



The “Peer Review Privilege” Should Not Shelter Hospital Policies and Procedures From Discovery

Roger T. Creager

In medical malpractice actions, lawyers for injured patients (or their estates) frequently seek discovery of the policies and procedures of the defendant hospital or other healthcare facility. Although most Virginia Circuit Courts that have addressed the issue have held these materials are discoverable and are not protected by the statutory “peer review” privilege created by *Virginia Code* § 801-581.17,² a minority of Circuit Courts have held that the statutory privilege does apply and have denied discovery.³ This article argues that the courts that have applied the statutory privilege to insulate hospital policies and procedures from discovery should reconsider their holdings in view of the flawed and incomplete reasoning of the case law applying the privilege and also because of more recent Virginia Supreme Court authority and legislative developments.

a. The assumption that hospital policies and procedures could never be admissible at trial is incorrect and should not influence the discoverability determination.

Most of the Circuit Court decisions holding that hospital policies and procedures are privileged under the peer-review statute have been heavily influenced by their belief that hospital policies and procedures would constitute “private rules” and would not be admissible as evidence at trial of a tort action.⁴ Importantly, however,

there is no blanket prohibition against admission of private rules as evidence. The evidentiary rule in Virginia (under the *Godsey* and *Pullen* decisions) is merely that private rules are not admissible to establish the standard of care.⁵ The Virginia Supreme Court has recognized, however, that a defendant’s safety policies may be relevant and admissible in a negligence action on the issue of defendant’s knowledge of a potential danger and as evidence of the foreseeability of the occurrence that caused injury. In *New Bay Shore v. Lewis*,⁶ the plaintiff contended that she was knocked off of a merry-go-round and injured due to movements of young boys who were moving from one horse to another during the ride. On appeal, the defendant argued that the jury verdict should be set aside because it was not foreseeable that a young boy could push an adult woman off the merry-go-round. In rejecting this argument, the Virginia Supreme Court observed:

It is not denied that defendant, for the protection of riders on its merry-go-round, adopted two safety rules, namely: (1) to require all riders on the merry-go-round to be seated, and remain seated, during a ride; and (2) “to be careful about children and boys running around.” According to plain-

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Mr. Creager’s practice, Creager Law Firm, PLLC, is located in Richmond.

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tiff’s testimony, defendant’s employees failed to enforce either of these rules. Hence the jury had a right to find that defendant was negligent. . . . The safety rules adopted by defendant, and its instructions to its employees, clearly indicate that defendant was aware of the potential dangers involved. Whether the negligence of defendant was the proximate cause of plaintiff’s injuries was a question for the jury to determine.⁷

Similarly, the training and instruction that a defendant has received is relevant and admissible evidence on the issue of whether his conduct constituted willful and wanton negligence that would overcome a contributory negligence defense or warrant an award of punitive damages.⁸ Hospital rules may also be relevant and admissible evidence with respect to issues such as vicarious liability and sovereign immunity.⁹ Moreover, certain aspects of the hospital policies and procedures sought in discovery may be found, when produced, not to constitute private rules within the scope of Virginia evidence law limiting the admissibility of private rules.¹⁰

Even with respect to the standard of care, hospital policies, protocols, guidelines, or procedures may be relevant and admissible evidence. In 1997, then Circuit Court Judge Donald W. Lemons (now Supreme Court Justice) cited *Godsey* and *Pullen* and held: “There is no cause of action based upon private rules; however, these rules may be evidence as to the appropriate standard of care to be provided by the defendants.”¹¹ This view of *Godsey* and *Pullen* is supported by the Virginia Supreme Court’s decision in *Bly v. Rhoades*, where the Court ruled that the issue of the correctness of the trial court’s exclusion of hospital rules was moot but also observed that the trial court’s ruling was only “arguably . . . supported by precedent [citing *Godsey*].”¹² As a result, the opinion in *Bly*, according to then Circuit Judge (now Virginia Court of Appeals Senior Judge) Rosemarie Annunziata “implies that [hospital rules] may provide some evidence of the stan-

