C3-98-1646
C5-98-1647

STATE OF MINNESOTA
IN COURT OF APPEALS

In re the Matter of the Petition of Fairview-University Medical Center and North Memorial Health Care to Quash Subpoena of Administrative Law Judge

and

In re the Motion of Methodist Hospital to Quash Subpoena of Administrative Law Judge

and

In re Petition of the Complaint Review Committee, Minnesota Board of Medical Practice, for Order Enforcing Subpoenas and Other Relief

and

In re the Matter of the Petition of the Minnesota Board of Medical Practice to Enforce Subpoena Regarding Dr. L

BRIEF AND APPENDIX OF AMICI CURIAE

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TABLE OF CONTENTS

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE AND FACTS 2

A. Case Before the Court 2

B. Interest of Amici Minnesota Medical Association, Minnesota Hospital and Healthcare Partnership and American Medical Association/State Medical Society Litigation Center 2

ARGUMENT 4

A. Standard of Review 4

B. The Importance of Peer Review 5

C. The Legislature, by Its Enactment of Minn. Stat. § 145.64, Has Determined the Public Policy of This State 9

D. Legislative History Supports the Trial Court's Decision to Quash the Subpoenas 10

CONCLUSION 15

STATEMENT OF THE ISSUE

WHETHER THE DISTRICT COURT'S DETERMINATION THAT MINN. STAT. § 145.64, SUBD. 1, PROTECTS ALL DOCUMENTS ACQUIRED BY RESPONDENTS' REVIEW ORGANIZATIONS FROM SUBPOENA BY THE BOARD OF MEDICAL PRACTICE IS IN ACCORD WITH MINNESOTA LAW.

STATEMENT OF THE CASE AND FACTS

A. Case Before the Court.

The relevant facts are fully set forth in Respondents' brief and will not be repeated herein for purposes of brevity.

By Order dated November 25, 1998, this Court granted the Minnesota Medical Association, the Minnesota Hospital and Healthcare Partnership and the American Medical Association/State Medical Society Litigation Center leave to file a joint amici curiae brief in this matter. Amici respectfully submit this brief in support of the decision entered by the district court below and urge this Court to affirm that decision in all respects.

B. Interest of Amici Minnesota Medical Association, Minnesota Hospital and Healthcare Partnership and American Medical Association/State Medical Society Litigation Center.

The Minnesota Medical Association (MMA) is a nonprofit organization operated to support and improve the science and art of medicine and to advance community welfare, community health and scientific education within the meaning of § 501(c)(6) of the Internal Revenue Code of 1986. The MMA currently has over 9,000 members.

The Minnesota Hospital and Healthcare Partnership (MHHP) is a private, nonprofit trade association representing Minnesota's 144 hospitals and 22 health systems. Virtually every hospital and health system represented by MHHP has internal peer review procedures necessary to the function of the entity.

The American Medical Association (AMA) is a private, voluntary, nonprofit organization of approximately 275,000 physicians, founded in 1947 to promote the science and art of medicine and the improvement of public health. Its members practice in all fields

of medical specialization. The AMA is participating in this matter as a member of the AMA State Medical Society Litigation Center (Litigation Center). The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, nonprofit state medical societies to represent the views of organized medicine in the courts. Forty-five state medical societies join the AMA as members of the Litigation Center.[1]

The MMA, MHHP and the AMA are each dedicated to promoting the public health and welfare through the maintenance of high professional standards and the provision of quality health care. In pursuit of these goals, the MMA, MHHP and AMA and their members participate in a wide range of peer review programs. Simply stated, peer review is the process through which the medical profession assesses the competence and conduct of its members. Hospital medical staffs, health plans, medical societies and other physician groups

