal law could simply be applied since there would be no difference whatsoever in the two sets of laws. The key to legitimate use of state law can be applied as long as it is not inconsistent with the nature or degree of federal privilege - some differences can be tolerated without the two privileges being rendered inconsistent.<sup>24</sup>

Furthermore, in *American Civil Liberties Union of Mississippi v. Finch*, the Fifth Circuit Court of Appeals, in formulating its own test, remarked that when a litigant seeks to assert a privilege that does not exist at common law but is enacted by a state legislature (such as the medical peer review privilege), a federal court must determine whether to recognize the privilege by "balancing the policies behind the privilege against the policies favoring disclosure."<sup>25</sup> This balancing test can be refined by answering the questions: (i) whether the fact that the courts of a state would recognize the privilege itself creates good reason for respecting the privilege in federal court, regardless of the federal court's independent judgment of its intrinsic desirability; and (ii) whether the privilege is intrinsically meritorious in the independent judgment of the federal court.<sup>26</sup> However, "that the courts of a particular state would recognize a given privilege will not often *of itself* justify a federal court in applying that privilege."<sup>27</sup>

In *Finch*, the court went on to identify four (4) conditions for the recognition of a testimonial privilege:

- (i) the communications must *originate* in a confidence that they will not be disclosed;
- (ii) this element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
- (iii) the relation must be one which in the opinion of the community ought to be *sedulously fostered*;
- and
- (iv) the *injury* that would inure to the relation by the disclosure of the communications must be greater *than the benefit* thereby gained for the correct disposal of litigation.<sup>28</sup>

"Only if these four conditions are present should a privilege be recognized."<sup>29</sup>

### 3. The Scope of Discovery Under the Federal Rules of Civil Procedure is Broad

The scope of discovery in federal courts is expansive.<sup>30</sup> Rule 26 of the Federal Rules of Civil Procedure provides:

Parties may obtain discovery regarding any matter . . . which is relevant to the subject matter involved in the pending action . . . The information sought need not be admissible at trial if the information sought appears reasonably calculated to

lead to the discovery of admissible evidence.<sup>31</sup>

"Relevance" for purposes of discovery is "synonymous with 'germane' and ... it should not be read as meaning 'competent' or 'admissible.'"<sup>32</sup> Furthermore, Rule 26 is to be considered broadly, to include "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."<sup>33</sup> Finally, "although not specifically stated in the rule, the privileges referred to in Rule 26 are those embodied by Fed. R. Evid. 50L"<sup>34</sup>

### ***The Harbinger of Bad News – University of Pennsylvania v. EEOC***

In *University of Pennsylvania v. EEOC*, the Supreme Court declined to recognize a common law privilege "against the disclosure of peer review materials" in a Title VII action.<sup>35</sup> *University of Pennsylvania* was a faculty tenure case in which Rosalie Tung ("Tung") asserted that she had been sexually harassed by a department chairperson and that, upon her insistence that their relationship remain professional, she was denied tenure. Tung also stated that her qualifications for tenure were either equal to or better than that of her five male colleagues who had received more favorable treatment. Tung filed a discrimination charge with the EEOC pursuant to Title VII. The EEOC investigated and eventually subpoenaed both Tung's tenure review files and those of her five male colleagues.

Tung sought disclosure of internal tenure-review files in order to prove her claim of discrimination under Title VII. The University requested that the Court deem the peer review documents privileged to "protect the integrity of the peer review process, which in turn is central to the proper functioning of many colleges and universities."<sup>36</sup>

In rejecting the claim of privilege, the Supreme Court noted that Congress had been aware of the possible burden associated with the disclosure of peer review materials when it enacted Title VII.<sup>37</sup> Moreover, recognition of a common law privilege against the disclosure of peer review materials would probably result in the assertion of similar privileges and the asserted privilege had no historical or statutory basis.<sup>38</sup> The Supreme Court also narrowly construed its role under FED. R. EVID. 501:

We do not create and apply an evidentiary privilege unless it "promotes sufficiently important interests to outweigh the need for probative evidence . . ." In as much as "[t]he testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to

every man's evidence,'" . . . any such privilege must be strictly construed.

Moreover, although Rule 501 manifests a congressional desire 'not to freeze the law of privilege' but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, we are disinclined to exercise this authority expansively. We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.<sup>39</sup>

Unfortunately, *University of Pennsylvania* has been adopted by many courts, often without significant critical analysis, to stand for the proposition that internal peer review proceedings are not subject to protection from discovery. These courts have failed to consider important distinctions between faculty/tenure peer review and medical peer review, especially the fact that "[c]andid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations."<sup>40</sup>

These courts have also failed to distinguish between the policy goals of medical peer review and other types of peer review. Indeed, while an internal university peer review may result in the loss of tenure, it does not silence the speaker nor does it remove her thoughts and ideas from public debate - it merely shifts them to another forum. On the other hand, denying protection to medical peer review carries with it the possibility of inhibiting the full and frank discussion of a practitioner's shortcomings and permits the potentially dangerous doctor to remain a continuing risk to the entire community.

In short, while *University of Pennsylvania* may well have been properly decided on its facts, it should not be applied in broad strokes to all other peer review cases. In particular, it should not be applied to medical peer review matters because of the countervailing policy considerations supporting the protection of medical peer review from discovery.

#### 4. **The HCQIA Does Not Explicitly Create a Privilege For Documents**

An additional hurdle to the creation of a medical peer review discovery exemption is that Congress, in providing protection for those involved in the peer review process, did not explicitly establish a privilege for most documents created in that process.<sup>41</sup> As a California court noted, in enacting the HCQIA:

Congress not only considered the importance of maintaining the confidentiality of the peer review process, but took the action it believed would best balance protecting confidentiality with other important federal interests. Congress spoke loudly with its silence in *not* including a privilege against discovery of peer review materials in the HCQIA.<sup>42</sup>

A New York court argued that the premise "that Congress did consider the relevant competing interests in declining to create a privilege for medical peer review materials is demonstrated by a number of factors."<sup>43</sup> In *Johnson v. Nyack Hospital*, the court elaborated:

First, the findings accompanying the statute clearly shows that Congress looked at a variety of ways to give doctors protection and incentives to participate in peer review programs. *Id.* § 11101. Second, the statute provides that some materials created in a medical peer review program are confidential, so that Congress must have considered what type of materials should be granted this protection, yet did not accord protection to the materials here in question. § 11137(b)(1). Finally, the HCQIA specifically denies immunity under the Civil Rights Act for participants in peer review proceedings, showing that Congress accorded more weight to vindication of civil rights than to the interests in the confidentiality of the peer review process. *Id.* § 11111(a)(1).<sup>44</sup>

The *Johnson* court went on to note that "[t]he legislative history demonstrates that Congress considered the factors pertinent to whether such communications should be privileged, but chose only to grant immunity from suit to doctors who participates in peer review."<sup>45</sup>

The flaw in this reasoning, of course, is that several federal courts had protected peer review documents from discovery prior to the enactment of the HCQIA.<sup>46</sup> Thus, while Congress created the National Practitioner Data bank in conjunction with the HCQIA and explicitly created discovery exemptions for the new class of documents related to the databank. Congress should not have felt compelled to write a statutory exemption for documents which already enjoyed protection from discovery under several existing court decisions.