dard of care.”¹³ As Judge Annunziata also observed, hospital rules may be outside the scope of the *Godsey* and *Pullen* private-rules doctrine since they may actually constitute relevant and potentially admissible evidence of industry-wide standards.¹⁴ Judge Annunziata stated: “The materials sought may properly be seen as reflecting widely-adopted standards established or required by third-party entities, such as the Joint Commission of Accreditation of Health Care Organizations (JCAH).”¹⁵

Although these decisions and observations do not establish that company policies, procedures, and rules are always admissible they certainly do establish that they are not always inadmissible.

It is also important to note that the Virginia Supreme Court has provided that information may be discoverable even if it appears likely to be inadmissible at trial. The *Rules of the Supreme Court of Virginia* provide in Rule 4:1(b): “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery

of admissible evidence.”¹⁶

To the extent that the Circuit Court opinions disallowing discovery of hospital policies and procedures are based upon or influenced by the assumption that the materials would not be admissible at trial, the validity of their reasoning is undermined since that assumption is not correct and is beside the point in any event.

- b. 2006 Riverside Hospital decision undercuts reasoning of Circuit Courts that have construed the statutory “peer review” privilege broadly to include hospital policies and procedures.

In late 2006, the Virginia Supreme Court held, in *Riverside Hospital, Inc. v. Johnson*,¹⁷ that the trial court did not err in admitting evidence regarding hospital ori-

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The Virginia Supreme Court has recognized, however, that a defendant’s safety policies may be relevant and admissible in a negligence action on the issue of defendant’s knowledge of a potential danger and as evidence of the foreseeability of the occurrence that caused injury.

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entation instructions and nurse training materials. The Court ruled that the hospital staff orientation instruction and nursing curriculum “were not hospital policies or procedures of the type involved in *Godsey* and *Pullen* [the Court’s leading “private rules” decisions, cited previously in this article].”¹⁸ The Court also observed that the evidence was not offered to establish the standard of care but rather was admitted for other purposes. Finally, in another portion of its opinion addressing an additional evidentiary issue, the Court rejected a broad approach to the statutory construction of the statutory peer review privilege and instead concluded that the legislative intent was to protect “committee discussion or action by the committee reviewing the information” which is of a type “that must ‘necessarily be confidential’ in order to allow participation in the peer or quality assurance review process.”¹⁹ The Court quoted from an earlier opinion in which it had declared: “The obvious legislative intent [of the statute] is to promote open and frank discussion during the peer review process among health care providers in furtherance of the overall goal of improvement of the health care system. If peer review information were not confidential, there would be little incentive to participate in the process.”²⁰ Most importantly, in *Riverside Hospital*, the Supreme Court rejected a broad interpretation of the statute on the basis that it was contrary to the language of the statute which contained numerous limiting provisions and thereby signaled a narrower legislative intent.²¹

The approach taken by the Virginia Supreme Court in *Riverside Hospital*, both to the private rules evidentiary principle and to the statutory peer review privilege is consistent with and validates the reasoning of the many Circuit Court opinions that have allowed discovery of hospital policies and procedures. The *Riverside Hospital* decision provides ample cause for the Circuit Courts who have disallowed discovery of hospital policies and procedures to reconsider their previous rulings.

c. The General Assembly declined in its 2008

session to pass proposed legislation overruling the *Riverside Hospital* decision and refused to enact a broad approach to the peer review privilege.

