

IN THE SUPREME COURT OF THE STATE OF NEVADA

FADI HAMWI, M.D.,  
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK, AND THE HONORABLE  
JACKIE GLASS, DISTRICT JUDGE,  
Respondents,


and

BARBARA STRZEMP AND LAWRENCE  
COWLES, INDIVIDUALLY AND AS  
PERSONAL REPRESENTATIVE OF  
THE ESTATE OF GISELA COWLES,  
Real Parties in Interest.

No. 40989

FILED

JUN 03 2003

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY  CHIEF DEPUTY CLERK

ORDER GRANTING IN PART AND DENYING IN PART  
PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

This is an original petition for a writ of mandamus or prohibition challenging a district court order that requires petitioner to produce three letters in a medical malpractice action. The real parties in interest have filed an answer to the petition. As explained below, we conclude that two of the letters are privileged communications not subject to discovery.

A writ of prohibition, rather than a writ of mandamus, is the appropriate remedy to prevent pretrial discovery of privileged material.<sup>1</sup> A writ of prohibition arrests the proceedings of any tribunal, corporation,

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<sup>1</sup>Columbia/HCA Healthcare v. Dist. Ct., 113 Nev. 521, 936 P.2d 844 (1997); see also NRCP 26(b)(1) (providing that privileged communications are not discoverable).

board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.<sup>2</sup>

NRS 49.119 provides that “[a] review committee has a privilege to refuse to disclose and to prevent any other person from disclosing its proceedings and records and testimony given before it.” A “review committee” includes “[a]n organized committee of . . . [a] health maintenance organization.”<sup>3</sup>

The term “organized committee” is not defined in the statute, but the legislative history indicates that the term encompasses PacifiCare Health Insurance Company’s Quality Improvement Department and Peer Review Committee.<sup>4</sup> During a June 1995 hearing, the chairman of the Senate Judiciary Committee rejected a concern raised by the attorney general’s office that the statute’s coverage was too broad.<sup>5</sup>

[T]he same public policy applies to quality assurance that does to peer review, and that is why it is included in the statute. There is a need to promote and facilitate open communication about things which might cause fear of liability. . . . [T]aking the quality assurance

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<sup>2</sup>NRS 34.320.

<sup>3</sup>NRS 49.117(1)(c).

<sup>4</sup>See Madera v. SIIS, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998) (stating that, when statutory “language is ambiguous, a court should consult other sources such as legislative history, legislative intent, and analogous statutory provisions”).

<sup>5</sup>The scope of the privilege concerned the attorney general’s office because an HMO’s participation in Medicaid programs requires unfettered regulatory agency access to quality assurance records.

programs out of this privilege would swallow part of the public policy of the bill.<sup>6</sup>

A hospital lobbyist further testified concerning the inseparable nature of peer review and quality assurance:

A problem arises when trying to differentiate peer review from quality assurance review. Part of the quality assurance process in a hospital . . . involves incident reporting which identifies things in the hospital that need correction. If those become discoverable, . . . the incident reports stop coming. Thus, if quality assurance is provided a different treatment under the provision, peer review would be impacted.<sup>7</sup>

Thus, we conclude that PacifiCare's Quality Improvement Department and Peer Review Committee are entities within the reach of NRS 49.119's review committee privilege.

Petitioner argues that the subject letters are protected committee "proceedings and records and testimony given before it"<sup>8</sup> because the letters were "derived directly from the peer review process." Petitioner distinguishes the letters from the occurrence reports this court found discoverable in Columbia/HCA Healthcare v. District Court.<sup>9</sup> The real parties in interest also rely on that case. But NRS 49.119 was not involved in Columbia. Rather, the relevant statute was NRS 49.265, which exempts from discovery the "proceedings and records" of three types

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<sup>6</sup>Hearing on S.B. 531 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., June 2, 1995) (quotation marks omitted).

<sup>7</sup>Id.

<sup>8</sup>NRS 49.119.

<sup>9</sup>113 Nev. 521, 936 P.2d 844 (1997).

of committees: organized hospital committees responsible for evaluating and improving the quality of care; similar committees of emergency medical service providers; and medical and dental society review committees. NRS 49.265 does not mention HMO review committees.

