

IF YOU HAVE QUESTIONS REGARDING  
THIS MATTER, PLEASE CONTACT:



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## IS THE SANCTITY OF CREDENTIALING, PEER REVIEW, AND QUALITY ASSURANCE IN JEOPARDY IN EMTALA CLAIMS?

Peer review privileges are provided by statute in most states for the purpose of ensuring candor and vigorous participation in credentialing, peer review, and quality assurance activities. A typical peer review statute provides that the peer review proceedings and the related communications and records of certain hospital and medical staff peer review committees are confidential. Many argue this confidentiality is the backbone of the ongoing effort to improve health care quality. However, some federal courts are threatening the sanctity of credentialing, peer review, and quality assurance by not accommodating state peer review privileges in cases dealing with federal claims, specifically Emergency Medical Treatment and Active Labor Act ("EMTALA") actions.

On August 14, 2006, the U.S. District Court for the Middle District of Alabama refused to apply the Alabama state peer review privilege in *Henderson v. Med. Ctr. Enter.*, No. 1:05-cv-823-MEF, at \*6-8 (M.D. Ala. Aug. 14, 2006). This EMTALA action was brought by a woman who, at the time in question, was 38 weeks pregnant and presented to the hospital's emergency room following an automobile accident. She was told by the emergency room clerk that the on-call obstetrician would need to be contacted to determine whether or not she would be seen. The patient opted not to wait and sought treatment at another hospital. She later filed an EMTALA complaint with the Centers for Medicare and Medicaid Services ("CMS") and a private cause of action against the hospital in federal court. The CMS investigation found the hospital's treatment of the patient violated a number of federal regulations.

In an effort to defeat the hospital's motion for summary judgment, the patient offered documents relating to the CMS investigation. Specifically, the patient sought to introduce into evidence the report setting forth CMS' investigation and findings. The hospital made various arguments in an attempt to preclude the admissibility of this evidence. Most notably, the hospital argued that the CMS investigation documents were not admissible pursuant to Alabama's peer review privilege.

The court rejected this argument and noted that federal courts have repeatedly declined to apply state peer review privileges in federal question cases brought under the ADA, Title VII, Sherman Act, and EMTALA. The court cited *Atteberry v. Longmont United Hosp.*, 221 F.R.D. 644 (D. Colo. 2004) and *Burrows v. Redbud Cmty. Hosp. Dist.*, 187 F.R.D. 606 (N.D. Cal 1998) for the proposition that federal courts have refused to apply state peer review privileges in cases involving EMTALA claims. Ultimately, the court ruled that the CMS investigation documents, minus any legal conclusions contained therein, were admissible under Federal Rule of Evidence 803(8)(C) (records of public agencies admissible as an exception to the hearsay rule).

This ruling out of the Middle District of Alabama demonstrates that a growing number of federal courts are refusing to apply state law peer review privileges in the context of EMTALA actions. Further, as pointed out by the court in

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*Henderson*, no federal peer review privilege exists due to Congress' exclusion of such a privilege in the Health Care Quality Improvement Act of 1986. *Henderson*, at \*8. Therefore, in EMTALA actions, information concerning credentialing, peer review, and quality assurance is potentially discoverable and admissible. Hospitals, when faced with these types of actions, should not necessarily assume that they will be afforded the protection of their state's peer review privilege.