

Medical Review Committee Privilege  
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All you really need to remember-

- Shelton v. Morehead Memorial 318 NC 76, 347 SE2d 824 (1986)
- NCGS 131E-95
- SOG Superior Court website, [www.judges.unc.edu](http://www.judges.unc.edu), past conference materials, June 2017

What is it?

131E-76(5)- any committee formed for the purpose of evaluating the quality, cost, or necessity of hospitalization or health care, including staff credentialing

So, “quality of health care” and “credentialing” will be the focus of discovery disputes in most cases. Examples: a committee of 1) a state or local professional society 2) the medical staff 3) a peer review organization or organization

131E-76(5)(c) defines a hospital committee as: a committee of a hospital or hospital system:

- 1) Created by the governing board or medical staff of the hospital or system
- 2) Operating under written procedures adopted by the governing board or medical staff of the hospital or system

What is not?

-The Board of Trustees (Shelton is the cite)  
-A “Root Cause Analysis Team” formed by the risk manager to find out what happened. Hammond v. Saini 367 NC 607, 766 SE2d 590 (2014). Trial Court did not err in ordering production.

What is protected? What is not?

-Protected: The proceedings, the documents, the witnesses, the matters considered, the reports or documents produced. 131E-95(b)

-Not Protected: Documents or matters that are otherwise available are not protected, and may be discovered or used in a civil action, even though they were also considered by the committee. 131E-95(b)

Examples: Armstrong v. Barnes 171 NCAp 287 (2005): Physician could not refuse to answer questions concerning substance abuse even though issue was considered by credentialing committee.

Cunningham v. Cannon 187 NCAp 732 (2007): Physician's application for privileges produced and submitted to hospital held discoverable despite being also considered by credentialing committee. This is also addressed in Shelton itself: 318 NC at 87

Hayes v. Premier Living 181 NC App 747, 641 SE2d 316 (2007): Incident reports re nursing home injury discoverable under NCGS 131E-107 (identical privilege adopted in 2005).

### Who has the Burden of Proof?

The party asserting the privilege has the B/P. HOWEVER:

-A mere objection to production or the mere assertion of the privilege is insufficient. Bryson v. Haywood 204 NCAp 532, 694 SE2d 416 (2010)

-Affidavit from risk manager did not establish how and when committee was created, nor how procedures of committee were adopted; therefore trial court did not err in ordering production. Hammond v. Saini 367 NC 607, 766 SE2d 590 (2014)

-Affidavits must establish the statutory requirements. Estate of Forgy 783 SE2d 1 (2016)

A proper affidavit should establish when the committee was established, how it was created, why it was created, what written procedures are followed, etc.,...the more the better...

Can the moving party discover the documents creating and defining the scope and function of the committee?

Yes, says Zander v. Craig Hospital 267 FRD 653 (2010), interpreting an equivalent Colorado statute.

### Can the privilege be waived?

-No North Carolina cases hold that it can. The privilege deals not only with discovery, but with admission. Thus, in Armstrong v. Barnes, the plaintiff's lawyer actually attended the committee hearing. The Plaintiff was barred from any use of the materials or testimony, including use for impeachment at trial, of those proceedings. 131E-95(b)

-In Virmani v. Presbyterian Health Services 350 NC 449 515 SE2d 675 (1999), plaintiff doctor denied privileges and attached the records of the committee hearing to his complaint. Trial Judge closed courtroom and sealed the complaint. SCt: Courts shall be open, and complaint is public record, but documents can't be admitted.

-Doctor did not make document at issue discoverable or admissible by disseminating it to third party, as it was created based on the committee proceedings, and at the direction of the committee. Woods v. Moses Cone 198 NCApp 120, 678 SE2d 787 (2009)

Lesson: The privilege in 131E-95(b) is broad and prohibits any use of committee proceedings, even if they are already in possession of both parties. As with Las Vegas, what happens in committee, stays in committee.

#### Other peer review statutes

-Nursing homes: 131E-107

-Mental health, developmental disabilities, substance abuse...any facility licensed under Chapter 122C. Privilege codified in 122C-30

-Medical review committees including those of insurance carriers: 90-21.22A

#### Can you allege negligence in the peer review process itself?

No. "A civil action against a hospital grounded on the alleged negligent performance of the hospital's medical review committee is by the statute's plain language a civil action resulting from matters evaluated and reviewed by such committees." Whisenhunt v. Zammit 86 NCApp 425, 358 SE2d 114 (1987)

#### Appeals, practical matters...

- The Issue of privilege is a question of law; in camera review is proper. *Medlin v. North Carolina Specialty Hospital* 233 NCApp 327, 756 SE2d 812 (2014)
- An order of production is immediately appealable as it effects a substantial right. *Woods v. Moses Cone, Estate of Forgy*
- Review of trial court's order is de novo. *Estate of Forgy*
- Make findings of fact and conclusions of law if asked, and probably even if not. An order of production remanded for entry of such in *Williams v. Marchelle Isyk* Allen P.A. 863 SE2d 632 (CoA Aug. 3, 2021)