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## Idaho Peer Review Privilege

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Idaho has enacted a broad privilege that protects the confidentiality of credentialing, quality improvement, and similar peer review activities by Idaho hospitals and other health care entities. The statute encourages participation and protects the integrity of such peer review activities by ensuring that peer review communications and proceedings remain confidential, and that participants are immune from liability.

**Application.** The privilege applies to “peer review” activities conducted by “healthcare organizations”. (I.C. § 39-1392).

"Health care organization" means a hospital, in-hospital medical staff committee,<sup>1</sup> medical society, managed care organization, licensed emergency medical service, group medical practice, or skilled nursing facility.

(I.C. § 39-1392a(3)).

"Peer review" means the collection, interpretation and analysis of data by a health care organization for the purpose of bettering the system of delivery of health care or to improve the provision of health care or to otherwise reduce patient morbidity and mortality and improve the quality of patient care. Peer review activities by a health care organization include, without limitation:

- (a) Credentialing, privileging or affiliating of health care providers as members of, or providers for, a health care organization;
- (b) Quality assurance and improvement, patient safety investigations and analysis, patient adverse outcome reviews, and root-cause analysis and investigation activities by a health care organization; and
- (c) Professional review action, meaning an action or recommendation of a health care organization which is taken or made in the conduct of peer review, that is based on the competence or professional conduct of an individual physician or emergency medical services personnel where such conduct adversely affects or could adversely affect the health or welfare of a patient or the physician's privileges, employment or membership in the health care organization or in the case of emergency medical services personnel, the emergency medical services personnel's scope of practice, employment or membership in the health care organization.

(I.C. § 39-1392a(11)).

**Scope of Privilege.** Under the statute,

all peer review records<sup>2</sup> shall be confidential and privileged, and

shall not be directly or indirectly subject to subpoena or discovery proceedings or be admitted as evidence, nor shall testimony relating thereto be admitted in evidence, or in any action of any kind in any court or before any administrative body, agency or person for any purpose whatsoever....

(I.C. § 39-1392b). Furthermore,

Persons and entities receiving peer review records shall preserve the confidential privileged character thereof and such persons and entities shall not be subject to subpoena or order compelling production of peer review records.

(*Id.* at § 39-1392d).

Consistent with § 39-1392b, Idaho Rule of Evidence (“I.R.E.”) 519 states:

A hospital, in-hospital medical staff committee, medical society, and maker of a confidential communication has a privilege to refuse to disclose and to prevent any other person from disclosing the confidential communication.

(I.R.E. 519(b)).

A communication is a "confidential communication" under this Rule if it (A) is made in connection with a proceeding for research, discipline, or medical study conducted by an in-hospital medical staff committee or medical society for the purpose of reducing morbidity and mortality, or improving the standards of medical practice or health care in the State of Idaho; (B) is a statement of opinion or conclusion concerning the subject matter of the proceeding; and (C) is not intended for disclosure to third persons, except persons present to further the purposes of or participate in the proceeding, or necessary for the transmission of the communication.

(I.R.E. 519(a)(4)).

Idaho's peer review privilege is quite broad; it “extends to all discussions and proceedings by hospital staff committees, conducted for the purpose of research, discipline or medical study.” (*Murphy v. Wood*, 105 Idaho 180, 184, 667 P.2d 859, 863 (App. 1983); see also Official Comment to I.R.E. 519). Idaho courts have repeatedly and consistently applied the peer review privilege broadly to prohibit discovery or preclude evidence of peer review proceedings or communications. (See, e.g., *Verska v. St. Alphonsus Reg. Med. Ctr*, 151 Idaho 889, 265 P.3d 502 (2011) (affirming an order protecting privileged communications); *Montalbano v. St. Alphonsus Reg. Med. Ctr*, 151 Idaho 837, 264 P.3d 944 (2011) (same); *Nightengale v. Timmel*, 15 Idaho 347, 353, 256 P.3d 755, 761 (2011) (denying motion to compel peer review materials); *Murphy*, 105 Idaho 180, 667 P.2d 859 (granting motion in limine to protect privileged peer review communications)).

Although the Idaho statutes and court rules offer strong protection, the

Idaho peer review privilege is not absolute. First, the peer review privilege is a product of state law; it may not apply in federal cases involving federal claims (e.g., antitrust or civil rights claims). Second, the statute allows malpractice plaintiffs to obtain limited information concerning whether peer review was conducted and the outcome of peer review information. (I.C. § 39-1392e). In addition, if a physician sues a hospital or other peer review participants for their peer review activity, the hospital or physicians may use the peer review information to defend themselves. (I.C. § 39-1392e(f)). Third, a healthcare organization may waive the privilege by using or disclosing peer review information intentionally or unintentionally, e.g., if it decides to use the information in defense of a claim by the peer review participant. (See, e.g., I.C. § 39-1392e(f)). Note, however, that the privilege belongs to the party who is asserting it; the other party may not waive the privilege on behalf of the party asserting the privilege.

**Scope of Immunity.** The peer review statute also offers significant immunity to persons who participate in peer review activities:

The furnishing of information or provision of opinions to any health care organization or the receiving and use of such information and opinions shall not subject any health care organization or other person to any liability or action for money damages or other legal or equitable relief.

