

# MEDICAL MALPRACTICE UPDATE

May 2009

## Peer Review in Peril?

*Exploring the little known “exception” to the Peer Review Privilege*

By Brian M. Pearson, Attorney

Recently, mental health care providers received letters from Michigan Protection and Advocacy Services (MPAS), a Patient and Advocacy (P & A) group, requesting access to treatment records and peer review materials. Here is a guide to some of the legal issues surrounding this patient advocacy group and its ability to access generally protected peer review materials.

### What is MPAS?

Congress created the Protection and Advocacy for Mentally Ill Individuals (PAMII) Act in an effort to address perceived abuse and neglect issues in mental health institutions across the country. As a result of federal funding, P & A programs were created to “investigate incidents of abuse and neglect of individuals if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.” MPAS qualifies as a P & A program under PAMII.

### Is MPAS legally entitled to patient records and if so, what records?

A provision of PAMII requires that P & A groups have access “to all records” of mentally ill persons in specified circumstances. Among

other things, these records arguably include information gathered and generated through peer review investigations.

In 1991, the Secretary of Health and Human Services attempted to explain that Congress did not intend the statute to compel or allow disclosure of peer review material to these protection and advocacy groups. However, and unfortunately, the Secretary’s committee report has not been given much weight by the courts addressing the extent to which protection advocacy groups are entitled to peer review information.

### Four Circuits of the United States Court of Appeals have found P & A groups legally entitled to peer review records.

In the first United States Court of Appeals case addressing this issue, *Pennsylvania Protection & Advocacy, Inc v Houstoun*, a Pennsylvania advocacy organization qualified to monitor and protect the rights of mentally ill patients under PAMII brought an action against state officials seeking access to peer review records. The Third Circuit **affirmed** the ruling of the district court **that peer review reports had to be disclosed to this type of agency**. The Court examined the language of the statute and held that it compelled

disclosure of peer review records to the patient advocacy organization. Significantly, this opinion was authored by Judge Samuel Alito, who now sits on the U.S. Supreme Court.

In *Center for Legal Advocacy v Hammons*, a Colorado PAMII group sought a declaratory judgment and injunction requiring access to peer review materials and quality assurance records related to suicides committed at a state mental health facility.

As it was an issue of first impression in this circuit, the Court sought guidance from the Third Circuit's decision in *Pennsylvania Protection & Advocacy, Inc v Houstoun*. The Court generally mirrored the analysis and rationale of the Third Circuit and held that the patient advocacy group was entitled to the peer review records. "Peer review or quality assurance records involving the care of an individual could easily fit within that definition of records, along with a myriad of other records relating to an individual and/or his or her care." Additionally, it noted "[t]o the extent that Colorado's laws conflict with PAMII, and the access to the peer review and medical assurance records which PAMII provides, they are preempted."

In *Protection & Advocacy for Persons with Disabilities v Mental Health & Addiction*, the Connecticut state office of protection and advocacy for disabled persons used PAMII to bring a federal civil rights claim against the State Department of Mental Health and Addiction Services seeking to compel disclosure of peer review records in connection with deaths of disabled persons. The Second Circuit held that P & A groups under PAMII are entitled to access all records of mentally ill persons in specific circumstances and that this extends to peer

review records kept at state-administered mental health facilities. The Court relied on the language and reasoning of the prior decisions of the Third and Tenth Circuits.

In *Missouri Protection & Advocacy Services v Missouri Department of Mental Health*, a patient advocacy group brought a federal civil rights action against the state department of mental health alleging a PAMII violation for the department's refusal to disclose a peer review report. The Court held that PAMII preempted state law prohibiting disclosure by healthcare facilities of medical peer review committee reports. This Court also heavily relied on the work of the Third Circuit in holding that the state department of mental health must disclose the peer review material.

**The New Hampshire Supreme Court held that a P & A group was not entitled to peer review**

**records.**

In what appears to be the only reported decision protecting the sanctity of peer review, in *Disabilities Rights Center, Inc v Commissioner, New Hampshire Department of Corrections*, the New Hampshire Supreme Court held that PAMII did not preempt state law providing that quality assurance records shall be kept confidential. The Court ruled that the legislative history of PAMII indicated it was not intended to preempt state law. The Court found it significant that both the state law and PAMII served the same end of benefiting mentally ill individuals and fostering quality care at mental health facilities.