## THE SELF-CRITICAL ANALYSIS PRIVILEGE AND STATE LAWS SUPPORT PROTECTING PEER REVIEW DOCUMENTS FROM DISCOVERY

In light of *University of Pennsylvania* and in the absence of an explicit statutory protection from discovery in the HCQIA, one must turn to the laws of the various states and to the Self-Critical Analysis privilege to find a basis for exempting medical peer review documents from discovery.

### 1. Overview of the Self-Critical Analysis Privilege

The self-critical analysis privilege<sup>47</sup> has its foundation in the public policy that certain types of information, vital to the internal operations and improvement of certain industries, ought to be protected from disclosure. The privilege protects from disclosure documents and other information that evaluate the performance and practices of an organization and has been asserted in numerous cases involving employment discrimination, products liability, patent infringement, and a myriad of other subject areas. The self-critical analysis privilege is intended to serve the "public interest by encouraging self-improvement through uninhabited self-analysis and evaluation."<sup>48</sup> However, opponents of the self-critical analysis privilege argue that it "does not provide the desired benefit of encouraging self-evaluative communications with institutions. Instead, the self-critical analysis privilege impedes discovery without providing any measurable off-setting benefit."<sup>49</sup>

Importantly, "the Supreme Court and the circuit courts have neither definitively denied the existence of such a privilege, nor accepted it and defined its scope. Additionally, some courts have reasoned that:

in light of the Supreme Court opinion in *University of Pennsylvania*, it is clear that to the extent a self-critical analysis privilege has any continued validity, the party seeking to invoke it bears a heavy burden of establishing that disclosure in the course of discovery will have a substantial chilling effect on the willingness of parties to engage in such reviews.<sup>51</sup>

In essence, what can be said is that even though there appears to be a limited recognition in the federal courts of the self-critical analysis privilege, it is rarely applied and is circumscribed in several ways. For example, in those circumstances where information is protected by the privilege, a showing of extraordinary circumstances or special needs has been found to trump the privilege.<sup>52</sup>

Moreover, the self-critical analysis privilege lacks any uniform recognition among all the states. Most states have granted statutory protection to medical peer review of patient care<sup>33</sup> while a number of states have enacted some form of the self-critical analysis privilege in other contexts.<sup>54</sup> Few state courts have considered whether the privilege should exist.<sup>55</sup> Most state courts which have recognized the privilege have done so only in the limited context of statutes protecting medical peer review materials.<sup>56</sup> Some states have recognized the privilege in other contexts.<sup>51</sup>

The self-critical analysis privilege has also been rejected by several state courts in various contexts<sup>58</sup>, including a case where the Kentucky Supreme Court refused to extend the privilege to internal hospital reports concerning methods of treatment and the correction of mistakes<sup>59</sup>, and the Wisconsin Supreme Court which refused to recognize the privilege to protect reports and minutes of a hospital peer review committee.<sup>60</sup>

### 2. The Genesis of the Privilege and its Elements

One of the earliest decisions to recognize the self-critical analysis privilege was *Bredice v. Doctor's Hospital, Inc.*<sup>61</sup> *Bredice* was a medical malpractice case where the plaintiff sought the production of minutes and hospital staff reviews concerning the death of a patient. In explaining the need for the self-critical analysis privilege, the court reasoned:

Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. . . The purpose of these meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. . . The value of these discussions . . . would be destroyed if the meetings and names of those participating were to be opened to the discovery process. . . . There is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded. . . . Absent evidence of extraordinary circumstances, there is no good cause shown requiring disclosure of these meetings.<sup>62</sup>

Since *Bredice*, most courts which have recognized the self-critical analysis privilege have insisted upon three criteria that must be met in order for the privilege to apply:

- (i) the information sought must result from an internal review conducted to improve procedures or products;
- (ii) the party' conducting the review must have intended that the information remain confidential in order to preserve the free exchange of ideas; and
- (iii) the information must be such that permitting discovery of it would curtail free exchange.<sup>63</sup>

In addition to these three prerequisites, other courts have also required an expectation of confidentiality, namely, that "no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential."<sup>64</sup>

The third criterion mentioned above typically requires the court to weigh the public interest served in preventing disclosure of confidential internal reviews against a plaintiffs need for the material to prove its case.<sup>65</sup> This balancing of public and private interests has become "the essential consideration when a court decides whether the privilege should prevent disclosure of relevant information."<sup>66</sup> Essentially, "the court must determine whether the type of internal review conducted by the party invoking the privilege is one that benefits the public interest and would be curtailed in the future if it were subject to disclosure during civil discovery."<sup>67</sup>

Finally, even those courts which have applied this privilege have declined to issue protective orders for materials of a purely factual nature.<sup>68</sup> Thus, data compilations, the identity of participants in the underlying events, records pertaining to the medical care being reviewed, or other facts which would not typically be exempt from discovery should not be shielded simply because they were considered by a peer review body.

### 3. The Application of the Self-Critical Analysis Privilege

The self-critical analysis privilege has been examined in various contexts, including medical malpractice claims, claims of antitrust violations, and in the employment context.

## a. Medical Malpractice Cases

### (i) Cases Supporting the Self-Critical Analysis Privilege

Despite the perceived reluctance of federal courts to protect peer review proceedings from discovery, several courts have opened the door to the creation of a federally recognized exemption using the self-critical analysis rationale. Two decisions from the 1980s provide sound rationale for such an exemption.

In a 1981 decision, *Morse v. Gerity*,<sup>69</sup> the plaintiff served notice of a non-party deposition subpoena duces tecum on the administrator of a hospital requesting the production of certain documents concerning the defendant doctor. The administrator moved to quash the subpoena on the grounds that the documents were privileged under a Connecticut statute which provided that "the proceedings of a medical review committee conducting a peer review shall not be subject to discovery or introduction into evidence in any civil action . . . arising out of the matters which are subject to evaluation and review by such committee."<sup>70</sup>

The court remarked that "this privilege has been regarded as a proper legislative choice between the competing public concerns of fostering medical staff candor, on the one hand, and impairing medical malpractice plaintiffs access to evidence, on the other hand."<sup>71</sup> However, in upholding the privilege, the court artfully and persuasively explained the need for the privilege:

Indeed, if the purpose of the statute is to encourage doctors to evaluate their peers without fear of disclosure, that purpose would be hampered by public release of any proceedings, not just those involving the patient who has sued. The danger of inhibiting candid professional peer review exists by the mere potential for disclosure. Any possibility that proceedings might be discoverable at a future date in some unrelated patient suit presents a risk that a doctor will be reluctant to provide the meaningful peer review contemplated by the statute. The overriding importance of these review committees to the medical profession and the public requires that doctors have unfettered freedom to evaluate their peers in an atmosphere of complete confidentiality. No chilling effect can be tolerated if the committees are to function effectively.<sup>72</sup>

The self-critical analysis privilege was again relied on in a 1987 decision. *Laws v. Georgetown University Hospital*,<sup>13</sup> a malpractice suit arising out of the Caesarean delivery of a child. During the deposition of the obstetrician in charge of the labor and delivery, the deponent stated that following the birth of the child, he sent a memorandum to the Chairman of the Department of Anesthesiology concerning complications with the delivery. The plaintiffs sought production of this letter. Also, the staff at Georgetown University conducted a morbidity meeting at which time the injuries were discussed.