(I.C. § 39-1392c). In *Harrison v. Binnion*, the Idaho Supreme Court held that the peer review immunity does not extend “to a health care organization for making a credentialing decision”; however, the Court reaffirmed that immunity does apply to peer review participants who furnish information or share opinions during the peer review process:

[§ 39-1392c] grants immunity for “[t]he furnishing of information or provision of opinions to any health care organization” and for “the receiving and use of such information and opinions.” The obvious purpose of the statute is to encourage the free exchange of information and opinions regarding peer review activities, which includes credentialing. A person who provides such information or opinions need not fear a subsequent lawsuit alleging claims such as slander, defamation, tortious interference with contract or prospective economic advantage, or intentional infliction of emotional distress. The statute grants immunity from “liability or action for money damages or other legal or equitable relief.” I.C. § 39-1392c. The broad grant of immunity may also form a basis for the recovery of attorney fees...

(147 Idaho 645, 649, 214 P.3d 631, 635 (2009)). As a practical matter, the peer review privilege may prevent plaintiffs from discovering or admitting evidence concerning peer review and, therefore, protect healthcare organizations from claims arising out of peer review activities even if the healthcare organization is not entitled to statutory immunity.

In addition to Idaho's peer review immunity, the federal Health Care Quality Improvement Act (“HCQIA”) protects peer review organizations and participants from state and most federal claims arising from a peer review

action so long as the subject of the peer review is given certain minimal due process rights. (42 U.S.C. § 11101 *et seq.*; *Laurino v. Syringa Gen. Hosp.*, CIV 98-0439-S-EJL, Order dated 3/14/05 (D. Idaho 2005) (summary judgment dismissing claims against hospital and peer review participants due to HCQIA immunity)). Peer review participants may also receive additional protection under the federal Volunteer Protection Act, 42 U.S.C. § 14501 *et seq.*; Idaho Tort Claims Act, I.C. § 6-901 *et seq.*; and/or the Idaho Non-Profit Directors and Officers Act, I.C. § 6-1605, depending on the nature of the healthcare organization.

**Protecting the Privilege.** Given the importance of the peer review privilege, healthcare organizations and those participating in peer review should take care to ensure that they protect privileged proceedings and communications by doing the following:

1. Conduct credentialing, quality assurance, incident investigations, and other peer review activities through committees, personnel and processes as authorized by and set forth in bylaws, policies and procedures. Avoid informal, ad hoc, or unauthorized actions by individuals.
2. Idaho law requires that “[p]ersons and entities receiving peer review records shall preserve the confidential privileged character thereof...” (I.C. § 39-1392d). Ensure that bylaws, policies, and/or credentialing applications include provisions that require applicants and practitioners to maintain the confidentiality of peer review activities and, to the extent allowed by law, waive or release claims against peer review participants. Remind participants of their confidentiality obligations.
3. Designate documents used or generated as part of the peer review process as confidential peer review information. For example, label or stamp minutes, reports, records, correspondence, e-mails, transcripts, etc. with the phrase, “**CONFIDENTIAL PEER REVIEW INFORMATION PROTECTED BY I.C. § 39-1392 et seq. DO NOT DISTRIBUTE OR DISCLOSE WITHOUT AUTHORIZATION.**”
4. Maintain tight control over peer review communications. Documents, e-mails, and other records should be kept in a secure location. Carefully consider the circumstances before distributing copies, and require recipients to acknowledge their obligation to maintain the confidentiality of the documents and return or destroy the documents upon completion of the recipient's participation.
5. Enforce the confidentiality rules. Improper disclosures may result in the waiver of the peer review privilege. Do not disclose peer review information outside of the authorized processes, including informal discussions between participants or with those outside the process. If peer review participants make improper disclosures, admonish the offenders and take any appropriate remedial action.
6. Strictly follow bylaws, rules and policies concerning the peer review process, including complying with procedural steps, standards, or rights granted to participants. Courts generally defer to peer review decisions so long as the decision was not arbitrary or capricious, and the reviewers

followed applicable bylaws and policies.

7. Ensure that any peer review activity based on professional conduct or competence that may adversely affect clinical privileges complies with HCQIA procedural requirements. At a minimum, the action should be taken in the reasonable belief that it furthered quality health care after a reasonable effort to obtain facts, adequate notice, and a chance for the subject to present evidence. Healthcare organizations are deemed to satisfy this requirement if they provide specific procedures listed in 42 U.S.C. § 11112(b).

8. Carefully consider the consequences before waiving the peer review privilege, including disclosing peer review information in response to discovery requests or subpoenas, or using peer review documents to defend the healthcare organization in lawsuits arising out of peer review actions. It may be that the healthcare organization is better off asserting the privilege instead of using or disclosing the privileged documents in its defense.

9. When in doubt, check with an attorney who knows and understands the peer review statutes and the consequences of waiving any privilege.

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For questions regarding this update, please contact:

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<sup>1</sup>"In-hospital medical staff committees" means: "any individual doctor who is a hospital staff member, or any hospital employee, or any group of such doctors and/or hospital employees, who are duly designated a committee by hospital staff bylaws, by action of an organized hospital staff, or by action of the board of directors of a hospital, and which committee is authorized by said bylaws, staff or board of directors, to conduct research or study of hospital patient cases, or of medical questions or problems using data and information from hospital patient cases." (I.C. § 39-1392a(5)).

<sup>2</sup>"Peer review records" means "all evidence of interviews, reports, statements, minutes, memoranda, notes, investigative graphs and compilations and the contents thereof, and all physical materials relating to

peer review of any health care organization..." (I.C. § 39-1392a(12)).

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