### **Impact of Case Law**

While the Sixth Circuit, which encompasses Michigan, has yet to rule on the issue of whether peer review documents are discoverable by P &

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A groups, there is no reason to suspect that it will act inconsistently with the decisions of the other circuits. **If a group such as MPAS requests an institution's peer review records regarding a mental health patient involved in an incident, the provider will have an uphill battle to avoid being compelled to produce the records.**

Questions remain as to what impact the disclosure of the records will have on the

effectiveness of the peer review process. The effects of a P & A group's use of peer review materials, or whether they can be used in an action against the provider, remain unclear.

We will continue to monitor and report on any new developments pertaining to this issue.

*Brian can be reached directly at 616.458.3638 or bpearson@shrr.com.*

## CASE LAW UPDATE

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Edited by: Brian M. Pearson, Attorney

### U.S. Court of Appeals (6<sup>th</sup> Circuit)

Moses v Providence Hospital and Medical Centers, Inc., April 6, 2009

Ms. Moses-Irons took her husband, Mr. Howard, to the emergency room because he exhibited signs of mental illness and demonstrated threatening behavior which made her fearful for her safety. Following admission to the hospital and six days of monitoring and evaluation, Mr. Howard was released. Tragically, Mr. Howard murdered his wife ten days later. Plaintiff, personal representative of the estate of Ms. Moses-Irons, alleged that the hospital and the psychiatrist who evaluated Mr. Howard during his admission violated EMTALA by releasing Mr. Howard without stabilizing treatment. Defendants argued that (1) plaintiff did not have standing to sue, because EMTALA only applies to individual patients seeking treatment at a hospital; and (2) a hospital's obligations under EMTALA ends once the patient is admitted to the hospital. While the district court granted summary disposition to all defendants, the appellate court reversed and remanded with respect to the

hospital. The 6<sup>th</sup> Circuit held that claims for violations of EMTALA are not limited to the patients treated at the hospital, thus plaintiff had standing to sue. Additionally, the court held that EMTALA's obligations do not automatically end once the patient is admitted and found that the hospital's decision to admit Mr. Howard for six days and perform further testing did not satisfy its obligations under EMTALA to treat and stabilize the patient. The appellate court remanded the case because issues of fact remained relating to the patient's medical condition upon his arrival as well as prior to his release.

### Michigan Court of Appeals

Velez v Tuma, April 16, 2009 (published opinion)

Plaintiff alleged that defendant physician failed to timely and properly diagnose and treat her acute, severe vascular insufficiency condition which resulted in her leg being partially amputated. Following a jury trial, judgment was entered in favor of plaintiff. Defendant appealed, primarily arguing that he was entitled

to a judgment notwithstanding the verdict (JNOV) because plaintiff did not establish proximate cause in this purported “lost opportunity” action. The appellate court affirmed the trial court’s decision holding the “lost opportunity doctrine” inapplicable to plaintiff’s claim of physical injury. The court examined case law regarding the doctrine and concluded that under Michigan law, “lost opportunity” generally means an opportunity to achieve a better result, typically in the context of wrongful death claims. As plaintiff claimed that defendant’s negligence more probably than not directly caused her to lose a portion of her leg, she needed only to set forth the elements of a traditional claim for medical malpractice and was not required to provide proof that the opportunity lost due to defendant’s negligence was greater than 50 percent.

Teal v Prasad, April 14, 2009 (published opinion)

Plaintiff filed a complaint alleging that defendants committed malpractice by failing to properly diagnose and treat Mr. Teal and by discharging him from the hospital prematurely and without a proper treatment plan to address his depression and alcoholism. Mr. Teal committed suicide seven days following his release from the hospital, where he had been treated for depression and suicidal intentions. The Court of Appeals affirmed the trial court’s grant of summary disposition to defendants because it found that Mr. Teal’s suicide was too remote in time from his care by the defendants, and likely too influenced by intervening factors, to establish a question of fact regarding the requisite element of proximate causation.