In determining that the self critical privilege analysis applied, the court remarked:

The Court holds that the policies motivating the *Bredice* decision are equally present in this case. The Court's conclusion is founded on the practical realization that the effectiveness of a hospital staff meeting is contingent upon a reliable stream of information detailing the circumstances of medical procedures under review. Permitting discovery of an explanation that a doctor accused of malpractice sends to his supervisor, which is obviously intended to prompt some kind of review, and in fact results in review at a staff meeting, could limit the very best source of committee data. Like the *Bredice* court, this Court recognizes an overwhelming public interest in promoting improvement in health care through the mechanism of staff peer review. The Court is thus reluctant to impair the flow of information which may be most valuable to such committees.<sup>74</sup>

#### ***The Jaffee Decision and its Progeny***

Recently, courts have found support for recognizing a federal peer review privilege in the United States Supreme Court's ruling in *Jaffee vs. Redmond*.<sup>15</sup> Decided six years after *University of Pennsylvania*, the Supreme Court in *Jaffee* recognized a privilege protecting confidential communications between a psychotherapist and her patient. The Supreme Court observed that the psychotherapist-patient privilege, like the attorney-client privilege, is "rooted in the imperative need for confidence and trust" which promotes frank and complete disclosures.<sup>76</sup> The Supreme Court further noted that the public policy of the states as reflected in their legislative and judicial pronouncements is part of the "reason and experience" which may be drawn upon in considering claims of privilege.<sup>77</sup>

Not long after *Jaffee* opened the door, the District Court in New Mexico decided *Weekoty v. United States*<sup>78</sup>

*Weekoty* was a medical malpractice case brought after Mr. Weekoty died while in the care of Dr. Jule Magri, a United States Health Care physician. The United States asserted that a trial court magistrate had improperly granted a motion to compel the production of documents related to a morbidity and mortality reviewed convened after Mr. Weekoty's death. The Government contended that this review was convened solely for the purpose of peer review deliberations and that it should not, therefore, be compelled to produce either the report prepared after that review or the minutes of that review.<sup>79</sup> The magistrate granted the motion to compel, finding that there was no federally recognized self-critical analysis privilege and that the Government failed to show that the information requested was immune from discovery pursuant to a New Mexico state peer review statute.<sup>80</sup>

The court first considered the magistrate's conclusion that there was no federally recognized self-critical analysis privilege. The court cited several cases where the privilege had been recognized<sup>81</sup> and other cases where the court rejected the privilege.<sup>82</sup> The court reasoned that "although of questionable necessity in many applications, the self-critical analysis privilege is particularly pertinent in the medical context as it promotes frank and honest discussions which protect lives and improve patient care."<sup>83</sup> Accordingly, because of this unique role in preserving the public health, the court found that medical morbidity and mortality' reviews must be distinguished from other types of documents.<sup>84</sup>

The court then recognized that this privilege in the medical setting was supported by the same policy considerations and Rule 501 analysis as the Supreme Court relied upon in *Jaffee* when it recognized the psychotherapist-patient privilege.<sup>85</sup> In *Jaffee*, the Supreme Court determined that the psychotherapist privilege, like the attorney-client privilege, was "rooted in the imperative need for confidence and trust which promotes frank and complete disclosure."<sup>86</sup> Similarly, the *Weekoty* court reasoned that "applying the self-critical analysis privilege in this case will ensure the same level of confidence and trust which will promote the type of open discussions necessary to accurately analyze medical procedures."<sup>87</sup> Moreover,

the public interest served by protecting medical peer review conferences from disclosure is perhaps greater than that served by the individual based spousal, attorney-client, and psychotherapist-patient privileges. A single conference in the this context promotes knowledge and understanding among numerous physicians about life saving techniques and potentially life threatening decisions. . . . Thus, the public good is multiplied far beyond an individual patient's care, as the information promotes more effective patient care throughout a hospital.<sup>88</sup>

According to the *Weekoty* court, the self-critical analysis privilege was further supported by the *Jaffee* analysis because the Supreme Court in *Jaffee* recognized that it was appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both the "reason" and "experience" Rule 501 requires in the recognition of a new privilege.<sup>89</sup> The *Jaffee* court concluded that federal recognition of the psychotherapist-patient privilege under Rule 501 was "confirmed by the fact that all 50 states and the District of Columbia have enacted into law some form of the psychotherapist privilege."<sup>90</sup> Because every state has statutes that protect the work of medical review committees<sup>91</sup>, *Weekoty* recognized that "as in *Jaffee*, the nearly unanimous state legislative recognition of the self-critical peer review privilege in the medical peer review context confirms the appropriateness of recognizing the privilege in this forum."<sup>92</sup>

The court next recognized the fact that the self-critical analysis privilege was supported by New Mexico's statutory privilege. The court held:

New Mexico, like the vast majority of the other states, has recognized a self-critical analysis privilege in the medical context and has protected such discussions from discovery . . . Moreover, out of comity, it is incumbent upon this Court to consider the New Mexico legislature's conclusion that the public interest in confidential morbidity and mortality conferences outweighs the interest of a single party to discovery of those discussions.<sup>93</sup>

Finally, in determining that the magistrate erred in ordering the production of the documents, the court stated:

Given the "overwhelming public interest" in providing physicians with a confidential context in which to evaluate the effectiveness of life-saving techniques and procedures, the Court is compelled to recognize the self-critical analysis privilege in the context of morbidity and mortality conferences and will apply it in this case...

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Because the Court agrees with the judgment of the United States Congress, the vast majority of state legislatures, and the New Mexico Legislature, that the self-critical analysis privilege will serve "public good transcending the normally predominate principle of utilizing all rational means for ascertaining truth," the

Court must recognize the application of the privilege in this context.<sup>94</sup>

**(ii) Medical Malpractice Cases Refusing to Apply the Privilege**

Despite the potential for a uniform federal privilege under *Jaffee*, at least one *fos\*-*Jaffee* court rejected a defendant's request to protect medical peer review proceedings from discovery. In *Syposs v. United States*<sup>95</sup> the plaintiffs brought an action under the Federal Tort Claims Act for medical malpractice against the Veterans Administration Medical Center, a hospital operated by an agency of the United States government. The plaintiffs sought to obtain peer review documents from non-party hospitals relating to the physicians in the lawsuit.

The hospitals objected on the ground that the information was privileged under federal common law and state law. Plaintiffs argued that state law privileges did not apply to the federal action and that there was no recognized federal medical peer review privilege in either federal common law or federal statute. In response, the hospitals asserted that there was a federal statutory peer review privilege set forth in HCQIA.

Initially, the court noted that in a federal question case, the federal common law of privilege was applicable, and not state statutory privilege.<sup>96</sup> The court then remarked that when a court balances the reasons for disclosure, "the balance does not often favor recognition of a new privilege unless it promotes sufficiently important interests to outweigh the need for probative evidence."<sup>97</sup>

The court rejected the cases relied on by the hospitals, *Bredice* and *Morse*, because they "predate[d] the enactment of the Health Care Quality Improvement Act and the Supreme Court's holding in *University of Pennsylvania*"" Additionally, the court remarked that "the Fifth Circuit decision in *In re United States*, 864 F.2d 1153 (5<sup>th</sup> Cir. 1989)<sup>99</sup>, and the New Jersey case of *Wei*, finding a federal statutory peer review privilege, also predate *University of Pennsylvania*"<sup>100</sup>

In conclusion, the *Syposs* court held:

given the general principle that privileges are strongly disfavored in federal practice, this court is unwilling to find a privilege where "it appears that Congress had considered the competing concerns and [did] not establish a privilege." While state privileges may be considered in determining whether a federal privilege exists, "a privilege for peer review materials has no similar historical or statutory basis" under federal law.

