

EVERYTHING YOU WANTED TO KNOW ABOUT
THE PEER REVIEW PRIVILEGE
AND WERE AFRAID TO ASK

1

SORRY, BUT THE EDUCATION COMMITTEE HAS TO GIVE YOU
G-RATED MATERIAL.

2

THE PRESENTATION IS NOT IN YOUR PACKET.

3

DON'T WORRY ABOUT THE CITATIONS.

THE PRESENTATION WILL BE POSTED ON THE SCHOOL OF
GOVERNMENT WEBSITE IN THE MATERIALS FROM PAST
CONFERENCES SECTION.

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1. WHERE DID THE PRIVILEGE COME FROM?

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SOME PRIVILEGES COME FROM COMMON LAW.

THE PEER REVIEW PRIVILEGE IS A STATUTORY CREATION. IT IS SET
OUT IN N.C. GEN. STAT. 131E-95

THE STATUTE REFERS TO A "MEDICAL REVIEW COMMITTEE" AND
AT TIMES THE PRIVILEGE MAY BE REFERRED TO AS THE MEDICAL
REVIEW COMMITTEE PRIVILEGE.

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2. DOES IT HAVE A PURPOSE?

3. IF IT DOES, WHAT IS IT?

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YES, THERE IS A PURPOSE.

“The peer review privilege is designed to encourage candor and objectivity in the internal workings of review committees.”

Hayes v. Premier Living, Inc., 181 N.C. App 747, 641 S.E. 2d 316 (2007).

There is a fear or concern that “external access to peer investigations conducted by staff committees stifles candor and objectivity.” Estate of Ray v. Forgy, ___ N.C. App. ___, 783 S.E. 2d 1 (2016).

The hope is that this objectivity promotes the public health. See Virmani v. Presbyterian Health Services Corp., 350 N.C. 449, 515 S.E. 2d (1999).

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4. IS THERE A DOWNSIDE OR COST TO THIS POLICY?

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YES.

The Act represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing the plaintiff’s access to evidence.

Shelton v. Morehead Memorial Hospital, 318 N.C. 76, 347 S.E. 2d 824 (1986).

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5. WHAT IS A MEDICAL REVIEW COMMITTEE OR PEER REVIEW COMMITTEE?

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N.C. GEN. STAT. 131E-76 (5) WHICH IS PART OF THE HOSPITAL LICENSURE ACT PROVIDES A DEFINITION.

“MEDICAL REVIEW COMMITTEE” MEANS ANY OF THE FOLLOWING COMMITTEES FORMED FOR THE PURPOSE OF EVALUATING THE QUALITY, COST OF, OR NECESSITY FOR HOSPITALIZATION OR HEALTH CARE, INCLUDING STAFF CREDENTIALING.”

SO, THE COMMITTEE HAS TO BE FORMED FOR THE PURPOSE OF EVALUATING ONE OF THESE ITEMS.

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THEN N.C. GEN. STAT. 131E-76(5) LISTS SOME EXAMPLES:

- a. A COMMITTEE OF A STATE OR LOCAL PROFESSIONAL SOCIETY.
- b. A COMMITTEE OF THE MEDICAL STAFF OF A HOSPITAL.
* * *
- d. A COMMITTEE OF A PEER REVIEW CORPORATION OR ORGANIZATION.

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6. WHY DID I SKIP ONE?

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BECAUSE, IT IS MORE COMPLICATED.

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N.C. GEN. STAT. 131E-76(5)(c) INCLUDES:

A COMMITTEE OF A HOSPITAL OR HOSPITAL SYSTEM, IF CREATED BY THE GOVERNING BOARD OR MEDICAL STAFF OF THE HOSPITAL OR SYSTEM OR OPERATING UNDER WRITTEN PROCEDURES ADOPTED BY THE GOVERNING BOARD OR MEDICAL STAFF OF THE HOSPITAL OR SYSTEM.

MOST OF THE CASES I HAVE SEEN INVOLVE THIS TYPE OF COMMITTEE.

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IN OTHER WORDS:

- 1. A COMMITTEE OF A HOSPITAL SYSTEM THAT:
- 2. IS EITHER
 - A. CREATED BY THE GOVERNING BOARD OR MEDICAL STAFF OF THE HOSPITAL OR SYSTEM,
 - OR
 - B. OPERATING UNDER WRITTEN PROCEDURES ADOPTED BY THE GOVERNING BOARD OR MEDICAL STAFF OF THE HOSPITAL OR SYSTEM.

