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CLIENT ALERT

IMPORTANT DEVELOPMENTS REGARDING MEDICAL PEER REVIEW

Recently, the Massachusetts Superior Court enforced an investigative subpoena issued by the Board of Registration in Medicine (“Board”) to Sturdy Memorial Hospital, Inc. (“Sturdy”), compelling the disclosure of materials claimed by Sturdy to be privileged proceedings, reports, and records of a medical peer review committee. Board of Registration v. Sturdy Memorial Hospital, 2011 WL 7102574 (Mass. Super. Dec. 12, 2011). If followed by other courts, Sturdy could have significant implications for Massachusetts health care providers.

The Sturdy court examined the application of two peer review statutes:

- **G.L. c. 111 § 204(a)** which protects core proceedings, reports, and records of a peer review committee from disclosure; the Board may access these core materials only upon initiating formal proceedings under G.L. c. 30A.
- **G.L. c. 111 § 205(b)** which protects raw materials necessary to the work product of a peer review committee; the Board may inspect, maintain, and utilize such raw materials upon request prior to the initiation of formal proceedings.

In his affidavit, Sturdy’s medical director claimed that the notes he created in his capacity as chairman and coordinator of two peer review committees were core materials protected under Section 204(a). The Sturdy court rejected Sturdy’s peer review protection claim because no peer review committee ever convened, generated any record, or rendered any decision regarding the particular physician’s conduct at issue, and because the notes were not made in response to a specific request by a medical peer review committee. In holding these materials discoverable, the Sturdy court relied on a previous Supreme Judicial Court ruling, Board of Registration in Medicine v. Hallmark Health Corp., 454 Mass. 498 (2009), which held that materials obtained from outside sources, but that were nonetheless necessary to comply with risk management and quality assurance programs, were raw materials protected under Section 205(b), rather than core materials under Section 204(a).

After Sturdy, it appears that notes created by or for a medical peer review committee and not obtained from an outside source may be discoverable (1) if not properly designated as privileged and/or (2) if the peer review committee has not formally convened or officially utilized the notes. The Sturdy decision’s more circumscribed process under Section 204(a) heightens the possibility for early-stage disclosure of materials to the Board under Section 205(b) and might have the effect of undermining the candor and openness required for effective medical peer review.

Healthcare providers should take steps to better protect confidential materials, including the following:

- Since documents prepared for a peer review committee but not yet utilized by such committee may be subject to early-stage disclosure to the Board, formally convene your peer review committee early in the process.
- Ensure that any materials made for purposes of a peer review committee are labeled in a timely manner as confidential core materials.

If you would like to discuss your assessment/medical peer review process, please contact Attorney Jennifer Gallop at (jgallop@kb-law.com) or Attorney Anthony J. Cichello at (acichello@kb-law.com).