Medical peer reviews do not enjoy the historical or statutory support upon which other privileges have been recognized in federal law, and the Hospitals have failed to provide any reason to believe some physicians would not provide candid appraisals of their peers absent the asserted privilege. Whether the public interest would be served by a medical peer review privilege in federal cases requires a weighing of interests more appropriate for Congress than for the courts. Thus, the fact that such peer review privileges exist under numerous state statutes is immaterial.<sup>101</sup>

The *Syoss* decision is subject to criticism because of (1) its undue reliance on *University of Pennsylvania* and (2) its reliance on the absence of an explicit grant of immunity under the HCQIA to support the denial of immunity from discovery under other theories. Also, to the extent that it discounted the Fifth Circuit's decision in *In re United States* because the decision predated the HCQIA, that decision is questionable in light of the Fifth Circuit's 1992 ruling in *U.S. v. Harris Methodist Fort Worth* which recognized the importance of confidentiality in peer review proceedings (see discussion below at page 16). Moreover, as referenced above, the *Syoss* decision fails to analyze the state of the law at the time Congress passed the HCQIA. Arguably, Congress passed the HCQIA in the light of several decisions which provided immunity from discovery to medical peer review proceedings<sup>102</sup> and, therefore, Congress's failure to add any explicit protection is unremarkable.

#### **b. The Self-Critical Analysis Privilege in Other Cases**

Peer review immunity, whether immunity from liability or from discovery, must be done as part of the weighing and evaluating of competing public policies. For instance, the HCQIA does not exempt from liability those who would use the system to violate another's civil rights.<sup>103</sup> The Texas peer review statute specifically allows the court to conduct an *in camera* inspection of purportedly protected documents and to order their production if they are relevant to a plaintiff's civil rights or antitrust case.<sup>104</sup> Expanding beyond these two statutory exceptions, an examination of how self-critical analysis privileges have been applied in specific areas gives guidance on how a uniform federal medical peer review discovery exemption should be formulated.

##### **(i) Antitrust**

In *Memorial Hospital For McHenry County v. Shadur*,<sup>105</sup> a physician filed a Sherman Act antitrust action

against a group of competing physicians, alleging that they had used the committee apparatus of the hospital as a sham to exclude plaintiff from its medical staff and destroy his practice. Plaintiff sought discovery regarding the hospital's treatment of other physicians in comparable disciplinary proceedings. These proceedings were privileged under an Illinois state statute and disclosure of information obtained in the course of such proceedings was a misdemeanor. The Seventh Circuit nonetheless permitted disclosure, reasoning that state law does not supply the rule of decision as to a federal claim.

The *Shadur* court weighed the need for disclosure of relevant evidence pertaining to plaintiff's antitrust claim with the policy of protecting the effectiveness of hospital peer review committees. The court determined that, unlike medical malpractice claims, disclosure was necessary because it was essential to the plaintiff's claim. The court concluded:

The same cannot be said, however, in a case such as this where the plaintiff's claim arises out of the disciplinary proceedings themselves and not some event or occurrence that exists independently of those proceedings. In this case, for example, [plaintiff] has alleged that the defendants have used the Hospital committee apparatus discriminatorily to deny him staff privileges at the Hospital in furtherance of an unlawful restraint of trade. To prove this allegation, [plaintiff] must present evidence that other physicians with comparable or worse records than his were not denied staff privileges. Such evidence, if it exists, would likely be found in the Hospital's records of disciplinary proceedings against other doctors. To deny [plaintiff] access to this information may very well prevent him from bringing this action altogether.<sup>106</sup>

Other courts have followed the *Shadur* decision and have rejected the privilege in the context of antitrust claims. For example, *Swarthmore Radiation Oncology, Inc. v. Lapes*<sup>107</sup> was an antitrust case regarding physicians' applications for staff privileges at a hospital where the hospital refused to disclose staff privileges files on the grounds that the files were protected by state and federal peer review statutes. Citing *University of Pennsylvania*, the court noted that new privileges are not to be created lightly and found that the policies reflected in the Pennsylvania Peer Review Act were incompatible with the federal interest in fair competition embodied in the antitrust laws.<sup>108</sup> The court further concluded that no federal statutory privilege existed under the HCQIA, as the statute only stated that participants

in legitimate peer review activities are immune from damages stemming from the peer review process and only information regarding adverse actions taken against physicians to a national health-care-quality clearinghouse is confidential and not to be disclosed under the HCQIA.<sup>109</sup>

In light of these cases and the strong public policy against antitrust, the Texas rule appears to offer a reasoned solution. By allowing otherwise protected documents to be submitted for *in camera* inspection, the court can determine whether they are relevant to an antitrust claim before requiring their production.<sup>110</sup> Moreover, such a schedule affords a defendant the opportunity to seek a summary disposition of the antitrust claim before the court rules on the discoverability of such documents.<sup>11</sup>

**(ii) Requests for Underlying Data Used in Peer Reviews**

In *Etienne v. Mitre Corporation*,<sup>112</sup> the court held that the self-critical analysis privilege did not apply to documents containing data and studies compiled by a government contractor regarding its compliance with equal opportunity laws. In support of its decision the court remarked:

This public right of broad discovery is especially strong in private discrimination suits. Individual plaintiffs bring employment discrimination suits on behalf of themselves and the public in an effort to eradicate discriminatory practices of private employers prohibited under federal law. Application of the self-critical analysis in cases such as this would, therefore, contravene the public interest which is at stake.<sup>113</sup>

As noted above, there seems little basis upon which a hospital could withhold factual information or data compilations except, perhaps, data relating to the identity or number of peer review proceedings conducted and their results.<sup>114</sup> For, example, to the extent that a physician's mortality rate was significantly outside of national norms or outside the norm for a particular facility, neither his mortality statistics nor those of the hospital should be protected from discovery as a result of having been considered or reviewed by a peer review committee. Thus, the *Etienne* decision offers little concern to those seeking a well defined and uniformly applied medical peer review discovery exemption.

**(iii) Racial Discrimination cases**

In *Johnson v. Nyack Hospital*,<sup>115</sup> an African-American surgeon brought an action against a hospital for allegedly denying his staff privileges based upon race. The surgeon sought peer review records from the hospital and

other non-party hospitals for other physicians whose applications had been granted. The hospitals, citing New York and New Jersey state privilege statutes, refused to comply with subpoenas issued by the plaintiff. In permitting the disclosure of peer review records, the court held that no federal privilege protected the confidentiality of medical peer review materials from various hospitals, citing *University of Pennsylvania*. The court remarked:

This Court recognizes that a number of federal cases have said that *University of Pennsylvania* does not eliminate the possibility of a federal medical peer review privilege. . . . Nevertheless, there is an additional circumstance present here which

. . . leads the Court to conclude that it is not open to the lower federal courts to recognize a medical peer review privilege in light of *University of Pennsylvania*."

The "additional circumstance" the court referred to was the HCQIA. The court reasoned that because the HCQIA gave qualified immunity from suits to officials who conducted peer reviews, but did not explicitly protect documents created in the peer review process, then Congress did not intend to establish any privilege for peer review documents.<sup>117</sup>

Although its language is arguably overly board and its rationale possibly flawed, the *Nyack* decision is not inconsistent with either the HCQIA nor is it inconsistent with many state statutes which also do not provide immunity from liability in civil rights cases. A reasoned rule would be to allow *in camera* inspection of peer review materials to determine whether they are relevant to a discrimination case.

