ReedSmith

MEMORANDUM

TO: HEALTH CARE CLIENTS

DATE: March 12, 2003

RE: State Court Recognizes Federal Quality Assurance Privilege Protects Outside Consultant Reports From Disclosure

I. INTRODUCTION

On February 25, 2003, New York's highest appellate court ruled that federal law protects from disclosure those nursing home records "generated by or at the behest of" a quality assurance committee for quality assurance purposes. *In re: Subpoena Duces Tecum to Jane Doe (The Park Associates, Inc. v. New York State Attorney General*, 2003 WL 441990, 2003 N.Y. Slip Op. 11299 (February 25, 2003). According to the court, the federal quality assurance privilege encompasses not only reports generated by members of a nursing home's quality assurance committee, but also materials generated or created by other persons or entities, such as consultants, at the committee's request for quality assurance purposes.

The court also ruled, however, that other records a facility is required to maintain or compile, but which are not expressly related to quality assurance, are not privileged. Further, it ruled that records cannot be made privileged merely by assigning the duty to keep the records to the quality assurance committee.

The *Park Associates* decision is significant because it recognizes that the federal quality assurance privilege can attach to records created outside of the quality assurance committee as long as they are for quality assurance purposes. Quality assurance committees often lack the time, experience, or objectivity to create appropriate reports themselves, and frequently seek the assistance of consultants with additional experience and expertise to analyze and report on specific issues. A Missouri court [*State ex rel. Boone Retirement Center, Inc. v. Hamilton,* 946 S.W.2d 740 (1997)] had ruled previously that the quality assurance privilege applied only to records created by the quality assurance committee itself, and not to records created by third parties at the request of the committee for committee use. The *Park Associates*

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decision, although binding only in New York, provides support for facilities whose quality assurance committees seek outside help.

II. BACKGROUND

Federal law, at 42 U.S.C. § 1395i-3(b)(1)(B) [Medicare] and § 1396r(b)(1)(B) [Medicaid], provides that a skilled nursing facility must maintain a quality assurance and assessment committee, and that records of such committees have a qualified immunity from required disclosure to a state or the Secretary. The statutes state:

> A skilled nursing facility must maintain a quality assurance and assessment committee, consisting of the director of nursing services, a physician designated by the facility, and at least 3 other members of the facility's staff, which (i) meets at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary and (ii) develops and implements appropriate plans of action to correct identified quality deficiencies. A State or the Secretary may not require disclosure of the records of such committee except insofar as such disclosure is related to the compliance of such committee with the requirements of this subparagraph.

42 U.S.C. § 1395i-3(b)(1)(B); id. § 1396r(b)(1)(B) (emphasis added).

A January 2003 report from the Office of Inspector General, U.S. Department of Health and Human Services, recognizes that quality assurance committees help ensure "both quality of care and quality of life in nursing homes." *See Quality Assurance Committees in Nursing Homes*, at 2, January 2003.[1] Further, quality assurance committees are "key internal mechanisms that allow nursing homes opportunities to deal with quality concerns in a confidential manner and can help them sustain a culture of quality improvement." Id.

By statute, the quality assurance committee must meet to identify and correct "issues with respect to which quality assessment and assurance activities are necessary." 42 U.S.C. § 1395i-3(b)(1)(B); id. § 1396r(b)(1)(B). Neither the committee's functions nor "quality assessment and assurance activities" are further defined by statute or regulation. As a consequence, nursing homes have broad discretion in the manner in which they structure the committee and carry out its function.

The privilege is made explicit in the portion of the statute that states that a "State or the Secretary" may not compel disclosure of "the records of such [quality assurance] committee," except to

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[1] The OIG report is available at http://oig.hhs.gov/oei/reports/oei-01-01-00090.pdf.

show compliance with the requirements to maintain a quality assurance committee. Id. In defining the scope of the privilege with respect to a "State," the Missouri Court of Appeals held that the privilege extended to all levels of state functions, including a grand jury examining criminal abuse of patients. *See Boone*, 946 S.W.2d at 742-43.

The statutes do not define the term "the Secretary," but the term is understood to refer to the Secretary of Health and Human Services, or a delegated designee. In cases alleging that the failure to provide quality care is tantamount to a false claim, the U.S. Department of Justice, through the local U.S. Attorney, has sought to compel disclosure of quality assurance records, arguing that only the Secretary is precluded from access to quality assurance documents, not the Attorney General. In this capacity, however, the Attorney General may be seen as functioning as a proxy for the Secretary to assure quality of care. Indeed, the Attorney General often seeks records related to residents who were the subject of state surveys.