Further, this court observed in Columbia that the Nevada Legislature intended NRS 49.265 to confer only a limited discovery exemption.<sup>10</sup> In contrast, the committee minutes for NRS 49.119 reflect the legislature's intent to craft a broad privilege. In response to a query by Senator Ernest Adler, counsel for the Nevada State Medical Association testified that the privilege would cover a doctor's written statement to a peer review committee and any reply by the peer review committee.<sup>11</sup> Further, NRS 49.119 was enacted in response to this court's decision in Ashokan v. State, Department of Insurance,<sup>12</sup> which interpreted NRS 49.265 as not barring the admission of purloined "quality assurance/peer review committee" records.<sup>13</sup> A physician from the Nevada State Medical Association testified that Ashokan "had a chilling effect on internal quality review," and that "[t]he bill [creating NRS 49.119] would give an appropriate degree of protection to allow reviews without fear."<sup>14</sup>

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<sup>10</sup>Id. at 531, 936 P.2d at 850 (emphasis omitted).

<sup>11</sup>Hearing on S.B. 531 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., June 2, 1995).

<sup>12</sup>109 Nev. 662, 856 P.2d 244 (1993).

<sup>13</sup>Hearing on S.B. 531 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., June 2, 1995); Hearing on S.B. 531 Before the Assembly Comm. on Judiciary, 68th Leg. (Nev., June 21, 1995).

<sup>14</sup>Hearing on S.B. 531 Before the Assembly Comm. on Judiciary, 68th Leg. (Nev., June 21, 1995).

Additionally, the Ashokan court declined to interpret NRS 49.265 broadly, in part, because of its placement in NRS chapter 49 among other lesser privileges, such as the clergy-penitent and news media privileges, “whose scope[s] differ[ ] from the usual formula.”<sup>15</sup> In contrast, the Nevada Legislature placed the NRS 49.119 privilege among the broad attorney-client and doctor-patient privileges.<sup>16</sup>

Further indicating the broad scope of the NRS 49.119 privilege is that it lacks the exclusion found in the NRS 49.265 privilege for statements made by a person attending a committee meeting who is a party to an action being reviewed at the meeting. The Appellate Division of the New York Supreme Court has interpreted New York’s identical exclusion to allow the discovery of a physician’s letter explaining his allegedly negligent conduct to a quality assurance committee.<sup>17</sup> As noted above, however, the Nevada Legislature heard testimony that NRS 49.119 would compel the opposite result. And, consistent with that testimony, NRS 49.121 allows a physician whose work is being reviewed to claim the privilege.

Turning to the letters at issue in this case, the NRS 49.119 privilege covers the February 23, 2001 introductory letter to petitioner from PacifiCare’s Quality Improvement Department. The privilege applies because the letter’s disclosure would reveal the initiation and nature of “proceedings” by a review committee. Although the term

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<sup>15</sup>Ashokan, 109 Nev. at 669, 856 P.2d at 248.

<sup>16</sup>See Columbia, 113 Nev. at 530, 936 P.2d at 850.

<sup>17</sup>Swartzenberg v. Trivedi, 594 N.Y.S.2d 927 (App. Div. 1993) (construing N.Y. Education Law § 6527(3)).

“proceedings” is not defined in the statute, Webster’s Dictionary defines it as “a particular step or series of steps adopted for doing or accomplishing something.”<sup>18</sup> As the introductory letter is a step toward accomplishing the quality assurance/peer review process, the letter falls within the definition of “proceedings.”<sup>19</sup>

The next privilege determination concerns the March 19, 2001 letter from the administrator of Inpatient Physicians of Nevada to PacifiCare’s Quality Improvement Department. As mentioned earlier, the Legislature heard evidence that the NRS 49.119 privilege would cover a physician’s statement to a peer review committee,<sup>20</sup> presumably under the privilege’s “testimony” component. But petitioner neither authored the March 19 letter nor directed its creation and submission. And the letter does not appear to constitute “testimony given before” a review committee because the statements in the letter were not made under oath or affirmation.<sup>21</sup> The Legislature appears to have intended a strict definition

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<sup>18</sup>Webster’s Third New International Dictionary 1807 (1976).

<sup>19</sup>See Steel v. Weisberg, 534 A.2d 814, 817 (Pa. Super. Ct. 1987) (construing “proceedings” to include steps even preliminary to notification of the healthcare provider, such as a review committee member’s receipt of a letter criticizing the provider’s professionalism, and the dissemination of the letter to other committee members).