**(iv) Discovery of "Non-Medical" Peer Review Materials**

In *Holland v. Muscatine General Hospital*<sup>^</sup> Leann Holland was a nurse at Muscatine General Hospital. She brought a Title VII action and charges of assault, battery, and negligence against two physicians at the hospital after an incident in which one of the physicians allegedly struck Ms. Holland. Ms. Holland sought discovery of peer review documents from the committee which had reviewed the physicians' conduct after the incident. In rejecting the claim of privilege, the court held:

The Court does not believe either that a federal peer review privilege, or Iowa's peer review privilege, should be recognized to prevent disclosure of documents and information which have a close degree of relevance to a hospital's

knowledge and investigation of the conduct of physicians which has allegedly resulted in employment discrimination in violation of federal law. Disclosure of documents and information bearing primarily on employment issues does not materially conflict with the fundamental objective of promoting quality health care served by the peer review privilege. . . . The use of the peer review process to document and investigate complaints by hospital employees of discrimination or harassment by physicians bears an indirect relationship to the quality of medical care - turmoil in the hospital setting can affect how patients are treated - but the interest in promoting quality medical care is not much served by protecting information in an employment discrimination action.

The court also rejected the hospital's claim that the documents were protected by a federal peer review privilege derived from the HCQIA. The court stated:

Nothing in the relevant provisions of the HCQIA suggests Congress intended to encourage employment discrimination claims involving physicians be investigated through the peer review process, or intended to cloak such investigations with confidentiality. To the contrary, the statutory immunity of persons participating in professional review actions specifically does not include "damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964 .. ." 42 U.S.C. § 1111(a)(1). This exception is a fairly clear indication that the HCQIA is not intended to interfere with the prosecution of civil rights actions

While true medical peer reviews should be afforded a cloak of protection, there is no compelling reason to allow medical peer review boards to consider instances of inappropriate conduct unrelated to medical issues under a shroud of privacy, despite the fact that such action may impact the physician's privileges.

#### GLIMMERS OF HOPE

Despite inconsistent rulings and some poorly articulated decisions, the prospect of a uniform set of evidentiary privileges for medical peer review remains alive. Several events give rise to this hope.

In a 1992 case, *U.S. v. Harris Methodist Fort Worth* <sup>m</sup> the Department of Health and Human Services ("HHS") sought to investigate the hospital's physician staff privileges and peer review process. HHS asserted that the investigation was authorized by Title VII. HHS appended an expansive request for information to the original notification of the investigation, including requests for all documents relating to, and the names and ethnic identities of all persons associated with, the granting of physician staff privileges at Harris Methodist.

Opposed to the extensive scope of the requested materials, Harris Methodist refused to permit HHS investigators access to the information. HHS then filed suit seeking declaratory relief. A bench trial was held and the court ruled in favor of Harris Methodist, concluding that the proposed compliance review was an impermissible warrantless search.<sup>122</sup>

On appeal, Harris Methodist urged, among other things, that the peer review materials were protected from disclosure by an evidentiary privilege.<sup>123</sup> Harris Methodist relied on *Laws* and *Bredice*, while HHS relied on *University of Pennsylvania*.<sup>124</sup> Although the court did not expressly recognize the privilege, it intimated that the privilege may be viable in the Fifth Circuit:

As Congress has recognized, peer review materials are sensitive and inherently confidential, and protecting that confidentiality serves an important public interest. . . . Unlike the privilege claim for faculty tenure decision rejected in *University of Pennsylvania v. EEOC*, as well as potential analogous claims by "writers, publishers, musicians, [and] lawyers," . . . the medical peer review process "is a sine qua non of adequate health care." *Bredice*, 50 F.R.D. at 250. However, because we affirm the district court's determination that the proposed search exceeded bounds of reasonableness, we need not define the scope of any applicable privilege.<sup>125</sup>

In the United States Supreme Court's 1996 *Jaffee* decision, the Court withdrew its support of an *ad hoc* balancing test used by several states that tested the application of an evidentiary privilege based on a judge's subsequent subjective determination of the relative parties' competing interests in privacy/disclosure stating that "if the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" <sup>m</sup><sup>126</sup>

It cannot be denied that the existing system does not allow participants in a medical peer review process to predict, with any certainty at all, whether discussions or materials will be protected from subsequent discovery. Many approach the process with a sense of skepticism and doubt as a result. Thus, the Supreme Court's rationale supports the recognition of a uniform federal privilege which is consistent with the comprehensive body of state laws.

Finally, in 2000 the authors obtained an order from the United States District Court in Houston protecting peer review documents from disclosure.<sup>127</sup> Although it was an unreported interlocutory decision, the order reflects the openness of federal judges to legal and policy arguments calling for a uniform application of evidentiary privileges for peer review.

### CONCLUSION

While the advertising or marketing concerns of Major League Baseball may support the application of different rules in different leagues, the same is not true in conducting medical peer review proceedings. The purpose of peer review is not to "sell tickets" or provide an advertising gimmick. Rather, the peer review process is essential to the ongoing self-policing of the medical profession. Hospital administrators throughout the nation realize that their physicians will not effectively and efficiently discover and discipline those who practice unsafe medicine without federal and state protection.

Unfortunately, mere protection from financial liability is not enough. The medical world often operates in a closed loop. Reputations, referrals, consults and many times the very financial viability of a physician's practice depends upon maintaining cordial relations with other staff

members. If peer review participants are not allowed to be brutally frank, open, and candid - even about their own partners or their section chiefs - peer review will never fully achieve its goal. The peer review process is the most effective and appropriate safeguard the medical community has - and the most effective and appropriate safeguard society has - against the poorly skilled practitioner. The uneven application of discovery immunity, and particularly the uneven application of the privilege between courts within the same geographic region, hinders the effectiveness of peer review as a tool to police the medical profession.

The federal courts should recognize, or the United States Congress should enact, an evidentiary privilege protecting all medical peer review proceedings from discovery and rendering any records of such proceedings inadmissible in court. This protection should apply except in civil rights cases, antitrust cases, or in other limited instances where either Congress or the courts find that extraordinary public policy overrides the otherwise compelling need for protection afforded the peer review process. In those instances in which other public policies are deemed more important, an *in camera* review of such documents should be conducted prior to their production to any opposing party.

The goal of medical peer review, and the goal of an evidentiary exception for medical peer review procedures, is not the protection of any defendant physician. The goal is not the protection of physicians as a group, of hospitals, or of any particular patient. Rather, the goal is the protection of the public at large from those who practice with credentials from their state governing boards, but without the skills necessary to make them good doctors. The peer review process is the only viable means of removing these doctors from the system.

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1. As is noted below, all 50 states have enacted some form of statutory protection for peer review documents or peer review proceedings.
  2. 42 U.S.C. § 11101 *et seq.*
  3. 42 U.S.C. § 11101(5). In the HCQIA itself, Congress explained the other purposes behind the legislation: (i) the increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State; (ii) there is a national need to restrict the ability of incompetent

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physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance; (iii) this nationwide problem can be remedied through effective professional peer review; and (iv) the threat of private money damage liability under Federal laws, including treble damages under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review. 42 U.S.C. § 11101.