Further evidence that the legislature does not intend that for peer review privilege to be applied broadly may be found in the fact that in its 2008 session the General Assembly declined to pass an amendment which would have overruled certain aspects of the *Riverside Hospital* decision and would have broadened the scope of the statutory privilege. The amendment, set forth in House Bill No. 382, would have broadened the scope of the privilege in numerous respects.²² The amendment would have protected all “restricted information” from discovery and provided, for example, that “[i]nformation created at the request of or for the express purpose of review by a committee or other entity specified in § 8.01-581.16 shall constitute restricted information without regard to the nature of the information contained therein.” House Bill 382 was eventually referred to the House Committee for Courts of Justice and never made it out of that committee. No amendment of the peer review privilege statute

was passed.

d. Special discovery protections should be narrowly construed in order to promote justice and fairness among litigants.

The discoverability of hospital rules and procedures should not be decided as though it is a bare abstract principle devoid of context. Rather, the decision of this issue obviously can have a fundamental impact on the fairness of the trial of a medical malpractice action. As Fairfax Circuit Court Judge Rosemarie P. Annunziata (now Senior Judge on the Court of Appeals) explained in her Fairfax County Circuit Court opinion ordering the discovery of hospital rules, regulations and protocols:

Logically, the hospital’s rules, regulations,

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and protocols can lead to discovery of admissible evidence on a myriad of issues. As claimant points out, the information will likely permit a more thorough and effective examination of the defendants and their expert witnesses about the medical care provided to the plaintiff, particularly in light of the applicable standard of care. Claimant’s Memorandum of Points and Authorities in Support of Discovery at 4. In addition, the policies and procedures also can aid in the discovery of other reports or records generated by parties to the litigation or by other witnesses which may be admissible. The documents also can assist in understanding what the defendants knew or should have known about claimant’s condition and when they knew it.²³

Knowledge of the hospital rules, regulations, and protocols can play an important role in the litigation of a medical malpractice action and can lead to relevant and admissible evidence in countless ways that cannot possibly be foreseen or even imagined by plaintiff’s counsel or the trial judge at the time of the discovery dispute. It is impossible for plaintiff’s counsel to fully predict and demonstrate the role that these materials would play in a case when the information and documents are completely unknown to plaintiff’s counsel.

The problems created by denying discovery of this information to the plaintiff are further compounded by the obvious fact that the hospital, doctors, and nurses (and the hospital’s counsel) all do have the benefit of full knowledge of and access to the hospital policies and procedures. Denying discovery of the hospital policies and procedures thus creates, by definition, a very uneven playing field. Potentially important information and documents are in the possession of one litigant and are completely denied to the other litigant. Moreover, hospitals, doctors, and nurses will presum-

ably produce and seek to take advantage of policies and procedures when they are helpful to the defense, but will oppose discovery of them when would be helpful to the patient’s case.

The backdrop for determination of the discoverability of hospital policies and procedures is that the discovery procedures are designed and intended to create an even playing field, to provide equal access to relevant information, and to prevent trial by surprise. These policy considerations are obviously the fundamental reason for the adoption of the discovery provisions of the *Rules of the Supreme Court of Virginia*. Yet, these important policy considerations are disserved by denying discovery of hospital policies and procedures, and they have gone completely unmentioned in the Circuit Court opinions denying such discovery. None of those decisions has considered or discussed the unfair and unequal situation produced by denying a malpractice plaintiff’s counsel any

access to information that directly controls and governs the manner in which a hospital is operated while defense counsel has full access to that same information at all times.

The policy considerations favoring full and equal access to relevant information should not, of course, override the policy considerations undergirding the peer review privilege. Those policy considerations, together with the *Riverside Hospital* opinion, however, clearly do support interpretation of the peer review privilege in a manner which takes due account of the policies served by the peer review privilege and the policies served by full and fair discovery. The policies favoring full and fair discovery deserve to be considered in the decision of discovery issues involving hospital policies and procedures, since the decision to deny one litigant access to information which is already available to the other litigant is never “cost free.” Rather, the denial of discovery can have a significant adverse

The problems created by denying discovery of this information to the plaintiff are further compounded by the obvious fact that the hospital, doctors, and nurses (and the hospital’s counsel) all do have the benefit of full knowledge of and access to the hospital policies and procedures. Denying discovery of the hospital policies and procedures thus creates, by definition, a very uneven playing field.