<sup>20</sup>Hearing on S.B. 531 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., June 2, 1995).

<sup>21</sup>Black’s Law Dictionary 1485 (7th ed. 1999) (defining “testimony” as “[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition”); cf. In re Marriage of Hutchinson, 588 N.W.2d 442, 446 (Iowa 1999) (stating that Iowa’s physician-patient privilege has no application in non-testimonial settings).

of “testimony,” given that the Legislature listed other types of evidence in addition to testimonial evidence when identifying the persons entitled to claim the privilege: “The privilege may be claimed by any member of the review committee, any person whose work has been reviewed by the committee or any person who has offered testimony, an opinion or documentary evidence before the committee.”<sup>22</sup>

The administrator’s letter is also not a record of the review committee because it is not a committee “account in writing or print . . . intended to perpetuate a knowledge of acts or events.”<sup>23</sup> And although the administrator wrote the letter in response to a review committee’s inquiry, the administrator does not “disclos[e] [the committee’s] proceedings.”<sup>24</sup> Thus, because the March 19, 2001 letter does not disclose review committee records or proceedings or the testimony given before the committee, it is not privileged.

The final privilege determination involves the May 1, 2001 letter from PacifiCare’s Medical Director, reciting the Peer Review Committee’s findings. Because disclosure of this letter would reveal the ultimate step of the quality assurance/peer review process, or possibly the committee’s records, it falls squarely within the NRS 49.119 privilege. Shielding the opinions and conclusions of a review committee from

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<sup>22</sup>NRS 49.121(1) (emphasis added).

<sup>23</sup>Webster’s Third New International Dictionary 1898 (1976).

<sup>24</sup>NRS 49.119.

disclosure is the primary function of any peer review privilege,<sup>25</sup> and appears to have been explicitly contemplated by the Nevada Legislature.<sup>26</sup>

Finally, we reject the real parties in interest's argument that petitioner waived the review committee privilege by not objecting to the deposition subpoena. Even if the letters were encompassed by the subpoena, the privilege cannot be waived absent a writing signed by each review committee member, petitioner, and any person who offered evidence before the committee.<sup>27</sup>

We conclude that the February 23 and May 1, 2001 letters from PacifiCare to petitioner are covered by the NRS 49.119 review committee privilege because the letters disclose the proceedings or records of a review committee. But the March 19, 2001 letter from Inpatient Physicians of Nevada to PacifiCare is not covered by the privilege.

Accordingly, we grant the writ petition in part and we deny it in part. The clerk of this court shall issue a writ of prohibition precluding

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<sup>25</sup>See Sanderson v. Bryan, 522 A.2d 1138, 1139 (Pa. Super. Ct. 1987) ("Generally, hospital peer review findings and records are protected from public scrutiny either legislatively, or by court decision."); George E. Newton II, Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection, 52 Ala. L. Rev. 723, 723-24 (2001) (observing that peer review privileges are designed to encourage frank and effective peer review in order to improve the quality of health care); Susan O. Scheutzow, State Medical Peer Review: High Cost But No Benefit – Is It Time For A Change?, 25 Am. J.L. & Med. 7, 8 (1999) (recognizing that "[t]o encourage peer review, almost all states have . . . made the deliberations and records of medical peer review privileged from judicial disclosure").

<sup>26</sup>See Hearing on S.B. 531 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., June 2, 1995).


<sup>27</sup>NRS 49.121.




the district court from requiring the production of the February 23 and May 1, 2001 letters from PacifiCare to petitioner.

It is so ORDERED.<sup>28</sup>

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Leavitt

  
\_\_\_\_\_, J.  
Becker

cc: Hon. Jackie Glass, District Judge  
Murchison & Cumming  
Vannah Costello Canepa Riedy Rubino & Lattie  
Clark County Clerk

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<sup>28</sup>In light of this order, we deny as moot petitioner's motion for a stay, and we vacate our temporary stay, entered on February 26, 2003. We also deny as moot the relief sought in the real parties in interest's April 14, 2003 letter. We remind counsel for the real parties in interest that a letter is not a proper method of obtaining relief from this court. NRAP 27(a).