4. *Mathews v. Lancaster General Hosp.*, 87 F.3d 624, 632 (3d Cir. 1996) (referencing H.R. Rep. No. 903, 99<sup>th</sup> Cong, 2d Sess. 2 (1986)).
5. Smith, Annotation- CONSTRUCTION AND

APPLICATION OF HEALTH CARE QUALITY IMPROVEMENT ACT OF 1986, 121 A.L.R. Fed. 255 (1994). The court in *Mamon v. Evans*, 986 F.2d 1036 (6<sup>th</sup> Cir.), cert. denied, 510 U.S. 818 (1993), explained that as states and health care accrediting bodies stepped up their promotion of peer review in the early 1980's, physicians aggrieved by the results of peer review increasingly appeared in federal court claiming that the actions of their peers were anti-competitive and violated federal antitrust laws. *Id.* at 1037.

6. *Smith*, (citing 42 U.S.C. § 11101(5), IIIII(a)). The HCQIA defines the term "professional review action" to mean "an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges . . . of the physician." 42 U.S.C. § 11151(9).
7. H.R.Rep. No. 99-903, at 3 (1986), reprinted in 1986 U.S.C.C.A.N. 6384, 6385. See also, *Syposs v. United States*, 63 F. Supp.2d 301, 306 (W.D.N.Y. 1999).
8. *Manion*, 986 F.2d at 1042. See also, *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 918 (8<sup>th</sup> Cir. 1999) ("HCQIA immunity is limited to suits for damages; there is no immunity from suits seeking injunctive or declaratory relief); 42 U.S.C. § 1111 l(a)(l).
9. The HCQIA provides that qualified individuals and entities "shall not be liable in damages." 42 U.S.C. § IIIII(a)(l). When applicable, the statute precludes the recovery of damages for the violation of any and all state and federal laws, save and excepting two federal civil rights laws, the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, etseq., and the Civil Rights Acts, 42 U.S.C. § 1981 etseq. See 42 U.S.C. § IIIII(a)(l).
10. *Johnson v. Nyack Hospital*, 169 F.R.D. 550, 560 (S.D.N.Y. 1996); 42 U.S.C. § IIIII(a).
11. 42 U.S.C. § 11112(a). See also, *Wayne v. Genesis Med. Ctr.*, 140 F.3d 1145, 1148 (8<sup>th</sup> Cir. 1998).
12. *Wayne*, 140 F.3d at 1148 (referencing 42 U.S.C. § 11112(a)).
13. 42 U.S.C. § 1111 l(a)(l).
14. 42 U.S.C. § 11111 (a)(2).
15. *Trammel v. United States*, 445 U.S. 40, 47 (1980) (quoting 120 Cong. Rec. 40,891 (1974) (statement of Rep. William Hungate)).
16. *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996) (citing *Trammel*, 445 U.S. at 51).
17. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) (quoting *Trammel*, 445 U.S. at 50).
18. *Id.* See also, *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("privileges . . . are not lightly created nor expansively construed for they are in derogation of the search for truth"); *American Civil Liberties Union of Mississippi, Inc. v. Finch*, 638 F.2d 1336, 1344 (5<sup>th</sup> Cir. 1981) ("privileges are strongly disfavored in federal practice").
19. *Wilson v. Martin County Hospital District*, 149 F.R.D. 553, 555 (W.D. Tex. 1993); *Garner v. Wolfenbarger*, 430 F.2d 1093, 1098 (5<sup>th</sup> Cir. 1970), cert. denied, 401 U.S. 974 (1971). In *Robertson v. Neuromedical Center*, 169 F.R.D. 80, 83-84 (M.D. La. 1996), the court held that the federal law of privilege governs even where the evidence might be relevant to pendent state law claims, citing *Hancock v. Hobbs*, 967 F.2d 462, 467 (11<sup>th</sup> Cir. 1992).
20. *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5<sup>th</sup> Cir. 1991); *Smith v. Smith*, 154 F.R.D. 661, 669 n.7 (N.D. Tex. 1994) ("principles of comity enable a federal court to accord deference to a state-created privilege"); *Lora v. Bd. Educ. of the City of New York*, 74 F.R.D. 565, 576 (E.D.N.Y. 1977) (holding "[i]f a state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the

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federal rule").

21. *Memorial Hospital v. Shadur*, 664 F.2d 1058, 1061 (7<sup>th</sup> Cir. 1981) (citing *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976)) (emphasis added).
22. *Wm. T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982).
23. 145 F.R.D. 683 (E.D.Cal. 1993)
24. *Id.* at 688.
25. FwcA.638F.2d at 1343.
26. *Id.*
27. *Id.* (italics added).
28. *Finch*, 638 F.2d at 1344 (citing *Wolfenbarger*, 430 F.2d at 1000) (referencing J. WIGMORE, Evidence § 2285).
29. *Finch*, 638 F.2d at 1344.
30. *Johnson v. Nyack Hospital*, 169 F.R.D. 550, 555 (S.D.N.Y. 1996).
31. FED. R. CIV. P. 26(b)(1).
32. *Johnson*, 169 F.R.D. at 556 (citing 8 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2008, at 111 (1994)).
33. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340,351(1978).
34. *Wei v. Bodner*, 127 F.R.D. 91, 94 (D.N.J. 1989).
35. 493 U.S. at 189.
36. *Id.* at 189.
37. *Id.* at 191.
38. 493 U.S. at 194-95.
39. 493 U.S. at 189 (citations omitted).
40. *Bredice v. Doctor's Hospital, Inc.*, 50 F.R.D. 249 (D.D.C.). *aff'd without opinion*, 479 F.2d 920 (D.C. Cir. 1973).
41. *Johnson*, 169 F.R.D. at 560.
42. *Teasdale v. Marin General Hospital*, 138 F.R.D. 691, 694 (N.D. Cal. 1991).
43. *Johnson*, 169 F.R.D. at 560.
44. *Id.* at 560-61.
45. *Id.* at 561 n. 15 (citing H.R.Rep. No. 99-903, 99<sup>th</sup> Congress, 2d Sess. 3, 9-10 (1986)).
46. *Morse v. Gerity*, 520 F. Supp. 470 (D. Ct. 1981); *Bredice v. Doctor's Hospital, Inc.*, 50 F.R.D. 249 (D.D.C.), *aff'd without opinion*, 479 F.2d 920 (D.C. Cir. 1973)
47. Although most courts refer to the privilege as the "self-critical analysis" privilege, it has been given several different names. See, e.g., *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 425 (9<sup>th</sup> Cir. 1992) ("privilege of self-critical analysis"); *In re Burlington N., Inc.*, 679 F.2d 762, 765 (8<sup>th</sup> Cir. 1982) ("self-critical subjective analysis"); *Pagano v. OrovilleHosp.*, 145 F.R.D. 683, 690 (E.D.Cal. 1993) ("peer review privilege").
48. *In re Crazy Eddie Securities Litigation*, 792 F.Supp. 197, 205 (E.D.N.Y. 1992).
49. McNab, *Criticizing The Self-Criticism Privilege*, 1987 U. ILL. L. REV. 675 (1987).
50. *Dowling*, 971 F.2d at 425 n.1.
51. *Abbott v. Harris Publications*, 1999 WL 549002 (S.D.N.Y.) See also. *In re July 5, 1999, Explosion at Kaiser Aluminum & Chemical Company*, 1999 WL 717513, \* 2 (E.D. La. 1999) ("Kaiser's assertion of the self-critical analysis (also known as self-evaluative) privilege is likewise rejected. Such a privilege is largely undefined and courts have been reluctant to recognize or enforce the same") (citations omitted).
52. *Lawson v. Fisher-Price, Inc.*, 191 F.R.D. 381