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[1] The member organizations are: Medical Association of the State of Alabama, Alaska State Medical Association, Arkansas Medical Society, California Medical Association, Colorado Medical Society, Connecticut State Medical Society, Medical Society of Delaware, Medical Society of the District of Columbia, Florida Medical Association, Medical Association of Georgia, Hawaii Medical Association, Illinois State Medical Society, Indiana State Medical Association, Iowa Medical Society, Kansas Medical Society, Kentucky Medical Association, Louisiana State Medical Society, Maine Medical Association, Massachusetts Medical Society, Michigan State Medical Society, Minnesota Medical Association, Mississippi State Medical Association, Missouri State Medical Association, Montana Medical Association, Nebraska Medical Association, New Hampshire Medical Society, Medical Society of New Jersey, New Mexico Medical Society, Medical Society of the State of New York, North Carolina Medical Society, North Dakota Medical Association, Ohio State Medical Association, Oklahoma State Medical Association, Oregon Medical Association, Pennsylvania Medical Society, Rhode Island Medical Society, South Carolina Medical Association, Tennessee Medical Association, Texas Medical Association, Utah Medical Association, Vermont State Medical Society, Washington State Medical Association, West Virginia State Medical Association, State Medical Society of Wisconsin, and Wyoming Medical Society.

utilize peer review to help assure that physicians provide quality medical care to patients and adhere to appropriate professional standards.

This appeal provides this Court the opportunity to address the meaning of the confidentiality provision of Minnesota's peer review statute, Minn. Stat. § 145.64. To assist the Court's review, the MMA, MHHP and AMA seek to provide additional insight into the important public policy purposes of effective peer review. Further, Amici are concerned that the failure to give the appropriate deference to legislative intent in creating the peer review privilege will jeopardize the integrity of the peer review process. Finally, the MMA, MHHP and AMA respectfully urge this Court to affirm the judgment below in all respects, sending a strong signal to Appellant that the Minnesota peer review privilege is to be read and interpreted according to the plain meaning of its terms.

ARGUMENT

THE PEER REVIEW STATUTE PROTECTS FROM DISCLOSURE THE DOCUMENTS SUBPOENAED BY THE BOARD.

A. Standard of Review.

This appeal arises out of the grant of summary judgment in favor of the Respondents. On appeal, this Court must apply the same standard governing summary judgments as that applied by the district court. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990), reh'g denied; Northbrook Ins. Co. v. American States Ins. Co., 495 N.W.2d 450, 453 (Minn. Ct. App. 1993). Pursuant to Rule 56 of the Minn. R. Civ. P., the court is to grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Holiday Acres No. 3 v. Midwest Federal Sav. and Loan Ass'n of Minneapolis, 308 N.W.2d 471, 480 (Minn. 1981). Summary judgment is

proper where the parties do not dispute the facts but only dispute the application of the law to the facts. Fire & Casualty Ins. Co. of Connecticut v. Illinois Farmers Ins. Co., 352 N.W.2d 798, 799 (Minn. Ct. App. 1984). On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993).

The material facts in this case are not in dispute. What is in dispute is the application of the law to the undisputed facts of this case. This case involves Minn. Stat. § 145.64, subd. 1. The interpretation of a statute is a question of law, which this Court considers de novo. Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527, 529 (Minn. 1985).

B. The Importance of Peer Review.

As a preliminary matter, Amici will briefly address for the Court's benefit the importance of peer review. Peer review is a process whereby practicing physicians evaluate the quality, efficiency and effectiveness of the professional care provided patients by other physicians. It is typically a formal process and is most often used to provide retrospective review of single cases, or groups of cases, and to provide guidance as to the establishment of standards or goals for future care provision. The basic premise of peer review is that professional peers are best placed to judge and critique each other's performance. Indeed, peer review as an effective process supports the physician's fundamental ethical duty to ". . . study, apply and advance scientific knowledge . . ." in the furtherance of providing quality patient care. American Medical Association Code of Medical Ethics, Statement V, page xiv (1997). (Amici Appendix [A.A.] 1.)

The importance of peer review as a process to enhance the quality of medical care provided to patients is recognized by a number of national organizations. In this regard, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) has encouraged and promoted formalized peer review since the early 1970's. Southwick, The Law of Hospital and Healthcare Administration (2nd Ed.).