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7. WHAT IS AN EXAMPLE OF SUCH A COMMITTEE UNDER THE CASE LAW?

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A COMMITTEE RESPONSIBLE FOR MEDICAL STAFF
CREDENTIALING

ARMSTRONG v. BARNES, 171 N.C. App. 287, 614 S.E. 2d 371 (2005).

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8. WHAT IS AN EXAMPLE OF A COMMITTEE THAT IS NOT
PROTECTED?

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A BOARD OF TRUSTEES OF A HOSPITAL SIMPLY CANNOT FIT
WITHIN THE STATUTORY LANGUAGE.

Shelton v. Morehead Memorial Hospital, 318 N.C. 76, 347 S. E. 2d (1986).

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9. ARE NURSING HOMES PROTECTED BY THIS STATUTE?

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NO.

BUT, N.C. GEN. STAT. 131E-107 CREATES A SIMILAR PEER REVIEW
TYPE PRIVILEGE FOR NURSING HOMES.

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THERE IS ANOTHER PEER REVIEW PRIVILEGE STATUTE IN
N.C. GEN. STAT. 90-21.22A THAT APPLIES TO LICENSED
PROVIDERS OF HEALTH CARE WHO DIRECTLY PROVIDE
SERVICES, PROVIDER SPONSORED ORGANIZATIONS,
AMBULATORY SURGICAL FACILITIES, MENTAL HOSPITALS
AND STATE OWNED FACILITIES.

THE LANGUAGE OF THIS STATUTE IS VIRTUALLY IDENTICAL TO
N.C. GEN. STAT. 131E-95(b).

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N.C. GEN. STAT. 122C-30
CREATES A SIMILAR PEER REVIEW COMMITTEE PRIVILEGE FOR
"A FACILITY LICENSED UNDER THE PROVISIONS"
OF CHAPTER 122C WHICH GOVERNS MENTAL HEALTH,
DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE.

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10. WHAT MATERIAL FALLS WITHIN THE SCOPE OF
THE PEER REVIEW PRIVILEGE?

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N.C. GEN. STAT. 131E-95(b) PROVIDES THAT:

1. THE PROCEEDINGS OF THE MEDICAL REVIEW COMMITTEE;
2. THE RECORDS AND MATERIALS IT PRODUCES; AND
3. THE MATERIALS IT CONSIDERS

SHALL BE CONFIDENTIAL.

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11. DOES THAT MEAN ANY DOCUMENT GIVEN TO THE
MEDICAL REVIEW COMMITTEE FALLS WITHIN THE PRIVILEGE?

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NO.

WHAT THE LEGISLATURE GIVETH, IT CAN TAKE AWAY.

N.C. GEN. STAT. 131E-95(b) FURTHER PROVIDES:

"HOWEVER, INFORMATION, DOCUMENTS, OR RECORDS
OTHERWISE AVAILABLE ARE NOT IMMUNE FROM
DISCOVERY OR USE IN A CIVIL ACTION MERELY BECAUSE THEY
WERE PRESENTED DURING PROCEEDINGS OF THE
COMMITTEE."

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DOCUMENTS THAT ARE OTHERWISE AVAILABLE ARE NOT WITHIN
THE PRIVILEGE.

FOR INSTANCE, DOCUMENTS PROVIDED BY INDIVIDUAL PHYSICIANS
IN THEIR APPLICATION FOR PRIVILEGES ARE NOT PROTECTED.

Shelton v. Morehead Memorial Hospital, 318 N.C. 76, 347 S.E. 2d 824 (1986).

A DOCTOR MAY NOT INVOKE THE STATUTE TO SHIELD HIMSELF FROM ANSWERING
DEPOSITION QUESTIONS REGARDING THE DETAILS ABOUT HIS DRUG ABUSE MERELY BECAUSE
HE DISCLOSED DETAILS DURING CREDENTIALING COMMITTEE PROCEEDINGS AND THOSE
DETAILS WERE PRESUMABLY INCLUDED IN THE COMMITTEE'S RECORDS.

Armstrong v. Barnes, 171 N.C. App. 287, 614 S.E. 2d 371 (2005).

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LET'S ASSUME WE HAVE A MEDICAL REVIEW COMMITTEE AND THAT THE MATERIAL IS PROTECTED BY THE PRIVILEGE.