- (D.Vt. 1999) (in products liability action against toy manufacturer, court held that there was no self-critical analysis privilege that would preclude discovery of documents generated by manufacturer in compliance with the Consumer Protection Safety Commission mandate).
53. See note 91.
54. See, e.g., COLO. REV. STAT. ANN. § 13-25-126.5 (West 1996) (qualified privilege for environmental audit report); LA. REV. STAT. ANN. § 6:336 (West 1996) (privilege for self-evaluation by bank or other financial institution); MINN. STAT. ANN. §§ 114C.22; 114C.26 (West 1996) (privilege for environmental audit report and self-evaluation form); MISS. CODE ANN. § 49-2-71 (1995) (qualified privilege for environmental self-evaluation report).
55. *Spencer Savings Bank v. Excel Mortgage Corp.*, 960 F.Supp. 835, 840 (D.N.J. 1997).
56. See, e.g., *Tucson Medical Center, Inc. v. Misevch*, 113 Ariz. 34, 545 P.2d 958, 961-62 (1976); *Posey v. District Court*, 196 Colo. 396, 586 P.2d 36, 37-38 (1978); *Dade County Medical Ass'n v. Hits*, 372 So.2d 117, 118-120 (Fla. Dist. Ct. App. 1979).
57. See, e.g., *Wylie v. Mills*, 195 N.J. Super. 332, 338, 478 A.2d 1273 (Law Div. 1984) (qualified privilege for self-evaluation portions of corporate accident report).
58. See, e.g., *Jolly v. Superior Court*, 112 Ariz. 186, 540 P.2d 658, 662-63 (1975) (refusing to extend privilege to internal safety investigation report of company); *Combined Communications Corp. v. Public Service Co.*, 865 P.2d 893, 898 (Colo. Ct. App. 1993) (noting that Colorado courts do not recognize self-critical analysis privilege); *Southern Bell Telephone & Telegraph Co. v. Beard*, 597 So.2d 873, 876 n.4 (Fla. Dist. Ct. App. 1982) (noting that privilege is not expressly accepted in state of Florida); *University of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. Sup. Ct. 1992) (refusing to adopt privilege for responses to inquiries of collegiate athletic association).
59. *Nazareth Literary & Benevolent Inst. v. Stephenson*, 503 S.W.2d 177, 178-79 (Ky. Sup. Ct. 1973).
60. *Davison v. St. Paul Fire & Marine Ins. Co.*, 75 Wis.2d 190, 248 N.W.2d 433, 440-442 (1977).
61. 50 F.R.D. 249 (D.D.C.), *affd without opinion*, 479 F.2d 920 (D. C. Cir. 1973).
62. *Id.* at 250-51 (emphasis added).
63. *Brem v. DeCarlo, Lyon, Heam & Pazourek*, 162 F.R.D. 94, 101 (D.Md. 1995); *Etienne v. Mitre Corp.*, 146 F.R.D. 145, 147 (E.D.Va. 1993). See also Note, *The Privilege of Self-Critical Analysis*, 96 HARV.L.REV. 1083, 1086 (1983).
64. *Dowling*, 971 F.2d at 426.
65. *Etienne*, 146 F.R.D. at 147.
66. *Id.*
67. *Id.* at 147-48.
68. *Troupin v. Metropolitan Life Ins. Co.*, 169 F.R.D. 546, 560 (S.D.N.Y. 1996). See also, *Pfkinans International Corp. v. IBJ Schroder Leasing Corp.*, 1996 WL 675772 (S.D.N.Y.) ("the self-critical analysis privilege is not absolute; it protects only the self-evaluative material, not the underlying facts which form the foundation of the evaluation or analysis"), *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 641 (S.D.N.Y. 1987) ("those courts that have recognized the privilege have restricted its application to 'purely evaluative' material and have ordered disclosure of non-evaluative facts, statistics or other data").
69. 520 F.Supp. 470 (D.Ct. 1981).
70. Mat 471.
71. Mat 471-72.
72. *Id.* at 472.

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73. 656 F.Supp. 824 (D.D.C. 1987).
74. *Id.* at 826.
75. 518 U.S. at 15.
76. *Id.* at 10.
77. *Id.* at 16.
78. **30 F. Supp.2d 1343 (D.N.M. 1998).**
79. *Id.* at 1344.
80. *Id.*
81. *Balkv. Dunlap*, 163 F.R.D. 360, 363 (D.Kan. 1995) (finding minutes of OB/GYN meeting called to discuss the quality of patient care protected under Kansas medical peer review statutes); *Spinks v. Children's Hospital National Medical Center*, 124 F.R.D. 9, 12 (D.D.C. 1989) (denying motion to compel production of morbidity and mortality conference and finding such materials subject to District of Columbia's statutory privilege); *Gillman v. United States*, 53 F.R.D. 316, 318-19 (S.D.N.Y. 1971) (citing *Bredice* and holding plaintiff not entitled to reports of a hospital's Board of Inquiry investigating suicide).
82. *University of Pennsylvania*, 493 U.S. at 182 (rejecting peer review privilege in academic tenure context and finding no basis for such a privilege in either the First Amendment or the concept of academic freedom); *Hording v. Dana Transport, Inc.*, 914 F.Supp. 1084, 1100 (D.N.J. 1996) (recognizing existence of self-critical analysis privilege but finding it not applicable to protect investigative materials from discovery).
83. *Id.* at 1345.
84. *Id.*
85. *Id.*
86. *Jaffee*, 518 U.S. at 10.
87. *Weekoty*, 30 F.Supp.2d at 1346.
88. *Id.* at 1346.
89. *Weekoty*, 30 F. Supp.2d at 1346 (referencing *Jaffee*, 518 U.S. at 13).
90. *Jaffee*, 518 U.S. at 13.
91. All states have enacted some form of protection for peer review documents or proceedings. Ala. Code § 34-24-58 (1991); Alaska Stat. § 18.23.030 (Michie 1998); Ariz. Rev. Stat. Ann. § 36-445.01 (West 1993); Ark. Code Ann. § 20-9-503 (Michie 1991); Cal. Evid. Code § 1157 (West 1990); Colo. Rev. Stat. § 25-3-109 (1990); Conn. Gen. Stat. Ann. § 19a-17b (West 1997); Del. Code Ann. tit. 24, § 1768 (1987); D.C. Code Ann. § 32-505 (1998); Fla. Stat. Ann. § 395.0193 (West 1997); Ga. Code Ann. § 31-7-143 (1996); Haw. Rev. Stat. Ann. § 624-25.5 (1995); Idaho Code § 39-1392b (1998); 225 ILCS 450/30.3 (West 1994); Ind. Code Ann. § 34-30-15-1 (West 1999); Iowa Code Ann. § 147.135 (West 1988); Kan. Stat. Ann. § 65-4915 (1992); Ky. Rev. Stat. Ann. § 311.377 (Michie 1990); La. Rev. Stat. Ann. § 44:7(D) (West 1988); Me. Rev. Stat. Ann. tit. 32, § 3296 (West 1999); Md. Code Ann., Health Occ. § 14-501 (1994); Mass. Gen. Laws Aim. ch. 112, § 5 (West 1996); Mich. Comp. Laws § 333.21515 (1992); Mum. Stat. Ann. § 145.64 (West 1998); Miss. Code Ann. § 41-63-9 (1993); Mo. Ann. Stat. § 537.035 (West 1988); Mont. Code Ann. § 50-16-203 (1997); Neb. Rev. Stat. § 25-12.123 (1991); Nev. Rev. Stat. Ann. § 49.265 (1996); N.H. Rev. Stat. Ann. § 329:29 (1995); N.J.S.A. 2A:84A-22.8 (Supp. 1988); N.M. Stat. Ann. § 41-9-5 (Michie 1993); N.Y. Educ. Laws § 6527 (McKinney 1985); N.C. Gen. Stat. § 131E-95 (1994); N.D. Cent. Code § 23-34-03 (1997); Ohio Rev. Code Ann. § 2305.251 (AndCTSon 1994); Okla. Stat Ann. tit. 63, § 1-1709 (West 1991); Or. Rev. Stat. § 41.675 (1997); Pa. Stat. Ann. tit. 63, § 425.6 (1996); R.I. Gen. Laws § 5-37.3-7 (1995); S.C. Code Ann. § 40-71-20 (Law. Co-op. 1986); S.D. Cod. Laws § 36-4-26.1 (Michie 1998); Tenn. Code Ann. § 63-6-219 (1990); Tex. Occ. Code § 160.007; Tex. Health & Safety Code § 161.032; Utah Code Ann. § 26-25-2 (1998); Vt. Stat. Ann. tit. 26, § 1443 (1998); Va. Code.