> Peer assessment is an essential aspect of medical quality assurance as currently practiced. Almost all quality assurance methods use peer judgments to make the final determination of the quality of care. The standards of the Joint Commission on Accreditation of Healthcare Organizations, for example, require that peer review be performed whenever the care provided by specific practitioners is examined. In light of its role, peer review has been described as "the foundation of professionalism in American medicine" and "essential to the existence of medicine as a profession." Other commentators have emphasized that the effectiveness of peer review activities may be the crucial factor in determining whether or not physicians maintain control over the standards of their profession.

Goldman, The Reliability of Peer Assessments of Quality of Care, 267 Journal of the American Medical Association 958 (Feb. 19, 1992).

JCAHO's current accreditation standards for healthcare organizations require, among other things, that medical staff members participate in organization performance-improvement activities, and provide for the ongoing surveillance of the professional performance of all individuals with delineated clinical privileges. In a similar vein, the AMA has long been a supporter of effective, physician-directed peer review. AMA policy on this issue evidences the organization's ". . . commitment to the development and maintenance of voluntary, professionally directed peer review of medical care; and (2) encourages physicians to expand their efforts to ensure that such care is of high quality,

appropriate duration and reasonable cost." AMA Policy Number H-375.996, AMA Policy Compendium, 562 (1998 ed.).

AMA policy establishes the ". . . ethical duty of a physician to share truthfully quality care information regarding a colleague when requested by an authorized credentialing body, so long as the information that is shared is not a proceeding or a document protected by statute or regulation as confidential peer review information." AMA Policy Number H-375.984, AMA Policy Compendium, 562 (1998 ed.) (emphasis added). AMA policy recognizes that confidentiality is crucial to the peer review process and advocates for legislation at the federal and state level to maintain the confidentiality of peer review. See, AMA Policy Number H-375.993, AMA Policy Compendium, 562 (1998 ed.).

The principles concerning voluntary medical peer review can be summarized as follows:

(1) Medical peer review is an organized effort to evaluate and analyze medical care services delivered to patients and to assure the quality and appropriateness of these services. Peer review should exist to maintain and improve the quality of medical care.

(2) Medical peer review should be a local process.

(3) Physicians should be ultimately responsible for all peer review of medical care.

(4) Physicians involved in peer review should be representatives of the medical community; participation should be structured to maximize the involvement of the medical community. Any peer review process should provide for consideration of the views of individual physicians or groups of physicians or institutions under review.

(5) Peer review evaluations should be based on appropriateness, medical necessity and efficiency of services to assure quality medical care.

(6) Any system of medical peer review should have established procedures.

(7) Peer review of medical practice and the patterns of medical practice of individual physicians, groups of physicians, and physicians within institutions should be an ongoing process of assessment and evaluation.

(8) Peer review should be an educational process for physicians to assure quality medical services.

(9) Any peer review process should protect the confidentiality of medical information obtained and used in conducting peer review.

AMA Policy Number H-375.997, AMA Policy Compendium, 563 (1998 ed.) (emphasis added). (A.A. 7-8.)

In order for the process to work effectively, a high degree of confidentiality is essential inasmuch as the discussion contemplated is to be open and frank concerning the matter at issue. The importance of this has long been recognized by the courts considering applications for access to information from peer review proceedings. See, e.g., Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249, 251 (D. D.C. 1970), aff'd without opinion, 479 F.2d 920 (D.C. Cir. 1973) ("There is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas can continue unimpeded."); Amaral v. Saint Cloud Hosp., __ N.W.2d ___, 1998 WL 792387 at *3 (Minn. Ct. App. 1998) (". . . the extent to which peer review materials are available to outside sources could well affect the nature and result . . . [of peer review]."). (A.A. 13.)

In this matter, it is the Board of Medical Practice (Board) that is seeking privileged peer review materials from the Respondent hospitals. As is clear from the following review of the genesis and evolution of the statutory peer review privilege, the Board's attempt to obtain privileged materials has no basis in the unambiguous terms of Minnesota's statute.

