

Medical Review Committee
Privilege
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All you really need to remember

- Shelton v. Morehead Memorial Hospital 318 NC 76, 347 SE2d 824 (1986)
- NCGS 131E-95
- www.judges.unc.edu past conference materials, summer 2017

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What is a Medical Review Committee?

- 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

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Hospital Committees

- 131E-76(5)(c): 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

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What is not a protected committee?

- 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.

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What is protected? What is not protected?

- 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)

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Examples of unprotected matters

- *Armstrong v. Barnes* 171 NCAApp 287 (2005): Physician could not refuse to answer questions concerning substance abuse even though issue was considered by credentialing committee
- *Cunningham v. Cannon* 187 NCAApp 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 NCAApp 747, 641 SE2d 316 (2007): Incident reports re nursing home injury discoverable under NCGS 131E-107 (identical privilege adopted in 2005)

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Who has the B/P?

- A: The party asserting the privilege; Mere objection or assertion of privilege is insufficient. *Bryson v. Haywood* 204 NCAApp 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)
- When created, how created, what created, and why created....

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Asserting and Testing the Privilege

- The privilege (equivalent Colorado statute) refers only to the work and work product of the committee, and not to the documents creating and defining the scope and function of the committee. *Zander v. Craig Hospital* 267 FRD 653 (2010)

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Waiver? Not so much...

- Not only not discoverable, but not admissible
- In *Armstrong v. Barnes*, the plaintiff's lawyer actually attended the committee hearing. Barred from any use, including impeachment, 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.

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Not so much, cont.

- 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)
- 131E-95(b) is very broad.
- As with Las Vegas, what happens in committee, stays in committee.

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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

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Can you challenge the peer review process itself?

- “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 NCAp 425, 358 SE2d 114 (1987)

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How do our job...

- Issue of privilege is a question of law; in camera review is proper. Medlin v. North Carolina Specialty Hospital 233 NCAp 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. Order of production remanded for entry: Williams v. Marchelle Isyk Allen P.A. 863 SE2d 632 (CoA Aug. 3, 2021)

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