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impact on the fairness of the adversarial process and trial. "Secrecy, after all, is anathema to the search for truth" ²⁴ The fact that full impact the denial of discovery actually has on the subsequent discovery and trial will never be known is no reason to be less concerned but rather makes the decision to deny discovery all the more seriously troubling.

Because the truth-seeking process and fair adjudication of disputes are disserved by secrecy (particularly one-sided secrecy) and a denial of discovery, courts deciding discovery issues regarding hospital policies and procedures should be mindful that the party asserting a discovery protection has the burden of establishing it. ²⁵ Fairfax Circuit Court Judge Leslie M. Alden reviewed this requirement and related principles in a 1999 opinion ordering discovery of certain healthcare organization records in a defamation action:

The party asserting the protection of a privilege has the burden of establishing both the existence and applicability of the privilege. *Commonwealth v. Edwards*, 235 Va. 499, 509, 370 S.E.2d 296 (1988). Because evidentiary principles operate to exclude relevant evidence and block the fact-finding function, they should be narrowly construed. *Id.* In deciding whether the privilege asserted should be recognized, the Court must take into account the particular factual circumstances in which the issue arises and weigh the need for the truth against the importance of the relationship or policy sought to be protected. Finally, the Court must determine whether the recognition of the privilege will, in fact, protect that relationship in the factual setting of the case. *Krach-Naden v. Sauk Village*, 1999 U.S. Dist. LEXIS 11346, 1999 WL 543190 (N.D. Ill. 1999). ²⁶

As Judge Rosemarie Annunziata observed in one of the leading decisions ordering discovery of hospital rules and procedures:

The hospital first claims that the guidelines, procedures, and protocols are written "communications" within the scope of § 8.01-581.17. Although the material technically might fall within the broad language of the statute, such an interpretation would provide a limitless privilege. Any ambiguities in the statute must be strictly construed for, as the

U.S. Supreme Court has noted, "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *U.S. v. Nixon*, 418 U.S. 683, 709-710, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974). ²⁷

The time has arrived for the minority of Circuit Courts denying discovery of hospital rules, protocols, policies, and procedures to take a fresh look at their position, particularly in view of the more recent *Riverside Hospital* decision. The better-reasoned approach is to take a narrower view of the statutory "peer review" privilege and allow discovery of these materials since they are not actually part of the "peer review" deliberations and discussions and since the materials may well lead to the discovery of admissible evidence. Whether the materials will ultimately be admissible in whole or in part at trial, and for what purpose or purposes, are determinations which can and should be made after they are produced in discovery and the case is mature for trial. ☐

¹ Mr. Creager's practice, Creager Law Firm, PLLC, is located in Richmond.