C. The Legislature, by Its Enactment of Minn. Stat. § 145.64, Has Determined the Public Policy of This State.

"The public policy of a state is for the legislature to determine and not the courts." Mattson v. Flynn, 216 Minn. 354, 362, 13 N.W.2d 11, 16 (Minn. 1944). See also, Mrozka v. Archdiocese of St. Paul and Minneapolis, 482 N.W.2d 806, 811 (Minn. Ct. App. 1992), rev. denied. The Minnesota Legislature has spoken on the issue of confidentiality of peer review and has established the public policy of this state. The confidentiality protections accorded to peer review in Minnesota are set forth in Minn. Stat. § 145.64, subd. 1, which states in pertinent part:

> 145.64. Confidentiality of records of review organizations
>
> Subdivision 1. Data and information. All data and information acquired by a review organization, in the exercise of its duties and functions, or by an individual or other entity acting at the direction of a review organization, shall be held in confidence, shall not be disclosed to anyone except to the extent necessary to carry out one or more of the purposes of the review organization, and shall not be subject to subpoena or discovery. No person described in section 145.63 shall disclose what transpired at a meeting of a review organization except to the extent necessary to carry out one or more of the purposes of a review organization. The proceedings and records of a review organization shall not be subject to discovery or introduction into evidence in any civil action against a professional arising out of the matter or matters which are the subject of consideration by the review organization. Information, documents or records otherwise available from original sources shall not be immune from discovery or use in any civil action

> merely because they were presented during proceedings of a review organization, nor shall any person who testified before a review organization or who is a member of it be prevented from testifying as to matters within the person's knowledge, but a witness cannot be asked about the witness' testimony before a review organization or opinions formed by the witness as a result of its hearings.

(Emphasis added.)

The language of Minn. Stat. § 145.64, subd. 1, is clear from all ambiguity. It plainly prevents from disclosure all information "acquired by" a review organization. Amaral v. Saint Cloud Hosp. at *2 ("all data and information discussed by a review organization is confidential"). (A.A. 13.) The unambiguous language of the statute does not permit the Board access to peer review information. State v. Reusswig, 110 Minn. 473, 126 N.W. 279 (1910) (the court cannot allow judicial interpretation of a statute to usurp the place of legislative enactment).

D. Legislative History Supports the Trial Court's Decision to Quash the Subpoenas.

Even if the Court feels it is necessary to review the legislative history of § 145.64, the statute's history is clear that the Legislature has rejected the Board's attempt to limit the protections of the peer review statute. (Respondents' Brief at 9-10.) During the 1988 session, the Board sought, unsuccessfully, to persuade the Legislature to amend § 145.64 in a manner that would have allowed it access to the information sought in this action. See H.I. No. 1890 and S.F. No. 1904. The Legislature's rejection of the Board's proposed amendments makes legislative intent on this issue clear. Since the Legislature has specifically declined to grant the Board access to peer review materials, this Court must likewise decline.

A review of the amendments to § 145.64 also demonstrates that although the statute has been modified several times to accommodate changes in health care delivery, the Legislature has not seen fit to change the statute in a manner that would accommodate the Board's claims of access to the peer review data. The peer review statute was originally enacted into law in 1971. Although § 145.64 has been amended several times since its enactment, the fundamental and overriding confidentiality provision remains the same: ". . . all data and information acquired by a review organization, in the exercise of its duties and functions, shall be held in confidence, . . . and shall not be subject to subpoena or discovery." See, 1971 Minn. Laws, ch. 283, § 4. Indeed, statutory amendments reveal that the Legislature has been willing to broaden and clarify the confidentiality protections afforded the peer review process, but unwilling to significantly restrict those protections.

The statute was first amended in 1974 by adding the latter two sentences to Minn. Stat. § 145.64, subd. 1. See 1974 Minn. Laws, ch. 295, § 4. In so doing, the Legislature expanded the confidentiality protections afforded peer review by precluding from disclosure in civil actions the proceedings and records of review organizations. At that time, the Legislature also created the original source exception to the confidentiality provision, providing that information, documents, records and testimony otherwise available from original sources are not immune from discovery or use in any civil action merely because they were otherwise presented during proceedings of a review organization. By its nature, this exception requires, however, that original source documents be obtained from their source.