12. WHAT DOES THE PRIVILEGE PREVENT YOU FROM DOING WITH THE INFORMATION?

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THE PROTECTED MATERIAL "SHALL NOT BE SUBJECT TO DISCOVERY OR INTRODUCTION INTO EVIDENCE IN ANY CIVIL ACTION AGAINST A HOSPITAL, AN AMBULATORY SURGICAL FACILITY LICENSED UNDER CHAPTER 131E..., OR A PROVIDER OF PROFESSIONAL HEALTH SERVICES WHICH RESULTS FROM MATTERS WHICH ARE THE SUBJECT OF EVALUATION AND REVIEW BY THE COMMITTEE." N.C. GEN. STAT. 131E-95(b).

NOT DISCOVERABLE AND NOT ADMISSIBLE.

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THESE MATERIALS ARE ALSO NOT PUBLIC RECORDS UNDER THE MEANING OF N.C. GEN. STAT. 132-1.

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"NO PERSON WHO WAS IN ATTENDANCE AT A MEETING OF THE COMMITTEE SHALL BE REQUIRED TO TESTIFY IN AN CIVIL ACTION AS TO ANY EVIDENCE OR OTHER MATTERS PRODUCED OR PRESENTED DURING THE PROCEEDINGS OF THE COMMITTEE OR AS TO ANY FINDINGS, RECOMMENDATIONS, EVALUATIONS, OPINIONS, OR OTHER ACTIONS OF THE COMMITTEE OR ITS MEMBERS." N.C. GEN. STAT 131E-95(b).

THIS CREATES A TESTIMONIAL PRIVILEGE IN ADDITION TO A BAR ON DISCLOSURE.

WHAT HAPPENS IN THE COMMITTEE, STAYS IN THE COMMITTEE.

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A MEMBER OF THE COMMITTEE OR A PERSON WHO TESTIFIES BEFORE THE COMMITTEE MAY TESTIFY IN A CIVIL ACTION BUT CANNOT BE ASKED ABOUT THE PERSON'S TESTIMONY BEFORE THE COMMITTEE OR ANY OPINIONS FORMED AS A RESULT OF THE COMMITTEE'S HEARINGS. N.C. GEN. STAT. 131E-95(b).

SO, YOU CAN'T KEEP A WITNESS OFF THE STAND MERELY BY HAVING THEM APPEAR BEFORE A PEER REVIEW COMMITTEE.

IT ALSO APPEARS THAT YOU CANNOT IMPEACH A WITNESS WITH STATEMENTS THE WITNESS MADE BEFORE THE COMMITTEE.

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13. DOES THE ASSERTION OF A CORPORATE NEGLIGENCE CLAIM AGAINST A HOSPITAL AVOID OR ESCAPE THE PRIVILEGE?

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NOPE.

IT WOULD SEVERELY UNDERCUT THE PURPOSES OF THE STATUTE, I.E. THE PROMOTION OF CANDOR AND FRANK EXCHANGE IN PEER REVIEW PROCEEDINGS, IF WE ADOPTED PLAINTIFF'S CONSTRUCTION OF THE STATUTE, FOR IT WOULD MEAN THESE PROCEEDINGS WERE NO LONGER PROTECTED WHENEVER A CLAIM OF CORPORATE NEGLIGENCE WAS MADE ALONE OR COUPLED WITH A CLAIM OF NEGLIGENCE AGAINST AN INDIVIDUAL PHYSICIAN.

SHELTON v. MOREHEAD MEMORIAL HOSPITAL, 318 N.C. 76, 347 S.E. 2d 824 (1986).

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14. HOW ABOUT A CLAIM THAT ASSERTS NEGLIGENCE IN THE PEER REVIEW PROCESS ITSELF?

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"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 N.C. App. 425, 358 S.E. 2d 114 (1987).

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SOME PRIVILEGES HAVE AN EXCEPTION IF A JUDGE DETERMINES THAT DISCLOSURE IS NECESSARY TO "THE PROPER ADMINISTRATION OF JUSTICE."

15. DOES THE PEER REVIEW PRIVILEGE HAVE SUCH AN EXCEPTION?

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NO.

N.C. GEN. STAT. 131E-95(b) DOES NOT CONTAIN SUCH LANGUAGE.

THE CASE LAW DOES NOT RECOGNIZE SUCH AN EXCEPTION.

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16. CAN THE PEER REVIEW PRIVILEGE BE WAIVED?

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17. DOES ATTACHING PEER REVIEW MATERIALS TO THE PLAINTIFF'S COMPLAINT AND FILING THEM WAIVE THE PRIVILEGE?

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NO.

THE PLAINTIFF IN VIRMANI V. PRESBYTERIAN HEALTH SERVICES DID JUST THAT.

