NO: 10-CI-4219

JEFFERSON CIRCUIT COURT
DIVISION TWO

DAL GENE FANCHER

PLAINTIFF

V.

CHRISTOPHER SHIELDS, ET. AL.

DEFENDANTS

OPINION AND ORDER

This matter comes before the Court on the Plaintiff's motion to compel discovery responses and the Defendant Norton Hospitals, Inc.'s motion for a protective order. Appropriate responses have been filed and oral arguments were heard on August 1, 2011. The issues now stand submitted for final adjudication.

BRIEF SUMMARY

The within action is one for medical malpractice. The Plaintiff seeks to compel the production of discovery responses, including Sentinel Event records and Root Cause Analysis, for which the Defendant has claimed attorney-client, work product and federal statutory privileges.

The Defendant seeks a protective order for medical records alleged to contain patient information and for confidential and proprietary material, such as policy and procedure manuals. The Defendant represents to the Court by counsel that it is willing to permit Plaintiff's counsel to retain documents in his file for the one year period of the legal malpractice statute of limitations, but then would seek the return of the documents. The Plaintiff has responded, indicating that the Defendant is not entitled to a protective order since the materials in question are widely disseminated.

OPINION

CR 26.02 (1) sets forth the general parameters of discovery. It states that, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...". "Relevant evidence" is defined in KRE 401 as, "... evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The Plaintiff asserts that the Defendant is required by its accrediting body, the Joint Commission, to declare a sentinel event and conduct a root cause analysis, then prepare an action plan. It is the Plaintiff's position that, since that information must be reported, it cannot be privileged because it is intended to be disclosed. Interrogatory No. 10 requests information about these events. Document Request No. 10 requests that policies and procedures of the Defendant and Request No. 11 requests related documents.

CR 26.03 provides for the entry of a protective order upon a showing of "good cause" where it is necessary to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." It is the Defendant's position that the materials requested with reference to its sentinel event and root cause analysis are privileged under the attorney-client privilege, work product protection and the Patient Safety Quality Improvement Act. It also contends that the policies and procedures requested are "trade secrets." Therefore, the Defendant seeks a protective order.

I. ATTORNEY-CLIENT PRIVILEGE:

The privilege is set forth in KRE 503 (b) and provides that, "A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential

communication made for the purpose of facilitating the rendition of professional legal services to the client: (1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer; (2) Between the lawyer and a representative of the lawyer; (3) By the client or a representative of the client or the client's lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein; (4) Between representatives of the client or between the client and a representative of the client; or (5) Among lawyers and their representatives representing the same client."

In *Haney v. Yates*, 40 SW 3d 352 (Ky. 2001), a self-insured cab company sought to protect Yates' statement to the company's safety department and in so doing asserted both the work product and attorney-client privileges. The Court, after noting that discovery should be "broad" while claims of privilege are to be "strictly construed," found that there was no confidential communication intended to be transmitted for purposes of facilitating the rendition of legal services and therefore, the privilege did not apply to Yates' statement.

The Court addressed the privilege in the medical malpractice context in the more recent case of *The St. Luke Hospitals, Inc. v. Kopowski*, 160 SW 3d 771 (Ky. 2005). The Court first noted that the party claiming the privilege bears the burden of showing its' application, see also *Shobe v. EPI Corporation*, 815 SW 2d 395 (1991). The plaintiff sought to discover statements made by two nurses to the hospital's risk management officer at the direction of the hospital's counsel. The Court held that a statement need not be made directly to a party's attorney in order to be privileged. Rather since, "the communications were made between two of the parties described in KRE 503 (b), made

for the purpose of facilitating the rendition of professional legal services to the hospital, and intended to remain confidential from those to whom disclosure would not further the rendition of professional legal services," those materials were, in fact, privileged. The Court held that the privilege is virtually absolute, breachable only upon the terms set forth in KRE 503 itself.

In *Lexington Public Library v. Clark*, 90 SW 3d 53 (Ky. 2002), the Court once again addressed the discovery of documents prepared by a third person at the behest of counsel. The Court concluded that "Whether a particular communication is privileged depends (absent waiver) not on what use was ultimately made of the communication, but on the facts and circumstances under which the communication was made." The Court found that if the circumstances do not indicate that the communications were made for the purposes outlined in the rule, then the materials in question constitute ordinary business records.