In 1991, the Legislature again broadened the protections of § 145.64 by extending confidentiality to matters referred by an initial review organization to its own governing body. See, 1991 Minn. Laws, ch. 137, § 5. The amendment, provided as a second paragraph to Minn. Stat. § 145.64, subd. 1, states:

> The confidentiality protection and protection from discovery or introduction into evidence provided in this subdivision shall also apply to the governing body of the review organization and shall not be waived as a result of referral of a matter from the review organization to the governing body or consideration by the governing body of decisions, recommendations, or documentation of the review organization.

In the 1991 session, the Legislature also added subdivision 2 to Minn. Stat. § 145.64, which carved out a limited exception to the confidentiality protections afforded peer review for professionals seeking information from a review organization specifically related to their own medical staff privileges. See, 1991 Minn. Laws, ch. 137, § 5. This exception was further limited in 1992 to clarify that any data disclosed to the professional was admissible only in a judicial proceeding brought by the professional to challenge an action related to his/her medical staff privileges or participation status. See, 1992 Minn. Laws, ch. 549, Art. 7, § 7. The current provision reads:

> Subd. 2. Provider data. The restrictions in subdivision 1 shall not apply to professionals requesting or seeking through discovery, data, information, or records relating to their medical staff privileges, membership, or participation status. However, any data so disclosed in such proceedings shall not be admissible in any other judicial proceeding than those brought by the professional to challenge an action relating to the professional's medical staff privileges or participation status.

In 1994, the confidentiality protection of § 145.64 was again extended by an amendment which clarified that the peer review protections included data and information acquired by individuals or other entities acting at the direction of a review organization. See, 1994 Minn. Laws, ch. 497, § 3 and 1994 Minn. Laws, ch. 625, Art. 8, § 47. The 1994 amendments further provided a mechanism whereby the governing bodies of government owned/operated review organizations could close otherwise public meetings for the purpose of addressing matters submitted by review committees. Id.

Finally, in 1996, the Legislature created subdivision 3, providing that data collected or maintained by the Hennepin County emergency medical services advisory council when performing health care review activities is private, nonpublic data pursuant to Minn. Stat. § 13.02. See, 1996 Minn. Laws, ch. 440, Art. 1, § 37.

The Board has unquestionably had ample opportunity to convince the Legislature of the merit of the Board's position, but has failed in its efforts. Indeed, as recently as the 1998 state legislative session, discussions were held between the Board, legislators and members of the health care community, including MMA and MHHP, concerning the Board's claimed right of access to peer review information. Then, as now, the Board asserted that § 145.64 does not apply to its activities. State Representative Lee Greenfield, among others, disagreed, responding that the Board's position ran afoul of Minnesota law. (A.A. 9.) This Court may take judicial notice of such legislative facts. See Minn. R. Evid. 201(a), Advisory Committee Comment. See also, United States Supreme Court Advisory Comm. Note to Fed. R. Evid. 201, quoted in Thompson on Evidence, 11 Minn. Practice § 201.02 (West 2nd ed. 1992 and supp. 1998).

If the Legislature intended to exempt the Board from the confines of § 145.64, it would have specifically done so. Since the Legislature has not seen fit to permit the Board to subpoena peer review documents, it is not within the province of this Court to rewrite the statute to accommodate the Board's request. See State ex rel. Bergin v. Washburn, 224 Minn. 269, 28 N.W.2d 652 (1947) (courts to apply law as legislature has enacted it).

The Board can only prevail in this matter with legislative change. Since the Legislature has refused to make such a change, the Board must rely on the variety of other avenues available to it to access information necessary to perform its functions. These are amply detailed by Respondents in their brief and need not be repeated here. (Respondent's Brief at 19-25.)

The access requested by the Board is simply unnecessary for the Board to conduct its affairs and would destroy the peer review process in Minnesota, a process crucial to the maintenance of quality medical care in this state.