By its terms the quality assurance privilege applies to the "records of" a quality assurance committee. Neither the statute nor regulations define what constitutes "records of" such committees. The *Boone* court ruled that the privilege is "exceedingly narrow" and that it protects only "the committee's own records -- its minutes or internal working papers or statements of conclusions." *Boone*, 946 S.W.2d at 743. The *Boone* court concluded that the privilege did not apply to records and materials generated or created outside the committee and submitted to the committee for review. The *Park Associates* court rejects this narrow reading of the privilege, and its decision may be viewed as a boon for nursing facilities attempting to protect the integrity of the quality assurance process.

III. DISCUSSION

The *Park Associates* court observed that the items for which protection from disclosure was sought in that case fell into two categories: (1) records created or generated for quality assurance purposes (monthly skin condition and pressure sore reports, monthly weight reports, and lists of any facility-acquired infections), and (2) records that the nursing home was required to maintain pursuant to federal or state law (incident/accident reports, and infection control reports).

The *Park Associates* court agreed with the *Boone* court's earlier ruling that the quality assurance privilege applies to protect records from disclosure pursuant to a state grand jury subpoena. However, the Park Associates case rejected the *Boone* standard for the scope of the privilege -- that only materials generated inside the committee are privileged.

Contrary to *Boone*, the *Park Associates* court ruled that the federal statute does not restrict quality assurance records to only those created by committee members themselves. Rather, "any reports

generated by or at the behest of a quality assurance committee for quality assurance purposes" are privileged. Thus, "compilations, studies or comparisons of clinical data derived from multiple records, created by or at the request of committee personnel for committee use" are "records of" the committee entitled to the privilege protection. The *Park Associates* court's application of the quality assurance privilege recognizes that a quality assurance committee often relies upon experts outside of the committee to help it perform its functions, and that the same privilege concerns and goals apply as apply to internal committee records. Accordingly, the monthly skin condition and pressure sore reports, monthly weight reports, and lists of any facility-acquired infections were protected from disclosure.

The *Park Associates* court ruled, however, that records are not privileged merely because the quality assurance committee reviews or creates them. First, where the quality assurance committee simply duplicates existing clinical records, no privilege will attach. Second, where the records are required by state or federal law to be maintained generally, and not expressly as part of a quality assurance function, no privilege will attach. In short, a facility may not create a privilege merely by assigning the duty for compliance with required record-keeping to the quality assurance committee.

IV. CONCLUSION AND RECOMMENDATION

The *Park Associates* decision is the first reported decision by the highest court in a state to apply the federal quality assurance privilege (the *Boone* case was decided by an intermediate court in Missouri). The *Park Associates* decision recognizes that the federal privilege extends to "any reports generated by or at the behest of a quality assurance committee for quality assurance purposes" and is not limited to just those internal records created by quality assurance committee members themselves. The Court's decision expands the scope of records protected by the privilege beyond the "extremely narrow" scope applied by the *Boone* court, recognizes that quality assurance committees may seek the assistance of consultants, and effectively affords an expectation of confidentiality to those records. Both cases affirm that the quality assurance privilege applies to protect records from forced disclosure pursuant to a state grand jury subpoena.

The *Park Associates* decision is binding only on New York courts. Nonetheless, it does offer persuasive authority that the quality assurance privilege applies to records of consultants that are created at the request of the quality assurance committee to aid the committee in the performance of its functions.

Quality assurance committees may seek the assistance of outside consultants for a variety of reasons. When this occurs, committees should be careful to document clearly when reports, compilations, or other assistance are generated by consultants but undertaken at the behest of the

committee to aid the committee in its quality assurance functions. Some quality assurance committees may receive regular reports from consultants; these reports as well should be clearly documented as provided at the request of the committee to aid its quality assurance functions. As with all privileged records, facilities should clearly label and secure privileged quality assurance documents -- both requests for reports and the responsive reports -- to help assure that the privilege is maintained and not waived through inappropriate disclosure.

Facilities also should be mindful that otherwise unprivileged reports may not become privileged merely because they are created by the quality assurance committee, or are referred to or duplicated by that committee.

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