"IT IS IMPROPER FOR DR. VIRMANI TO ATTACH THEM TO HIS COMPLAINT AS EVIDENCE OR AS A FORECAST OF EVIDENCE. WE EMPHASIZE THAT THESE DOCUMENTS CONTINUE TO BE INADMISSIBLE AS EVIDENCE OR AS A FORECAST OF EVIDENCE IN THIS CASE..."

Virmani v. Presbyterian Health Services Corp., 350 N.C. 449, 515 S.E. 2d 675(1999).

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18. DOES DISCLOSURE OF THE DOCUMENTS TO THIRD PARTIES WAIVE THE PEER REVIEW PRIVILEGE?

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NO.

BECAUSE THE LETTER WAS PRODUCED AT THE REQUEST OF THE MEDICAL REVIEW COMMITTEE, THE LETTER IS ABSOLUTELY PRIVILEGED UNDER N.C. GEN. STAT. 131E-95. ALTHOUGH THE LETTER MIGHT BE SEEN BY PERSONS OUTSIDE THE COMMITTEE, IT NONETHELESS REMAINS PROTECTED FROM DISCOVERY AND ADMISSIBILITY AT TRIAL. THEREFORE, THE TRIAL COURT ERRED IN CONCLUDING THAT DR. STERN COULD WAIVE THE PRIVILEGE BY DISSEMINATING THE LETTER TO PERSONS OUTSIDE OF THE COMMITTEE.

WOODS v. MOSES CONE HEALTH SYSTEM, 198 N.C. App. 120, 678 S.E. 2d 787(2009).

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THERE IS ALSO A STATUTORY PROVISION THAT PERMITS DISCLOSURE OF PEER REVIEW MATERIALS TO AN ACCREDITING AND CERTIFICATION ENTITY OR A PATIENT SAFETY ORGANIZATION WITHOUT A WAIVER OF THE PRIVILEGE.

N.C. GEN. STAT. 131E-95(c).

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19. CAN THIS PRIVILEGE BE WAIVED AT ALL?

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SINCE THE PURPOSE IS TO ENCOURAGE CANDOR AND OBJECTIVITY ON THE PART OF THE PARTICIPANTS IN A MEDICAL REVIEW COMMITTEE, IT MIGHT MAKE SENSE TO ALLOW THE PARTICIPANTS TO WAIVE THE PRIVILEGE IF ALL OF THEM AGREE TO DO SO.

THERE IS NO CASE LAW IN NORTH CAROLINA TO SUPPORT SUCH A RULING. HOWEVER, I HAVE RULED THAT WAY IN A CASE THAT LATER SETTLED.

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LET'S TALK ABOUT SOME PROCEDURAL ASPECTS OF THE PEER REVIEW PRIVILEGE.

20. WHO HAS THE BURDEN OF ASSERTING THE PRIVILEGE?

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IT IS FOR THE PARTY OBJECTING TO DISCOVERY OF PRIVILEGED INFORMATION TO RAISE THE OBJECTION IN THE FIRST INSTANCE AND HE HAS THE BURDEN OF ESTABLISHING THE EXISTENCE OF THE PRIVILEGE.

BRYSON v. HAYWOOD REGIONAL MEDICAL CENTER, 204 N.C. APP. 532, 694 S.E. 2d 416 (2010).

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21. IS AN OBJECTION ALONE ENOUGH?

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NO.

MERE ASSERTIONS THAT DOCUMENTS CONSTITUTE PEER REVIEW MATERIALS AND MEET THE REQUIREMENTS ARE NOT ENOUGH.

Bryson v. Haywood Regional Medical Center, 204 N.C. App. 532, 694 S.E. 2d 416 (2010).

A TRIAL COURT PROPERLY GRANTS A MOTION TO COMPEL WHEN THE DEFENDANTS DO NOT PRESENT ANY EVIDENCE TENDING TO SHOW THE REPORTS WERE PRIVILEGED. *Id.*

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22. ARE CONCLUSORY ALLEGATIONS ENOUGH?

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NO.

“THE PARTY ASSERTING THE PRIVILEGE HAS THE BURDEN TO DEMONSTRATE EACH OF ITS ESSENTIAL ELEMENTS AND CANNOT MEET THIS BURDEN BY MERE CONCLUSORY ALLEGATIONS.”

Hammond v. Saini, 367 N.C. 607, 766 S.E. 2d 590 (2014).

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23. ARE AFFIDAVITS ENOUGH TO PROVE THE PRIVILEGE?

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MAYBE.