Ann. § 8.01-581.17 (Michie 1994); Wash. Rev. Code § 4.24.250 (1988); W. Va. Code § 30-3c-3 (1998); Wis. Stat. Ann. § 146.38 (West 1998); Wyo. Stat. Ann. § 35-17-105 (Michie 1988).

92. *Weekoty*, 30 F. Supp.2d at 1346-1347.
93. *Id* at 1347.
94. *Id.* at 1348 (emphasis added).
95. 179 F.R.D. 406 (W.D.N.Y. 1998).
96. *Syposs*, 179 F.R.D. at 409.
97. *Id.* (citing *University of Pennsylvania*, 493 U.S. at 189).
98. *Id.* at 410.
99. Holding that district court order directing Government to produce in Federal Tort Claims Act action records generated in course of medical peer review process in military hospital breached specifically erected safeguards of statute (10 U.S.C. § 1102) barring discovery or use of medical quality assurance records in litigation. Interestingly, when Congress enacted 10 U.S.C. § 1102 in 1986 (the same year as the HCQLA), Congress recognized that medical quality assurance programs depend on peer review and that "to be effective, this type of collegial review process must operate in an environment of confidentiality in order to elicit candid appraisals and evaluations of fellow professionals." *In re U.S.*, 864 F.2d at 1154 (S.Rep. No. 331, 99<sup>th</sup> Cong., 2d Sess 245, reprinted in 1986 U.S.Code Cong. &Admin. News 6413, 6440). Concerned that the then-current fear of "release of committee records . . . through discovery in litigation . . . [results in] beneficiaries . . . receivjmg] less than the high quality care they deserve, *id.*, Congress enacted section 1102 to bar the discovery or use of medical quality assurance records in litigation except in certain limited instances. *A rca&*, 864 F.2d at 1154.
100. *Id*
101. *Syposs*, 179 F.R.D. at 411-412 (citations omitted).
102. *Morse v. Gerity*, 520 F. Supp. 470 (D. Ct. 1981); *Bredice v. Doctor's Hospital, Inc.*, 50 F.R.D. 249 (D.D.C.), *aff'dwithout opinion*, 479 F.2d 920 (D.C. Cir. 1973).
103. 42. U.S.C. § 11111 (exemption from liability does "not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Acts of 1964, 42 U.S.C. 2000e, et seq. And the Civil Rights Acts, 42 U.S.C. 1981,etseq.")
104. TEX. OCC. CODE § 160.007 (" Ifajudge makes a preliminary finding that a proceeding or record of a medical peer review committee or a communication made to the committee is relevant to an anticompetitive action, or to a civil rights proceeding brought under 42 U.S.C. Section 1983, the proceeding, record, or communication is not confidential to the extent it is considered relevant.")
105. 664 F.2d 1058 (7<sup>th</sup> Cir. 1981).
106. *Id.* at 1062-63. See also. *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (5<sup>th</sup> Cir. 1978), *cert. denied*, 444 U.S. 924 (1979) (state law barring use of committee records and proceedings as evidence in civil actions would not be applied in action brought by abortion clinic alleging that doctors conspired to boycott clinic and fix prices for abortions in the area).
107. 1993 WL 517722 (E.D. Pa. 1993).
108. *Id.at*\*3.
109. *Id.*
110. TEX. OCC. CODE § 160.007 ("Ifajudge makes a preliminary finding that a proceeding or record of a medical peer review committee or a communication made to the committee is relevant to an anticompetitive action, or to a civil rights proceeding brought under 42

- U.S.C. Section 1983, the proceeding, record, or communication is not confidential to the extent it is considered relevant.")
111. Without offering an extensive independent analysis here, the authors note that antitrust claims are very difficult for plaintiffs to make when complaining of restrictions on their privileges or even when complaining about the denial of their privileges. Indeed, at least one court has noted that "The cases involving staffing at a single hospital are legion. Hundreds, perhaps thousands of pages in West publications" have been devoted to analyzing antitrust claims arising from a hospital's staffing decisions and , "[t]hose hundreds or thousands of pages almost always come to the same conclusion: the staffing decision at a single hospital was not a violation of section 1 of the Sherman Act." *BCB Anesthesia Care v. Passavant Mem. Area Hosp.* 36 F.3d 664, 667 (7<sup>th</sup> Cir. 1994). Under well settled antitrust law, unless the plaintiff can come forward with empirical data supporting his claim, it is subject to summary disposition early in the proceedings.
112. 146 F.R.D. 145 (E.D.Va. 1993).
113. *Id.* at 148-49 (emphasis added). See also, *Tharp v. Sivyer Steel Corp.*, 149 F.R.D. 177, 184 (S.D. Iowa 1993) ("because the 'self-critical analysis' privilege may impede plaintiffs access to important relevant documentation needed to press their claims, the "self-critical analysis" privilege must be viewed as restricting the important public interest of enforcement of this nation's equal employment opportunity laws"); *Hardy*, 114 F.R.D. at 640 ("a number of courts have declined to recognize the privilege or held that its application should be severely restricted in employment discrimination cases in view of the strong policy favoring private enforcement of the anti-discrimination laws").
114. See note 68 above.
115. 169 F.R.D. 550 (S.D.N.Y. 1996).
116. /d..at 560.
117. *Id.* ("the HCQIA specifically denies immunity under the Civil Rights Act for participants in peer review proceedings, showing that Congress accorded more weight to vindication of civil rights than to the interests in the confidentiality of the peer review process")
118. 971 F. Supp. 385 (S.D. Iowa 1997)
119. *Id.* at 389.
120. *Id.* at 390.
121. 970 F.2d 94 (5<sup>th</sup> Cir. 1992).
122. *Id.* at 96.
123. *Id.*
124. *Id.* at 103.
125. *Id.* at 103. However, in *Sabatier v. Bames*, 2001 WL 175234 (E.D.La. 2001), the court refused to find a federal review privilege holding that "in the absence of a contrary ruling by the Fifth Circuit, the undersigned again concludes that the weight of authority is that there is no peer review privilege under federal common law. *United States v. Harris Methodist Fort Worth* does not change that conclusion." *Id.* at \* 3.
126. 126. *Jaffee*, 518 U.S. at 18, quoting, *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).
127. 127. *Manik Husain, M.D. v. Clear Lake Regional Medical Center, Inc.*, Civil Action No. H-99-2031, (S.D. Tex.), Order dated August 8, 2000.