² See *Hubbard v. Pascual*, 71 Va. Cir. 265 (Portsmouth Cir. Ct. 2006); *Auer v. Baker*, 63 Va. Cir. 596 (Norfolk Cir. Ct. 2004); *Saunders v. Gottfried*, 61 Va. Cir. 641 (Chesterfield Cir. Ct. 2002); *Day v. Medical Facilities of America, II, L.P.*, 59 Va. Cir. 378 (Salem Cir. Ct. 2002); *Levin v. WJLA-TV*, 51 Va. Cir. 57 (Fairfax County Cir. Ct. 1999); *Bradburn v. Rockingham Memorial Hospital*, 45 Va. Cir. 356 (Rockingham Cir. Ct. 1998); *Owens v. Children's Hospital of the King's Daughters, Inc.*, 45 Va. Cir. 97 (Norfolk Cir. Ct. 1997); *Pipkin v. Pleasant Care, Inc.*, 43 Va. Cir. 443 (Chesapeake Cir. Ct. 1997); *Messerly v. Avante Group, Inc.*, 42 Va. Cir. 26 (Rockingham Cir. Ct. 1996); *Stevens v. Hosp. Auth. For the City of Petersburg*, 42 Va. Cir. 321 (Richmond City Cir. Ct. 1997); *Stevens v. Lemmie*, 40 Va. Cir. 499 (Petersburg Cir. Ct. 1996); *Houchens v. Univ. of Va.*, 23 Va. Cir. 202 (Charlottesville Cir. Ct. 1991); *Curtis v. Fairfax Hospital Systems, Inc.*, 21 Va. Cir. 275 (Fairfax County Cir. Ct. 1990); *Sawyer v. Childress*, 12 Va. Cir. 184, 188 (Norfolk Cir. Ct. 1988); *Hedgepeth v. Jesudian*, 12 Va. Cir. 221 (Richmond City Cir. Ct. 1988); *Johnson v. Roanoke Memorial Hospitals, Inc.*, 9 Va. Cir. 196 (Roanoke City Cir. Ct. 1987).

³ See *Colston v. Johnston Mem. Hosp.*, 49 Va. Cir. 540 (Chesterfield Cir. Ct. 1998); *Mangano v. Kavanaugh*, 30 Va. Cir. 66 (Loudoun Cir. Ct. 1993); *Riordan v. Fairfax Hospital System, Inc.*, 28 Va. Cir. 560 (Fairfax Cir. Ct. 1988); *Leslie v. Alexander*, 14 Va. Cir. 127 (Alexandria Cir. Ct. 1988); *Francis v. McEntee*, 10 Va. Cir. 126

(Henrico Cir. Ct. 1987).

⁴ See, e.g., *Riordan v. Fairfax Hosp. Systems, Inc.*, 28 Va. Cir. 560 (Fairfax County Cir. Ct. 1988); *Leslie v. Alexander*, 14 Va. Cir. 127 (Alexandria Cir. Ct. 1988); *Francis v. McEntee*, 10 Va. Cir. 126 (Henrico County Cir. Ct. 1987).

⁵ See *Virginia Ry. & Power Co. v. Godsey*, 117 Va. 167, 83 S.E. 1072 (1915); *Pullen v. Nickens*, 226 Va. 342, 310 S.E.2d 452 (1983).

⁶ 193 Va. 400, 69 S.E.2d 320 (1952) (relied upon in *Curtis v. Fairfax Hospital Systems, Inc.*, 21 Va. Cir. 275 (Fairfax County Cir. Ct. 1990)).

⁷ 193 Va. 400, 408-409, 69 S.E.2d 320, 325-326 (1952).

⁸ See *Alfonso v. Robinson*, 257 Va. 540, 546, 514 S.E.2d 615, 619 (1999) (“A critical characteristic distinguishing the present case from those two cases [two previous cases in which there was insufficient evidence of willful and wanton conduct] is that Alfonso was a professional driver who had received specialized safety training warning against the very omissions he made prior to the accident. As stated above, Alfonso admitted at trial that he was instructed that the deployment of safety flares and reflective triangles was the first act that should be taken after securing a disabled truck. He knew that the purpose of such safety devices was to warn motorists that they were approaching a stopped vehicle. Despite this training and knowledge, Alfonso consciously elected to leave the disabled truck in a travel lane of an interstate highway without placing any warning devices behind it.”).

⁹ See *Houchens v. Rector and Visitors of the Univ. of Va.*, *supra*.

¹⁰ See, e.g., *Riverside Hospital, Inc. v. Johnson*, 272 Va. 518, 636 S.E.2d 416 (2006).

¹¹ *Stevens v. Hospital Auth. of Petersburg*, 42 Va. Cir. 321, 329 (Richmond City Cir. Ct. 1997) (emphasis added).

¹² *Bly v. Rhoads*, 216 Va. 645, 653, 222 S.E.2d 783, 789 (1976).