“THE MERE SUBMISSION OF AFFIDAVITS BY THE PARTY ASSERTING THE MEDICAL REVIEW PRIVILEGE DOES NOT AUTOMATICALLY MEAN THAT THE PRIVILEGE APPLIES. RATHER, THE AFFIDAVITS MUST DEMONSTRATE THAT EACH OF THE STATUTORY REQUIREMENTS CONCERNING THE EXISTENCE OF THE PRIVILEGE HAVE BEEN MET.”

Estate of Ray v. Forgy, ___ N.C. App. ___, 783 S.E. 2d 1 (2016).

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FOR INSTANCE, THE AFFIDAVIT MUST PROVE THAT THE PEER REVIEW COMMITTEE IS ONE OF THOSE IDENTIFIED BY N.C. GEN. STAT. 131E-76(5) THAT WE DISCUSSED EARLIER.

“THE EVIDENCE MUST SET FORTH EITHER HOW THE COMMITTEE WAS CREATED OR HOW THE WRITTEN PROCEDURES IT OPERATES UNDER WERE ADOPTED.

Hammond v. Saini, 367 N.C. 607, 766 S.E. 2d 590 (2014).

THE STATUTE WOULD ALSO REQUIRE PROOF THAT THE COMMITTEE HAD ONE OF THE REQUIRED PURPOSES SET OUT IN THE STATUTE.

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24. WHAT ABOUT THE DOCUMENTS THEMSELVES? HOW DO I DETERMINE IF THEY ARE PRIVILEGED?

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“IN ORDER TO DETERMINE WHETHER THE PEER REVIEW PRIVILEGE APPLIES, A COURT MUST CONSIDER THE CIRCUMSTANCES SURROUNDING THE ACTUAL PREPARATION AND USE OF THE DISPUTED DOCUMENTS INVOLVED IN EACH PARTICULAR CASE. THE TITLE, DESCRIPTION, OR STATED PURPOSE ATTACHED TO A DOCUMENT BY ITS CREATOR IS NOT DISPOSITIVE...”

Estate of Ray v. Forgy, ___ N.C. App. ___, 783 S.E. 2d 1 (2016).

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25. DOES THIS MEAN I HAVE TO DO AN IN CAMERA REVIEW OF THE DOCUMENTS?

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IT MAY.

“THE DETERMINATION OF PRIVILEGE IS A QUESTION OF LAW WHICH THE TRIAL COURT MUST DECIDE AND IN CAMERA REVIEW OF THE EVIDENCE IN QUESTION IS PROPER.”

Medlin v. North Carolina Specialty Hospital, LLC, 233 N.C. App. 327, 726 S.E. 2d 812 (2014).

“THE CASE LAW SUPPORTS THAT ON THE QUESTION OF PRIVILEGE, THE TRIAL COURT HAS AN INTEREST IN ENSURING THAT THE ASSERTED INFORMATION IS INDEED PRIVILEGED AND NEED NOT RELY ON THE WORD OF THE INTERESTED PARTY OR ITS COUNSEL.” *Id.*

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26. IF I RULE ON A CLAIM THAT MATERIALS ARE PROTECTED BY THE PEER REVIEW PRIVILEGE, HOW IS MY DECISION REVIEWED?

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WHETHER A DOCUMENT IS PRIVILEGED PURSUANT TO N.C. GEN. STAT. 131E-95 IS A QUESTION OF LAW.

Medlin v. North Carolina Specialty Hospital, LLC, 233 N.C. App. 327, 726 S.E. 2d 812 (2014).

ON APPEAL FROM A TRIAL COURT’S DISCOVERY ORDER IMPLICATING THE MEDICAL REVIEW PRIVILEGE, THE COURT OF APPEALS REVIEWS DE NOVO WHETHER THE REQUESTED MATERIALS ARE PRIVILEGED UNDER N.C. GEN. STAT. 131E-5(b).

Estate of Ray v. Forgy, ___ N.C. App. ___, 783 S.E. 2d 1 (2016).

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27. IF I ORDER MATERIAL THAT IS ALLEGEDLY PROTECTED BY THE PEER REVIEW PRIVILEGE DISCLOSED, CAN THE OBJECTING PARTY IMMEDIATELY APPEAL?

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YES.

“ORDERS COMPELLING DISCOVERY OF MATERIALS PURPORTEDLY PROTECTED BY THE MEDICAL REVIEW PRIVILEGE OR WORK PRODUCT DOCTRINE ARE IMMEDIATELY REVIEWABLE ON APPEAL DESPITE THEIR INTERLOCUTORY NATURE.”

Estate of Ray v. Forgy, ___ N.C. App. ___, 783 S.E. 2d 1 (2016).

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