Clearly, the sentinel event and root cause analysis information was not prepared for the purpose of facilitating the rendition of legal services. This information was prepared and communicated for the purpose of complying the Joint Commission's requirements and for the purpose of providing the information to its patient safety organization. It was not intended to be solely entrusted to the confidence of the Defendant's attorney, but was for other business purposes. The privilege does not apply.

I. WORK PRODUCT:

Also in *Haney*, supra, the Court considered whether the cab driver's statement might be covered by the work product protection found in CR 26.02 (3) (a). The Court noted that this is a qualified privilege, extending only to materials prepared "in anticipation of

litigation" and only produced upon a showing of "substantial need." Again, the Court refused to apply the protection to Yates' statement.

A more extensive discussion of the work-product privilege is found in *Transit Authority of River City [TARC] v. Vinson*, 703 SW 2d 482 (Ky. App. 1985). A private investigator hired by TARC to conduct surveillance on the Vinsons produced his reports and material during discovery and TARC attempted to preclude their use at trial. On appeal, TARC claimed that the information was not discoverable since it was work product. The Court noted that the privilege only operates to protect "documents and tangible things" which do not reflect the "mental impressions, conclusions, opinions and legal theories of the preparer." The underlying facts are not exempt from discovery. The Court found that the materials in question were discoverable since they were factual in nature.

As stated above, this information was not prepared in anticipation of litigation, certainly not solely for the purpose of any specific legal action, but in order to comply with the hospital's reporting requirements. Even if this were not the case, the underlying facts contained in the documents would still be discoverable, with appropriate redactions.

II. PATIENT SAFETY QUALITY IMPROVEMENT ACT:

42 USC § 299b-22 establishes a privilege from disclosure for "patient safety work product." In 42 USC § 299n-21 (7) this wok product is defined as "any data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements—(i) which (I) are assembled or developed by a provider for reporting to a patient safety organization and are reported to a patient safety organization; or (II) are developed by a patient safety organization for the conduct of patient safety activities; and

which could result in improved patient safety, health care quality, or health care outcomes; or (ii) which identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a patient evaluation system," see also 42 CFR § 3.20, 3.208

The statute also contains certain exceptions, such as those in subparagraph (B) (i) and (ii), those being patient records, including billing and other information that is "collected, maintained, or developed separately, or exists separately, from a patient safety evaluation system. Such separate information or a copy thereof reported to a patient safety organization shall not by reason of its reporting be considered patient safety work product." Significantly for this inquiry, subparagraph (iii) provides that, "Nothing in this part shall be construed to limit—(I) the discovery or admissibility of information described in this subparagraph in a criminal, civil or administrative proceeding."

In *KD v. Dieffenbach*, 715 F. Supp 2d 587 (D. Del. 2010), KD, a minor cardiac patient, participated in a study conducted and monitored by the National Heart Lung and Blood Institute, a component of the National Institutes of Health. When his condition worsened, his father sought discovery of the results of that monitoring and the Institute sought a protective order to prevent its disclosure.

In reaching its decision, the Court first addressed whether or not state or federal privilege law applied. Relying upon KRE 501, the Court held that, "Congress intended federal courts to apply state privilege law only where state substantive law operates of its own force. Because Maryland negligence law operates in this case only by incorporation into the FTCA, this court will evaluate defendant's assertion of privilege under federal common law."

The Court then went on to discuss the Patient Safety Quality Improvement Act of 2005. The Court noted that the Act, "announces a more general approval of the medical peer review process and more sweeping evidentiary protections for material used therein," and then concluded that, since the same type of peer review system was in place at the National Institutes of Health, the privilege should apply to protect the data from discovery.

The Court found that such a holding did not impede the prosecution of a malpractice case, because a plaintiff may find its own expert to review the data, rather than focusing upon the findings of a review board. The Court emphasized that, "the privilege recognized today applies only to those materials prepared with the expectation that they would be kept confidential and not in fact disclosed."