¹³ *Curtis*, *supra*, 21 Va. Cir. at 278-279. A law review article has suggested the same approach: “Patient care standards . . . do not ultimately define the defendant’s duty. . . . The standards, along with learned treatises and [testimony of] expert witnesses, simply represent some concrete evidence of that duty and assist the trier of fact in determining the relevant standard of care. . . . Invariably, a defendant hospital’s employees admit under oath that knowledge of relevant standards and substantial compliance with them is a basic part of their orientations training and a required part of their job description.” Schockemoehl, “Admissibility of Written Standards as Evidence of the Standard of Care in Medical and Hospital Negligence Actions in Virginia,” 18 *U. Rich. L. Rev.* 725, 742-743 (1984).

¹⁴ See, e.g., *Tazewell Oil Co. v. United Va. Bank*, 243 Va. 94, 110, 413 S.E.2d 611, 620 (1992) (expert witness was properly prohibited from testifying because he was not shown to be familiar with acceptable commercial standards within the banking industry).

¹⁵ *Curtis*, *supra*, 21 Va. Cir. at 279.

¹⁶ *Va. Sup. Ct. Rules*, Rule 4:1(b).

¹⁷ 272 Va. 518, 636 S.E.2d 416 (2006).

¹⁸ 272 Va. at 529, 636 S.E.2d at 422.

¹⁹ 272 Va. at 533, 636 S.E.2d at 424.

²⁰ *HCA Health Services of Virginia, Inc. v. Levin*, 260 Va. 215, 221, 530 S.E.2d 417, 420 (2000).

²¹ The Virginia Supreme Court explained:

A literal application of the phrase “all communications, both oral and written, . . . provided to such committees” would impress the privilege on every document and every statement made available to a committee or entity identified in the statute. Such an application would allow a health care facility to immunize from disclosure every statement or document maintained by the facility simply by insuring that such statement or document was provided or available to a peer or quality review committee. Considering this phrase in the context of the entire section, however, shows that the General Assembly did not intend such a broad application of the privilege. For example, the privilege attaching to oral communications regarding a specific medical incident involving patient care is limited. *Code* § 8.01-581.17(B). Similarly, the section is not to “be construed” as applying the privilege to the facility’s medical records of a specific patient kept in the ordinary course of operating such facility, or to evidence of a patient’s treatment or hospitalization kept in the ordinary course of the patient’s hospitalization. *Code* § 8.01-581.17(C). These limitations on the application of the privilege are consistent with preserving the confidentiality of the quality review process while allowing disclosure of relevant information regarding specific patient care and treatment.

272 Va. at 532-533, 636 S.E.2d 424. Interpreting the statutory privilege to encompass and protect hospital policies and procedures involves an overly broad interpretation which would protect any and all documents that pass through or are disseminated by a peer review committee regardless of whether they actually contain confidential peer review deliberations and information.

²² See House Bill No. 382 (offered January 9, 2008).

²³ *Curtis v. Fairfax Hospital Systems, Inc.*, 21 Va. Cir. 275, 280 (Fairfax Cir. Ct. 1990).

²⁴ *Johnson*, *supra*, 9 Va. Cir. 202.

²⁵ *Robertson v. Commonwealth*, 181 Va. 520, 540, 25 S.E.2d 352, 360 (1943) (“Since exemption from production is the exception and not the rule, the burden is on the party claiming the privilege to show that he is entitled to it. His mere assertion that the matter is confidential and privileged will not suffice. Unless the document discloses such privilege on its face, he must show by the circumstances that it is privileged.”).

²⁶ *Levin v. WJLA-TV*, 51 Va. Cir. 57 (Fairfax Cir. Ct. 1999).

²⁷ *Curtis v. Fairfax Hospital Systems, Inc.*, 21 Va. Cir. 275, 277 (Fairfax County Cir. Ct. 1999). ☒