Peterson v Garden City Hospital, April 9, 2009 (published opinion)

At case evaluation in this medical malpractice action, the panel rendered an award in favor of plaintiff against two physicians and the hospital. However, the trial court granted the defendant physicians’ pending motion for summary disposition prior to the accept/reject date for the evaluation. Plaintiff filed a motion for reconsideration and rejected the case evaluation. The trial court denied plaintiff’s motion for reconsideration and granted the physician defendants’ motions to tax costs and for case evaluation sanctions. The amount awarded included costs for expert witnesses and attorney fees incurred from the date plaintiff rejected case evaluation. The plaintiff appealed the trial court’s order claiming that case evaluation sanctions were improper because the trial court granted defendant’s summary disposition before plaintiff rejected the case evaluation. The appellate court affirmed the trial court’s award of costs to the defendants in holding that the denial of plaintiff’s motion for reconsideration, after rejection, constitutes a “verdict” under the case evaluation court rule.

Lanigan v Huron Valley Hospital, Inc., March 3, 2009 (published opinion)

Plaintiff’s complaint alleged defendants breached the standard of care in causing plaintiff to undergo a heart transplant in lieu of bypass surgery. The Court of Appeals reversed the trial court’s order granting summary disposition for defendants. In remanding the case, the Court found the existence of a genuine issue of material fact because reasonable minds could differ with regard to the meaning of conflicting statistics regarding lost opportunity to achieve a better result. This decision illustrates the complexity and importance of expert testimony in claims for “lost opportunity.”

## SHRR NEWS & SUCCESS

In a case handled by **Joe Engel** and **Cindy Boer** at the trial level, and by **Bill Henn** in the Court of Appeals, the Michigan Court of Appeals affirmed dismissal of a medical malpractice claim against a West Michigan hospital and staff physician, agreeing that the plaintiff failed to timely initiate her wrongful death action within the applicable statute of limitations, and that pursuant to the Michigan Supreme Court's decision in *Waltz v Wyse*, the wrongful death act's savings provision was not tolled by the Notice of Intent.

**Jason Sebolt** obtained summary disposition

for a hospital client in a case where plaintiff attempted to circumvent the medical malpractice statutes by filing the claim in ordinary negligence. The court agreed with Jason's position that the case, which involved an injury allegedly suffered during a transfer from a surgical gurney to hospital bed, was based in medical malpractice as opposed to ordinary negligence. Because the plaintiff did not comply with any of the medical malpractice statutes prior to commencing the action the Court agreed that it should be dismissed.

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**SMITH HAUGHEY RICE & ROEGGE'S  
MEDICAL MALPRACTICE DEPARTMENT**



**A. Joseph Engel, III**  
Co-Chair  
616.458.6247  
aengel@shrr.com



**Paul M. Oleniczak**  
Co-Chair  
616.458.5461  
poleniczak@shrr.com



**Cindy C. Boer**  
616.458.1331  
cboer@shrr.com



**Carol D. Carlson**  
616.458.9289  
ccarlson@shrr.com



**Cheryl L. Chandler**  
734.913.2031  
cchandler@shrr.com



**Gary S. Eller**  
734.913.1075  
geller@shrr.com



**Christopher R. Genther**  
616.458.0222  
cgenther@shrr.com



**Dale L. Hebert**  
734.913.1057  
dhebert@shrr.com



**Brian J. Kilbane**  
616.458.0296  
bkilbane@shrr.com



**John M. Kruijs**  
616.458.8304  
jkruijs@shrr.com



**Brian A. Molde**  
616.458.1499  
bmolde@shrr.com



**John C. O'Loughlin**  
616.458.9370  
joloughlin@shrr.com



**Brian M. Pearson**  
616.458.3638  
bpearson@shrr.com



**L. R. Roegge**  
616.458.7425  
lroegge@shrr.com



**Maria T. Saez**  
734.913.5517  
msaez@shrr.com



**Jason R. Sebolt**  
616.458.3628  
jsebolt@shrr.com



**Edward R. Stein**  
734.913.5387  
estein@shrr.com



**Robert W. Tubbs**  
231.486.4535  
rtubbs@shrr.com



**Paul Van Oostenburg**  
616.458.9462  
pvanoostenburg@shrr.com