In *Lee Medical, Inc. v. Beecher*, 312 SW 3d 515 (Tenn. 2010), the Act was analyzed in the state court context. Following an audit, the provider of vascular access services to local hospitals found its contract terminated. The provider sued, alleging improper interference with its contractual relationships. The plaintiff sought to discover documents related to the hospitals' decision to terminate the contract. However, the hospitals claimed those materials were privileged. As neither party asserted the federal privilege pursuant to the PSQIA, the Court did not analyze the extent to which it may have preempted Tennessee law.

The application of this privilege is an issue of first impression in this Commonwealth. Indeed, it is an issue of first impression in most of the nation. Therefore, this Court has looked to the published opinions thus far on the matter. As

there are no guiding authorities on the issue of preemption, the Court must make its findings *de novo*.

In *Wright v. General Electric Company*, 242 SW 3d 674 (2007), the Court discussed the doctrine of preemption. The case involved exposure to asbestos. The defendant moved for summary judgment on the grounds that Wright's state law tort claims were preempted by the Locomotive Boiler Inspection Act. The Act provides that a railroad can only use a locomotive shown to be safe. The Court noted that, "The doctrine of federal preemption is derived from the supremacy clause of the United States Constitution, Article VI." Simply put, the doctrine provides that "a state law that conflicts with federal law is without effect." The key to such a determination is, "the purposes of Congress in enacting the federal statute." Preemption may be either express or implied. Express preemption is set forth in the language of the statute. Implied preemption occurs where the state and federal legislation are in conflict or where the federal government has taken over the field to such a degree the there is no room for state action.

In *Directv, Inc. v. Treesh*, 290 SW 3d 638 (Ky. 2009), the issue was whether the federal Telecommunications Act preempted the field to such a degree that Kentucky could not impose a gross receipts tax on Directv's income. The Court held that Congress, in passing the Act, intended to preempt "the locality-by-locality administrative burdens" of taxation such as the gross receipts tax under consideration.

As noted in *KD, supra*, the Senate sought to promote, "a learning environment that is needed to move beyond the existing culture of blame and punishment that suppresses information about health care errors to a 'culture of safety' that focuses on

information sharing, improved patient safety and quality and the prevention of future medical errors. The PSQIA was thus designed to encourage this "culture of safety" by "providing for broad confidentiality and legal protections of information collected and reported voluntarily for the purposes of improving the quality of medical care and patient safety." Thus, there is a clear statement of a Congressional intent that such communications be protected in order to foster openness in the interest of improved patient safety. The Court therefore finds that the area has been preempted by the federal law.

The language of the Act appears to be contradictory in that it declares a privilege and then claims that it does not "limit—(I) the discovery or admissibility of information described in this subparagraph in a criminal, civil or administrative proceeding." However, this Court finds that the reasoning of *KD, supra,* is sound. The possibility that information given regarding a sentinel event could then be discovered in a civil proceeding, could have a chilling effect on accurate reporting of such events. Further, as noted, the facts themselves are discoverable and the Plaintiff may submit them to his own expert for analysis. The findings of a peer review board, the Joint Commission, or a patient safety organization are not dispositive. Only the facts found by a jury are significant herein.

IV. TRADE SECRETS:

KRS 365.880 (4) (a) and (b) defines a "trade secret" for purposes of the Uniform Trade Secrets Act as, "information, including a formula, pattern, compilation, program, data, device, method, technique, or process that: (a) Derives independent economic value, actual or personal, from not being generally known to , and not being readily

ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Based upon this definition, it appears that the policies and procedures of the Defendant are trade secrets. The Defendant derives its income from the manner in which its hospital is run. This information would be of value to a competitor. Further, the Defendant has asserted that its employees are asked to sign confidentiality agreements as to this information. Therefore, these materials are intended to be secret and the Court will not breach that confidentiality.

ORDER

IT IS HEREBY ORDERED AND ADJUDGED that the Defendant's motion to compel is DENIED.

IT IS FURTHER ORDERED that the Plaintiff's motion for a protective order is GRANTED as to the sentinel event and root cause analysis materials reported to its patient safety organization, as well as to its policies and procedures.

JAMES M. SHAKE, JUDGE
JEFFERSON CIRCUIT COURT
DIVISION TWO

DATE:

ENTERED IN COURT
DAVID L. NICHOLSON, CLERK
AUG 16 2011
BY DEPUTY CLERK

Cc: John W. Phillips/Katherine K. Tipton
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